[HIGH COURT OF AUSTRALIA.]

LOUISA ELIZABETH ANNING . . . APPELLANT;
PLAINTIFF,

AND

LILLIAN CONSTANCE ANNING, BEATRICE LOUISA ANNING, KATHLEEN OLIVE ANNING, ELLA MILDRED ANNING, AND EVELYN EDITH ANNING (INFANTS) . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *April* 24, 25; *May* 4.

Griffith C.J., Isaacs and Higgins JJ.

Deed of gift—Personalty—No delivery of possession—Necessary conditions of transfer—Partnership share—Bank deposits—Crown leaseholds—Chattels personal—Effectuation of gift—Creation of imperfect trust—Assignment—Notice—Judicature Act 1876 (*Qd.*) (40 *Vict. No.* 6), *sec.* 5 (VI.)—*Bills of Sale Act* 1891 (*Qd.*) (55 *Vict. No.* 23), *secs.* 3 (I.), 4—*Guardianship and Custody of Infants Act* 1891 (*Qd.*) (55 *Vict. No.* 13), *secs.* 3, 5.

A domiciled resident of Queensland, being about to die, executed in 1899 a deed of gift voluntarily conveying to his wife and several infant children in equal shares the whole of his personalty. This included chattels in possession (household goods, implements, and live stock), promissory notes, book-debts, money secured by mortgage of land in New South Wales held under the *Real Property Act* (N.S.W.), money on current account and fixed deposit in certain banks, a Crown leasehold in Queensland called Chudleigh Park Station, and a partnership interest in another pastoral property called Mount Sturgeon. Nothing, beyond the execution and delivery of the deed, was done in the direction of perfecting the transfer of the various properties before the death of the grantor, which occurred a few days later. His widow, being the executrix of his will of realty, and also legal guardian of the children under the *Guardianship of Infants Act* 1891 (Qd.), brought an administration suit against the children to decide whether she was to share in the personalty under the deed or as on an intestacy.

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Held: The deed was intended to take effect as an absolute conveyance, and, if ineffective for that purpose, could not be made effectual as a declaration of trust. The effect of the deed depended upon whether the donor had, with regard to each particular item of property in question, done all that was necessary on his part to place the donees in the position of the donor, as between him and them.

Milroy v. *Lord*, 4 De G. F. & J., 264, explained and applied.

Held therefore that :—(1) The assignment of the chattels in possession fell under the *Bills of Sale Act* 1891 (Qd.) (55 Vict. No. 23), and was therefore ineffectual for lack of registration. But *semble*, the defect might be cured, as to so much only of the chattels as still remained in specie, by registration of the deed under that Act.

(2) The mortgage debt secured on land in New South Wales could only be transferred in the mode prescribed by the *Real Property Act* of that State, and was not effectually conveyed by the deed of gift.

(3) The Mount Sturgeon partnership share, being purely an equitable interest, was effectually conveyed by the deed.

(4) The Chudleigh Park Crown leasehold, which was by the law of Queensland transferable only by an instrument in statutory form duly executed and registered in the Lands Department, was not effectually conveyed by the deed.

(5) The promissory notes did not pass.

(6) (*Higgins* J. dissenting) the bank deposits and book-debts did pass.

The money on deposit was by the bank regulations transferable only in a certain way by cheque and indorsement of the deposit notes. No express notice of the assignment under the *Judicature Act* 1876, was given to the banks, but the manager of one bank was given the deed of gift to read.

Per Curiam :—The bank regulations were no obstacle to transfer; but the handing of the deed to the manager was not a sufficient notice of assignment to satisfy the *Judicature Act*.

Per Griffith C.J.—As notice could equally well be given by the donees, *semble*, the donor had done all that was necessary on his part. The wife being a donee, and legal guardian of the other donees, and also being appointed executrix by the donor, the gift was perfected. The deed operated also as a covenant by the donor to do nothing which would prevent the donees from obtaining the benefit of the gift.

Per Isaacs J.—The donor had not perfected the gift, as he could have done, by giving notice, which was an essential factor under the *Judicature Act* for completing the title; and the defect could not now be cured by giving the requisite notice. But the deed of gift contained an implied covenant by the donor not to exercise any rights of ownership over the property assigned, which could be enforced.

Per Higgins J.—The donor not having done all that he could under the *Judicature Act* have done to perfect his gift, the assignment, being merely voluntary, could not be enforced. Neither the appointment of one of the donees as executrix, nor her guardianship of the infant donees, was effectual to make the gift complete. There was no allegation in the statement of claim that there was such a covenant as the alleged implied covenant of the deed, and no argument that damages as for breach of that covenant could be recovered. But *semble*, no such covenant arises unless the gift is effectual to pass the property.

Per Curiam (*Higgins* J. dissenting):—The action was an action for administration, and costs could therefore be ordered to be paid out of the estate.

Judgment of *Cooper* C.J. (*Anning* v. *Anning*, (1906) St. R. Qd., 317), varied.

William Anning, being ill in 1899, executed a few days before his decease a deed poll, freely and voluntarily conveying to the appellant (his wife) and the respondents (his five children) in equal shares all his personal estate whatsoever, including Chudleigh Park Station, which was a leasehold from the Crown, his partnership share in Mount Sturgeon Station, all cattle and horses thereon, and money on current account and at fixed deposit in several banks. Besides these specified items the personalty included jewellery, furniture, implements, book-debts and mortgages. After the execution of the deed of gift, which was intended to save the personalty from succession duty, he executed a will of realty. Nothing further was done to effectuate the transfer of the property before his death. The appellant, being executrix of the will and guardian of the children, brought an administration action against the respondents to have it determined whether there was an effectual gift by the deed or an intestacy. In a similar suit between the same parties in New South Wales in 1899 the Chief Judge in Equity decided (1) that the deed was intended to operate as a *donatio mortis causâ*, and was ineffectual for lack of delivery, so that the result was an intestacy. In the present case *Cooper* C.J. held that the deed was a valid declaration of trust, operating as an immediate irrevocable gift, and constituting the donor a trustee of the beneficial interest in all the property concerned except so much of it as was effectually

(1) 21 N.S.W. L.R. (Eq.), 13.

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passed by the instrument itself. (*Anning* v. *Anning* (1)). From this decision the plaintiff now appealed to the High Court.

Feez, for the appellant. If this was a good deed of gift it is admitted that the chattels in possession passed, but not the other property. Certain of the property transferred by the deed was subject to special conditions of transfer which were not fulfilled at the time of the deed or since. In transfers of fixed deposits the banks require that a cheque for the amount shall be lodged and the deposit note endorsed by the owner. The Chudleigh Park Station, which was Crown leasehold, could only be transferred in accordance with the special form prescribed in the Regulations, Form 62, under the *Land Act* 1897 (61 Vict. No. 5): *Wilson's Land Acts*, p. 227. An imperfect instrument of gift will not be made effectual by turning it into a perfect trust. This deed was never intended as a *donatio mortis causâ*, but as a complete divesting of the property. But the donor did not do all that was necessary, according to the nature of the property, to make the transfer complete: *May on Voluntary Dispositions*, 2nd ed., p. 402; *Milroy* v. *Lord* (2); *Richards* v. *Delbridge* (3); *Finucane* v. *Registrar of Titles* (4). An assignment of an equitable chose in action to a volunteer will not be held valid, even though made by deed, if the gift was then left imperfect: *Encyclopædia of Laws*, vol. I., p. 356, § 3.

[HIGGINS J. referred to *Cochrane* v. *Moore* (5).]

The donor's partnership interest in Mount Sturgeon Station did not pass by the deed; notice should have been given to the Lands Department and to the donor's partners before his death; and an interest in the leaseholds on Mount Sturgeon Station could only be transferred in the statutory form. The mortgages which were included in the personalty were not passed by the deed, as notice to the mortgagors was necessary to complete the assignment. The donor did not convey all the legal and beneficial interest in these properties; and, if he had lived, his assignees could not have taken them from him or enforced the completion

(1) (1906) St. R. Qd., 317.
(2) 4 De G. F. & J., 264, at p. 274.
(3) L.R. 18 Eq., 11, at p. 14.
(4) (1902) St. R. Qd., 75, at p. 88.
(5) 25 Q.B.D., 57, at p. 72.

of the gift: *Donaldson* v. *Donaldson* (1); *Re Way's Trusts* (2); *Moore* v. *Ulster Banking Co.* (3); *Partnership Act* 1891 (Qd.) (55 Vict. No. 5), sec. 34; *Hardinge* v. *Cobden* (4); *In re Griffin* (5); *Nanney* v. *Morgan* (6). An assignment of a purely equitable interest to a volunteer might be validly made by mere deed of gift; but not where, as in the present case, the whole legal and equitable interest was united in the donor.

Hart, for the respondents. The deed was equivalent to a valid declaration of trust of the Chudleigh Park leasehold. It was also an absolute assignment in writing of all choses in action comprised in the estate within the meaning of the *Judicature Act* 1876 (Qd.) (40 Vict. No. 6), sec. 5 (vi.), and the requisite notice in writing was given after the death of the assignor; or at any rate it was the duty of appellant as testamentary guardian of the respondents to give that notice, and it does not lie in her mouth to say that it was not given: *Guardianship and Custody of Infants Act* (Qd.) 1891 (55 Vict. No. 13), sec. 5. As between the assignor and assignees notice was immaterial, and the whole interest of the donor passed by the deed; he could not set up as against the donees that he had not given notice, and no more remained to be done by him outside the deed. Therefore his interest in Mount Sturgeon passed under the deed: *Pollock on Partnership*, 7th ed., p. 95; *Lindley on Partnership*, 7th ed., pp. 348, 396. The banks, in requiring transfer of deposits in a certain form, were merely regulating the method of discharging their own obligations to depositors; this could not make the deposits non-assignable by deed: *In re Dillon*; *Duffin* v. *Duffin* (7); *Anning* v. *Anning* (8).

[HIGGINS J. referred to *Williams on Executors*, 10th ed., p. 593.]

The notice was properly given after death, and when given entitled an assignee to sue in his own name: *Walker* v. *Bradford Old Bank Ltd.* (9); *Read* v. *Brown* (10); *In re Patrick* (11); *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (12).

(1) Kay, 711; 23 L.J., Ch., 788.
(2) 2 DeG. J. & S., 365.
(3) I.R. 11 C.L., 512.
(4) 45 Ch. D., 470.
(5) (1899) 1 Ch., 408.
(6) 37 Ch. D., 346, at p. 351.
(7) 44 Ch. D., 76.
(8) 21 N.S.W. L.R. (Eq.), 13.
(9) 12 Q.B.D., 511.
(10) 22 Q.B.D., 128, at p. 132.
(11) (1891) 1 Ch., 82.
(12) 34 Ch. D., 128.

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Moore v. *Ulster Banking Co.* (1) was before the Irish *Judicature Act*. The inspection of the deed by the bank's manager was sufficient notice of the assignment, equivalent to an express notice in writing: *Encyclopædia of Laws*, 2nd ed., vol. I., p. 357; *Camp* v. *King* (2); *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (3); *Harding* v. *Harding* (4).

[GRIFFITH C.J. referred to *Lee* v. *Magrath* (5).

ISAACS J. referred to *Bateman* v. *Hunt* (6).

HIGGINS J. referred to *Hudson* v. *Fernyhough* (7).]

The appointment of the appellant, who was one of the beneficiaries of the deed, as executrix of the donor's estate, completed the gift: *In re Griffin* (8); *Strong* v. *Bird* (9). In *In re Deane*; *Reid* v. *McIntyre* (10) the assignment, though voluntary and notice given after death, was held valid.

The deed is good as an equitable assignment apart from the *Judicature Act* 1876 (Qd.) (40 Vict. No. 6); *Fortescue* v. *Barnett* (11); no act remained to be done by the grantor: *In re Griffin* (8); *Gason* v. *Rich* (12); *Elliott* v. *Elliott* (13); *Gilbert* v. *Overton* (14).

It having been possible to assign debts at law before the *Judicature Act*, the fact that the fixed deposits are choses in action makes no difference, as choses in action may be assigned freely, the only objection being to the form of action: *Master* v. *Miller* (15); and the omission of notice is immaterial: *Re Frankish* (16); *In re King*; *Sewell* v. *King* (17); *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (18). The assignment, being by deed, was valid at law before the *Judicature Act* as between the assignor and assignee, on the principle that the grantor may not derogate from his own deed: *Deering* v. *Farrington* (19); *Caister* v. *Eccles* (20); *In re Patrick* (21).

The mortgage debt, under the New South Wales *Real Property*

(1) I.R. 11 C.L., 511.
(2) 14 V.L.R., 22.
(3) (1905) A.C., 454.
(4) 17 Q.B.D., 442, at p. 444.
(5) 10 L.R. Ir., 313.
(6) (1904) 2 K.B., 530.
(7) 61 L.T., 722.
(8) (1899) 1 Ch., 408.
(9) L.R. 18 Eq., 315.
(10) 26 A.L.T., 229.
(11) 3 Myl. & K., 36.
(12) 19 L.R. Ir., 391, at p. 401.
(13) 19 N.S.W. L.R. (Eq.), 162.
(14) 2 Hem. & M., 110.
(15) Sm. L.C., 11th ed., vol. I., pp. 767, 788-9.
(16) 14 N.Z. L.R., 711.
(17) 14 Ch. D., 179.
(18) (1905) A.C., 454, at p. 461.
(19) 1 Mod. Rep., 113; 1 Freeman K.B., 368.
(20) 1 Raym. (Ld.), 683.
(21) (1891) 1 Ch., 82.

Act, is by the law of Queensland a simple contract debt, and, although the security would not pass because the assignment was not in the form of the New South Wales *Real Property Act*, yet the benefit of the covenant to pay was passed by the assignment: *Payne* v. *Reg.* (1).

[GRIFFITH C.J.—The transferees under the deed could not give a discharge for the mortgage.]

Feez in reply. The deed was not a declaration of trust, and it was imperfect as a transfer: *May on Voluntary Dispositions*, p. 454.

The assignment is really a bill of sale within the meaning of the *Bills of Sale Act* 1891 (Qd.) (55 Vict. No. 23); it was never registered, therefore even the chattels in possession did not pass, because the assignment was void until registered, and cannot now be registered. The gift was left incomplete, and the donor did not do everything that he could do and was necessary to be done: *West* v. *West* (2); *Hayes* v. *Alliance Assurance Co.* (3). Notice of the assignment can be given to the banks by the assignor or the assignee; but notice has not in fact been given: *Encyclopædia of Laws*, vol. IX., p. 218.

Cur. adv. vult.

May 4.

GRIFFITH C.J. The question for determination in this case is as to the effect to be given to an instrument under seal executed by William Anning a few days before his death, and alleged to have been made with a view to avoid payment of succession duty. The instrument, which was in form a deed poll, witnessed that Anning freely and voluntarily conveyed to his wife (the appellant) and his five infant children (the respondents) all his personal estate of whatsoever nature and wheresoever situate, including a station called Chudleigh Park, his share in another pastoral property called Mount Sturgeon, all cattle and horses thereon, and all moneys lying to his credit in three banks, to be equally divided between the donees.

In a suit in the Supreme Court of New South Wales between

(1) (1902) A.C., 552.
(2) 9 L.R. Ir., 121.
(3) 8 L.R Ir., 149.

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the same parties the question was raised whether this instrument was intended to take effect as a deed *inter vivos* or as a *donatio mortis causâ*, and *A. H. Simpson*, Chief Judge in Equity, upon the evidence before him took the latter view, but held that the attempted gift failed to take effect in consequence of want of delivery of possession.

Upon the hearing of the present action before *Cooper* C.J. on oral evidence, that learned Judge came to a different conclusion on the facts, and held that the deed was intended to operate as an immediate irrevocable gift. This finding of fact is not challenged, nor is it suggested that the decision of the Supreme Court of New South Wales concludes the matter as *res judicata*. The question for our determination, therefore, is how far the deed was effectual to pass the property in the personal estate of the donor.

The whole law on the subject is contained in the judgment of *Turner* L.J. in *Milroy* v. *Lord* (1):—"I take the law of this Court to be well settled, 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 and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust,

(1) 4 De G. F. & J., 264, at p. 274.

for then every imperfect instrument would be made effectual by being converted into a perfect trust."

The learned Chief Justice thought that in the present case the donor intended to constitute himself a trustee of the property, and that the deed was therefore effectual as to all the property described in it. I am unable to agree in this conclusion. It seems clear to me that the testator intended to divest himself of his legal ownership. The question therefore arises, and must be answered with respect to each class of property described in the deed, whether the donor did everything which, according to the nature of the property, was necessary to be done in order to transfer the property and make the gift binding upon himself. I think that the words "necessary to be done," as used by *Turner* L.J. in *Milroy* v. *Lord* (1), mean necessary to be done by the donor. Thus, in the case of shares in a company which are only transferable by an instrument of transfer lodged with the company, I think that the donor has done all that is necessary on his part as soon as he has executed the transfer. So, in the case of a gift of land held under the Acts regulating the transfer of land by registration, I think that a gift would be complete on execution of the instrument of transfer and delivery of it to the donee. If, however, anything remains to be done by the donor, in the absence of which the donee cannot establish his title to the property as against a third person, the gift is imperfect, and in the absence of consideration the Court will not aid the donee as against the donor. But, if all that remains to be done can be done by the donee himself, so that he does not need the assistance of the Court, the gift is, I think, complete.

I proceed to apply this doctrine to the several kinds of property comprised in the deed now in question.

With regard to some of the property no difficulty arises. The Chudleigh Park Station was held under lease from the Crown, which by law was transferable by an instrument duly executed and registered in the Lands Department. Anning did not execute any such instrument. The attempted gift of this leasehold was therefore ineffectual. The same consequences follow as to certain promissory notes payable to order, which the donor

(1) 4 DeG. F. & J., 264.

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failed to endorse. With regard to the donor's share in the Mount Sturgeon property and the stock upon it, his interest, being equitable only, was effectually assigned by the deed.

With regard to his money in the banks, some of which was on fixed deposit and some at current account, a more difficult question arises. The donor's interests in all these funds were choses in action. In *Fortescue* v. *Barnett* (1), *Sir John Leach* M.R., held that a voluntary assignment by deed of a policy of life assurance was valid and complete without notice to the assurance company. He put the case on the same footing as an assignment of a bond, and seems to have thought that, as all property is assignable in equity by some means or other, and as no other way of assigning a chose in action than by some writing can be suggested, an assignment by deed is sufficient. In *Edwards* v. *Jones* (2), however, Lord *Cottenham* C. said that the decision in *Fortescue* v. *Barnett* (1) depended upon the relationship of trustee and *cestui que trust* having been completely created between the assignor and assignee. He did not elaborate his reasons for taking this view, but on consideration they will, I think, be found to be these: Although a legal chose in action was not assignable at law, a Court of Equity would give effect to it by allowing the assignee to sue the debtor in his own name. As between the assignee and the debtor the absence of consideration for the assignment was immaterial. But in such a suit the assignee was bound to join the assignor as a defendant. The foundation of the jurisdiction of the Court of Equity in such a case was that the assignor would not take the necessary action at law to enable the assignee to get the benefit of the assignment. But this assumes some breach of duty on the part of the assignor, against the consequences of which the Court will relieve the assignee. In the absence of consideration for the assignment it is clear that there is no such breach of duty, unless the assignor has become a trustee for the assignee. Another way of arriving at the same result is to say that a suit by the assignee of a legal chose in action against the debtor was only an instance of the class of suits by a *cestui que trust* in respect of trust property when the trustee refuses to take the necessary steps for its protection.

(1) 3 Myl. & K., 36. (2) 1 My. & C., 226.

Unless, therefore, this relation existed between the assignor and assignee the Court would not interfere in the absence of valuable consideration for the assignment. In *Ward* v. *Audland* (1), Lord *Langdale* M.R. expressed disapproval of *Fortescue* v. *Barnett* (2) which he said stood alone. In *In re Patrick*; *Bills* v. *Tatham* (3), which was the case of a voluntary assignment by deed of debts due upon covenants in bills of sale which the assignee afterwards received, *Lindley* L.J., referring to *Fortescue* v. *Barnett* (2), and *Donaldson* v. *Donaldson* (4), (a case of an equitable chose in action), said that the fact that notice of assignment was not given to the debtor did not render the gift incomplete; and it was held that the assignee could claim in the administration of his estate notwithstanding the absence of notice to the debtors. There were, however, many special provisions in the deed of gift under consideration in that case, upon which the Court relied, and which I think preclude us from regarding this statement of the law as one of general application to all cases of voluntary assignment of legal choses in action.

Reliance was placed on both sides upon the provisions of sec. 5, sub-sec. 6, of the Queensland *Judicature Act*, which enacts that an absolute assignment in writing of any debt or legal chose in action "of which express notice shall have been given to the debtor" shall be effectual in law to pass the legal right to the debt or chose in action from the date of such notice.

The section does not say by whom the notice is to be given, but it is, I think, clear that it may be given either by the assignor or the assignee. In the present case no notice was given to the banks in the donor's lifetime, but in *Walker* v. *Bradford Old Bank Ltd.* (5), it was held by the Court of Appeal that notice of a voluntary assignment might be effectively given after the death of the assignor.

I think, therefore, that if after Anning's death the donees had given notice to the banks the gift would have been perfect. I do not think that the evidence established such a notice as required by the Act. It appears that the manager of the bank had the

(1) 8 Beav., 201.
(2) 3 Myl. & K., 36.
(3) (1891), 1 Ch., 82.
(4) Kay, 711.
(5) 12 Q.B.D., 511.

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deed in his possession after Anning's death and probably read it, but this does not seem to me to be more than verbal notice of the existence of the deed with a request to read it. I think that written notice means a document addressed to, and intended to be retained by, the debtor. But, considering that in such a case the notice can be given by the assignee, I am disposed to think, for the reasons which I have already given, that the assignor has by executing the assignment done all that is necessary on his part within the meaning of the rule as stated in *Milroy* v. *Lord* (1).

In the present case, however, I do not think it necessary to determine this question. If A. makes a voluntary assignment in writing of a legal chose in action to B., and dies before notice of the assignment has been given to the debtor, having appointed B. his executor, I think the gift is complete; for A. has not only made the assignment of the debt, but has clothed B. with the legal right to receive and give a discharge for it: *In re Griffin* (2). The object of the notice is to inform the debtor that the debt is to be paid to B. instead of A., but if B. is executor the notice would be irrelevant for that purpose. I think that the same consequences follow if the donor appoints one of several donees to be executor. In *Lee* v. *Magrath* (3) a lady who had made a voluntary assignment of a debt died before notice of the assignment was given to the debtors, and appointed one of the debtors her executor. The Court of Appeal in Ireland held that the debt was extinguished by the appointment of the debtor as executor before notice, and that the gift of the debt failed. In my opinion, when the legal right to receive the debt is vested in one of several donees, the gift is complete, and *à fortiori* when, as in this case, the donee clothed with the legal right to receive the debt was also empowered by the law of Queensland to give a discharge on behalf of the other donees, of whose property she is the legal guardian. (See *Guardianship of Infants Act* 1891, sec. 5.)

There is also, in my opinion, another ground for holding that in this case the donees are entitled to the benefit of the fund in question. Assuming that the gift, *quâ* gift, fails, the deed

(1) 4 DeG. F. & J., 264.
(2) (1899) 1 Ch., 408.
(3) 10 L.R. Ir., 313.

nevertheless, as was pointed out by *Knight Bruce* L.J. in *Kekewich* v. *Manning* (1), operated at law as a covenant. The implied covenant is not to do anything which will have the effect of preventing the donee from obtaining the benefit of this donation. A receipt of the debt by the donor or his executor before notice given by the donee to the debtor would be a breach of this obligation, for which an action at law would lie by the donee against the donor or his executor, in which action the amount of the debt, or so much of it as was received by the donor or his executor, could be recovered: *Aulton* v. *Atkins* (2); *Gerard* v. *Lewis* (3). In this view the donees are creditors of the estate for the amount of the bank deposits. This was, indeed, the way in which the case was presented to the Court in *In re Patrick* (4).

For these reasons I am of opinion that the assignment was effectual as to the bank deposits. These considerations do not apply to the promissory notes, as to which the donees could not by any act on their part perfect their title without endorsement by the donor.

Another part of the donor's personal estate consisted of a debt secured by a mortgage of land in New South Wales held under the *Real Property Act* of that State. By that Statute it is provided that all interests in land must be transferred by a registered instrument, and that a transfer of a mortgage shall transfer not only the right to the debt but the right to sue for it in a Court of law. I think that, as to this debt, the donor did not do all that was necessary on his part to confer a perfect title on the donees, and that the deed of gift is therefore ineffectual. It is suggested that the debt and the security might be severed, and that the assignment of the debt may therefore be effectual, although the security was not transferred in accordance with the law of New South Wales. But this would, in my opinion, be giving to the deed an effect not intended by the donor.

With respect to the horses and cattle and other chattel property capable of manual delivery comprised in the deed, the gift would be valid according to the law of England, which allows such

(1) 1 De G. M. & G., 176.
(2) 18 C.B., 249.
(3) L.R. 2 C.P., 305.
(4) (1891) 1 Ch., 82.

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property to be transferred either by delivery or by instrument under seal. But the law of Queensland is different. By the *Bills of Sale Act* 1891 a deed purporting to transfer chattels is absolutely void, even as between the assignor and assignee, until registered as prescribed by that Act. The effect is that the property in chattels in Queensland can only be transferred (otherwise than by a contract of sale) by delivery or registered deed. This point, which was not taken in the Supreme Court, seems to be fatal to the donees' claim to the chattels in Queensland, except, perhaps, as to any still existing in specie, which may pass on a future registration of the deed. It is, perhaps, doubtful whether the registration, after a lapse of so long a time, could be held to have this effect. The chattels came into the possession of the executrix *quâ* executrix, and it cannot be maintained that she was under any duty to register a deed which up to that time was *quoad haec* absolutely void as against the donor.

The action is in form an action for administration. Such an action may, of course, be brought for the administration of any trust fund. The question for determination is as to the proportions in which the beneficiaries are entitled to participate in a fund of which the plaintiff has obtained possession as executrix of the donor. The defendants claim that she is a trustee for them of five-sixths of the fund by virtue of the deed, while she claims that she is a trustee of four-sixths only by reason of an intestacy. They also claim to be creditors in the estate. An action for the determination of any of these claims is an action for administration in which the Court has jurisdiction to order payment of the costs out of the fund administered.

The judgment appealed from should be varied accordingly. The costs of both parties will be paid out of the estate of Anning.

ISAACS J. The deed of 13th June 1899 purports, and was intended to be, an immediate voluntary transfer by William Anning of all his personal property, some of which was particularized. It does not declare a trust, nor did the grantor intend to create himself a trustee. His object was to part *instanter* with all his personal estate, by this deed. He did nothing further to carry out his intention.

Two propositions applicable to such an instrument are now firmly established.

The first is that the deed must stand or fall as a gift simply, and if wanting in any of the elements of a gift it cannot be supported as a trust: see *Milroy* v. *Lord* (1); *Richards* v. *Delbridge* (2).

The second is that a gift to be valid must be complete, or in other words, the intention of the donor must have been perfectly effectuated so far as the nature of his property admits. Otherwise the gift must fail, because without the aid of a Court of Equity the donees are unable to make out a title to the property, and equity will not lend its aid to complete a title unless the donees can show they have in the meantime given consideration, or done what is equivalent to consideration by acting upon the presumed gift, because there is nothing unconscientious in a donor in refusing at any stage to perfect a mere bounty. In *Callaghan* v. *Callaghan* (3), Lord *Cottenham* said "Courts of Equity do not decree specific performance of incomplete gifts." The rule was laid down in the clearest terms in the leading case of *Kekewich* v. *Manning* (4).

On the other hand, if the donor has carried out his intention so far as the nature of the property will allow, equity will then exercise its jurisdiction to assist the donee in getting in the property.

As was said by *Chitty* J. in *In re Earl of Lucan*; *Hardinge* v. *Cobden* (5):—"It is unnecessary to say in the case of a gift, the gift must be complete, and equity will not assist in completing an imperfect gift, though it is equally plain that equity will protect a donee who by a valid gift has obtained the title to the enjoyment of the thing that has been given."

The material consideration then is, was the gift perfect by the mere execution of the deed? Apart from the *Bills of Sale Act* 1891 it was necessarily conceded that the deed itself passed the absolute property in the chattels in possession.

But as to the choses in action it has been contended that none

(1) 4 DeG. F. & J., 264.
(2) L.R., 18 Eq., 11.
(3) 8 Cl. & F., 374, at p. 401.
(4) 1 De G. M. & G., 176.
(5) 45 Ch. D., 470, at p. 474.

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of them passed to the donees. The argument is that some further act was required to be done to complete the transfer. This is denied on the part of the donees, and on the issue so raised the case greatly depends.

Apart from the effect to be given to the *Judicature Act*, the true test as it appears to me in such a case is whether, with regard to any particular property under consideration the donor had done all that is necessary on his part to place the donee in his position as between themselves.

If as between themselves all rights have been transferred to the donee, the mere fact that notice of the transfer is necessary to be given to some third person in order to protect it is immaterial. The transfer as between donor and donee has taken place, and that is sufficient to perfect the transaction as a gift.

The donee has it completely in his power to obtain perfect protection by giving the notice, and this independently of any further act of the donor. In *Fortescue* v. *Barnett* (1) a policy of insurance was voluntarily assigned by deed. *Sir John Leach* M.R. held that the gift was complete without delivery of the policy because nothing remained to be done by the grantor, and that, so far as the assignment was concerned, that was the duty of the trustees of the deed.

In *Edwards* v. *Jones* (2) Lord *Cottenham* L.C. refused to assist any incomplete gift of a bond, but approved of the principle upon which *Fortescue* v. *Barnett* (1) was decided. Speaking of the judgment of *Sir John Leach* the Lord Chancellor said :—" He put his decision expressly upon the fact that the transaction was complete—that there was nothing further for the donor or donee to do—that the *latter had nothing to ask further from the donor.* Whether upon the circumstances of that case, it was right or wrong to come to that conclusion, is a question with which I have nothing to do. The principle of the decision is quite consistent with the other cases; for it proceeds upon the same grounds, namely, that if the transaction is complete, the Court will give it effect."

In *Blakeley* v. *Brady* (3) Lord *Plunket* L.C. asks :—" Then if

(1) 3 Myl. & K., 36.
(2) 1 My. & C., 226, at p. 239.
(3) 2 Dr. & Wal., 311, at p. 326.

the transaction is not in itself illegal, and if no *act remains to be done by the grantor*, why is it not to be acted on as a valid and complete transaction between the parties?" His Lordship approved of *Fortescue* v. *Barnett* (1).

In *Donaldson* v. *Donaldson* (2) *Sir W. Page Wood* V.C. decided that notice of assignment to trustees was not necessary to perfect the title of the assignee of an equitable chose in action, and he corrected any misapprehension that might have arisen from the observations of Lord *Cottenham* L.C. in *Edwards* v. *Jones* (3) that there was nothing further for the *donor or donee* to do. The Vice Chancellor made it quite clear that, so long as the donees required no assistance from the Court against the assignor, the Court would support the assignment. His Honor left doubtful one question, namely, whether the donees would have any remedy against the donor or his executors for afterwards obtaining possession of the fund. This doubt has since been resolved.

In *Pearson* v. *Amicable Assurance Office* (4) effect was given to a voluntary assignment of a policy of insurance containing an irrevocable power of attorney. *Sir John Romilly* M.R. laid stress on the consideration that there was nothing further which the assignee could ask the assignor to do. His judgment contains the following passage:—"The question, whether anything remains to be done to complete the assignment of a policy, is exactly the same, whether it arises on a voluntary instrument or upon one for valuable consideration; whether it be one or the other, the question must be, *what is there that the assignee can require the assignor to do* to make the instrument more complete."

In *Justice* v. *Wynne* (5) Lord Justice *Blackburne* referred to *Fortescue* v. *Barnett* (1) as an authority. Lord Chancellor *Brady* in the same case said:—"An assignment to a volunteer, if it be complete in form, will confer a title upon the volunteer as against the assignor himself; and that notice to the company a debtor is wholly unnecessary as between the assignee and assignor. *Fortescue* v. *Barnett* (1) is a clear authority to that

(1) 3 Myl. & K., 36.
(2) Kay, 711.
(3) 1 My. & C., 226, at p. 239.
(4) 27 Beav., 229, at p. 232.
(5) 12 Ir. Ch., 289, at p. 303.

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effect; and though some observations have been made on that decision, I find that it is now considered a satisfactory and binding authority." To the same effect is *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (1) an equitable assignment of a debt for value; *In re Earl of Lucan*; *Hardinge* v. *Cobden* (2); *In re Patrick*; *Bills* v. *Tatham* (3); and *In re Griffin* (4).

The case of *In re Patrick* (3), although determined in 1890, had reference to a voluntary assigment of debts by deed dated August 1873. Two questions were raised, as *Lindley* L.J. said, namely, whether the debts could have been recovered by the assignees from the debtors who owe them to the settlor without any further assistance from him; and secondly, whether the settlor having himself got them in was liable to make good to the assignees the amounts received by him. The debts were owing on bills of sale given to the settlor; he assigned them and gave a power of attorney to the trustees of the assignees to sue either in his name or their own, but he did not expressly assign either the bills of sale or the chattels comprised in them. It was held that the assignment was complete within the principle of *Kekewich* v. *Manning* (5), and the Lord Justice proceeded to say (6):—"The fact that notice of the assignment was not given to the debtors did not render the gift incomplete. See *Fortescue* v. *Barnett* (7), and *Donaldson* v. *Donaldson* (8)."

Then on the basis that the assignment was complete, the Lord Justice held that the settlor having got in the debts himself was accountable to the assignees for the amount got in, again following *Fortescue* v. *Barnett* (7). So far his opinion was shared by the other members of the Court. But the learned Lord Justice went on to assert a proposition which, if correct, has a very important bearing upon the present case. He referred to two common law cases, *Gerard* v. *Lewis* (9) and *Aulton* v. *Atkins* (10), and from them deduced the proposition that the settlor could have been sued at law for the money he had, in derogation of

(1) 34 Ch. D., 125.
(2) 45 Ch. D., 470.
(3) (1891) 1 Ch., 82.
(4) (1899) 1 Ch., 408, at p. 411.
(5) 1 DeG. M. & G., 176.
(6) (1891) 1 Ch., 82, at p. 87.
(7) 3 My. & K., 36.
(8) Kay, 711.
(9) L.R. 2 C.P., 305.
(10) 18 C.B., 249.

his assignment, got in from his debtors. The other Lord Justices reserved their opinion on this point. I shall revert to this aspect of the case further on.

Considering the case apart from any special effect of the *Judicature Act* upon voluntary assignments, it seems plain that the question resolves itself into a question of fact to be determined, regarding each item of property separately, whether the transfer is complete—whether there was anything left undone which the donee required to ask the donor to do.

The most important item in the dispute was the money which William Anning had in the bank on fixed deposit and not then due. The contract between him and the bank was in writing and was simply to repay at a fixed date the principal and interest, the sole condition expressed in the contract being the production of the deposit receipt. It is true the receipt also attempts to prescribe as a condition that it is not transferable, but that is no bar. *In re Griffin* (1) was a case substantially similar to this with respect to the terms of the deposit.

There can be no doubt that under the terms of the deed the property in the documents themselves—the deposit receipts—as pieces of paper, was intended to pass and I think it did pass to the grantees. They were therefore given the debt and the documents which evidenced it, and which the bank required to be delivered as a condition of repayment. In *Barton* v. *Gainer* (2) *Watson* B. says :—"Suppose a person grants to another a bond and the bond debt, the debt passes in equity."

It is necessary to consider the effect of the *Judicature Act* upon voluntary assignments of legal choses in action. Has it made them more difficult ? Has it rendered impossible in future any binding voluntary equitable assignment of a legal chose in action ? In my opinion it has. *Palles* C.B. in *Lee* v. *Magrath* (3), in dealing with a debt secured by a non-negotiable promissory note, and the effect of the *Judicature Act* on the voluntary assignment of such a debt, said :—"That Act removed a debt, secured as the present, from the category of subjects incapable, to that of those capable, of legal transfer." Upon that principle

(1) (1899) 1 Ch., 408.
(2) 3 H. & N., 387, at p. 388.
(3) 10 L.R. Ir., 313, at p. 320.

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the Irish Court of Appeal held: (1) That without notice of the assignment to the debtor under the *Judicature Act* no right passed to the assignee; (2) That notice to the maker of the note after extinction of the debt by the act of the assignor in appointing the maker his executor was useless, because the maker was no longer the debtor. The Chief Baron on the second point said (1):—"The intention of the Statute was merely to transfer the legal debt as it actually existed at the date of the notice, and not to revive a debt which previously had been paid to the original creditor, or had been released by him, or otherwise extinguished."

So long as the debt remains a debt the assignee may give the requisite notice at any time: *Bateman* v. *Hunt* (2); even after the assignor's death: *Walker* v. *Bradford Old Bank Ltd.* (3). But it must be to the debtor while he continues to be the debtor.

In *West* v. *West* (4), *Chatterton* V.C. in considering whether there had been a perfect or complete gift of debentures, which were transferable in manner prescribed by an Act of Parliament, held that the gift was not complete because the prescribed method of passing the legal property had not been followed. He said:—"If the deed were delivered to the secretary, and the transfer registered by him, the legal property would be thereupon transferred, and the gift would become perfect," and later he observed that the case was not like those where the donor had not in himself a property capable of legal transfer. The principle had been long previously laid down in such cases as *Bentley* v. *Mackay* (5). There *Sir John Romilly* M.R., says:—"In all cases where the legal owner intends voluntarily to part with the property in favour of other persons, the Court requires everything to be done which is requisite to make the legal transfer complete; for if anything remains to be done, this Court will not be made an instrument for perfecting it."

The *Judicature Act* prescribes a means of obtaining, not merely the legal remedy, but also the legal right. The remedy is only incidental to the right. Notice under the Act is an essential factor in constituting the title: *Read* v. *Brown* (6).

(1) 10 L.R. Ir., 313, at p. 319.
(2) (1904) 2 K.B., 530, at p. 538.
(3) 12 Q.B.D., 511.
(4) 9 L.R. Ir., 121, at p. 126.
(5) 15 Beav., 12, at p. 18.
(6) 22 Q.B.D., 128.

In that respect it differs entirely from notice in a case of an equitable assignment, which, as already stated, is neither necessary to perfect the assignment that being already complete, nor capable of making effectual the assignment if otherwise wanting. The trustee of a fund which has been equitably assigned holds it for the person equitably entitled whoever it may be, as he did before, and notice is only necessary to inform him of the change of identity of the person entitled and to warn him against parting with the fund to the person who has in fact parted with it, but whom the trustee already reasonably and justifiably believes to be the equitable owner (see *per* Lord *Macnaghten* in *Ward* v. *Duncombe* (1).)

In view of this fundamental distinction it cannot be said that an assignment of a legal chose in action is, independently of notice, complete and effectual to pass the legal estate even as between the assignor and the assignee.

If the owner of the equitable right to property, or the owner of both the legal and equitable right to property, the legal title being unassignable at law, clearly indicates his intention to voluntarily transfer it to another, and there is no further act which he could be required to do, if the transfer were supported by consideration, equity is satisfied with and will enforce the gift: *Pearson* v. *Amicable Assurance Office* (2). But if there is any further act which could be insisted on if the transaction were for value, equity will not assist to complete it.

If the legal title is assignable at law it must be so assigned or equity will not enforce the gift. If for any reason, whether want of a deed by the assignor, or a specifically prescribed method of transfer, or registration, or statutory notice, the transfer of the legal title is incomplete when the law permits it to be complete, equity regards the gift as still imperfect and will not enforce it. In such a case, the fact that the assignor has done all that he can be required to do is not applicable.

It has been argued that express notice in writing was in fact given to the bank because Mr. O'Halloran, one of its inspectors, had possession of the deed. But the facts proved in relation to its custody were so far removed from any intended notification

(1) (1893) A.C., 369, at p. 392. (2) 27 Beav., 229.

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of assignment to the bank as debtor that it is impossible to regard them as the requisite notice. I do not find it necessary to determine whether in any case the production of such a document would satisfy the requirements of the Statute as to notice.

I feel constrained, therefore, to hold that as to the money in the bank the gift was and is imperfect as a gift: and next that there is now no power by notice under the Act to make the intended donation complete, and further that equity cannot be invoked to assist the intended donees. If there were nothing more in the matter they would fail. And if the assignment were not under seal there would be nothing more possible to effectuate the intended gift.

But there is another line of approach to this branch of the present case which, in my opinion, affords a means of giving a legal effect to the undoubted intention of the donor. There must always be a desire on the part of any Court, if it can possibly see its way to do so in accordance with law, to carry out the real wishes of an intending donor, more particularly under circumstances as are presented in this case. It is at the least "a debt of honour," and the Court has, in exercising its jurisdiction over the property of a lunatic, given effect even to an incomplete gift of a large sum of money because it thought it was a debt of honour which ought to be recognized if with justice it could be. See *In re Whitaker* (1), which was a gift by way of promissory note, and *Cotton* L.J. referred to the fact that at law no action could lie. So in the cases of intended grants Courts of law have not hesitated to imply covenants on the part of a grantor who had assigned choses in action by deed to the effect that he would do nothing to derogate from his deed. In *In re Patrick* (2), *Lindley* L.J. referred to decisions at law which showed "that the assignor of a debt is liable to be sued at law by the assignee, if the assignor himself defeats his own assignment by getting in or releasing the debt assigned"; namely *Gerard* v. *Lewis* (3), and *Aulton* v. *Atkins* (4). Reference to those cases seems to bear out entirely the view expressed by *Lindley* L.J.

Aulton v. *Atkins* (4) was an action in which the plaintiff sued

(1) 42 Ch. D., 119.
(2) (1891) 1 Ch., 82, at p. 88.
(3) L.R., 2 C.P., 305.
(4) 18 C.B., 249.

the defendant under the following circumstances. The defendant and one Leedham were lace manufacturers in co-partnership, and they sold and by deed assigned to the plaintiffs all the co-partnership debts, money, personal estate, effects, and property. The partnership held a bill of exchange for £130 as part of the assets payable to the defendant's order. After the assignment the defendant parted with the possession of the bill of exchange and thereby prevented the plaintiffs from obtaining the money. The declaration averred this parting with the possession of the bill of exchange as a breach of an implied covenant of the indenture, and it also contained a count for conversion of the bill of exchange. The defendant demurred to the first count which alleged this breach of an implied covenant. The ground of demurrer is worth quoting in full. It was:—"That the said indenture did not operate as a legal assignment of the debt and bill of exchange mentioned in the first and second breaches, the same being choses in action, and the debt not being at law assignable, and the bill only being at law assignable by indorsement; and that the matters sued for were matters of partnership account, which could not be investigated at law; and that the first and second breaches showed no covenant or legal obligation by the defendant to pay the alleged sum, or transfer the alleged bill to the plaintiffs." It was argued in support of the demurrer that the deed was only a conveyance of certain property, that it was not a deed of covenant, that no covenant could be implied, and that the bill of exchange was only assigned by indorsement. These arguments did not prevail. The Court held that there was an implied covenant on the part of the defendant not to do anything in derogation of his deed; it also held that he did something in derogation of his deed when he parted with the possession of the bill of exchange in such manner and on such terms as to incapacitate himself, and thereby to prevent the plaintiffs from acquiring or having any right or title to the money therein specified.

Gerard v. *Lewis* (1) was a case in which the defendant and another, who were shipbrokers in partnership, assigned the debts owing to them to the plaintiff, with the securities for the same, and full power in the names of the assignees and authority to sue

(1) L.R. 2 C.P., 305.

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or compound for the debts. The plaintiff sued a debtor and obtained a *capias* to hold him to bail and the defendant caused the sheriff to discharge the debtor—the action was against the defendant upon an implied covenant that he would do no act in derogation of his grant. The Court held the action would lie. *Willes* J. said (1):—"The rule against assigning a chose in action stood in the way of an actual transfer of the debt, so as to enable the plaintiff to sue in his own name; and, therefore, it became necessary to give the power of attorney. But the intention of the parties in giving that power was to give the assignee the conduct and control of the litigation necessary for enforcing payment of the debts assigned. The defendant, therefore, who interfered to thwart or impede the remedy of the assignee under this deed, unquestionably broke the covenant implied from the words 'with full power and authority . . . to ask, demand, sue for, recover, &c., the said debts, or any of them.'"

The case of *Deering* v. *Farrington* (2), is greatly in point. An action of covenant was brought upon a deed by which the defendant *assignavit et transposuit* all the money which should be allowed by any order of a foreign State to come to him in lieu of his share in a ship. It was argued that an action of covenant would not lie, and also that an assignment transferring, when it cannot transfer, signifies nothing. From the report in this case in 1 Freeman K.B., 368, the latter objection is put thus: —Admitting they would amount to an implicit covenant, yet this being to transfer a chose in action, and so void, the implicit covenant is also void. But it is a covenant, and then it is all one as if he had covenanted that he should have all the money he should recover for his loss in such a ship. In *Caister* v. *Eccles* (3), and in *Seignorett* v. *Noguire* (4), Lord *Holt* C.J. referred with approval to *Deering* v. *Farrington* (2).

In *Ward* v. *Audland* (5), *Parke* B. said:—"*Deering* v. *Farrington* (2) shows, than an assignment and transfer of a chattel creates an implied covenant against the assignor and all who claim under him, though it may convey no title to the grantee."

(1) L.R. 2 C.P., 305, at p. 309.
(2) 1 Mod. Rep., 113; 1 Freeman K.B., 368.
(3) 1 Raym. (Ld.), 683.
(4) 2 Raym. (Ld.), 1241.
(5) 16 M. & W., 862, at p. 872.

The governing principle was enunciated in *Stirling* v. *Maitland* (1), when *Cockburn* C.J. said:—"I look on the law to be that, if a party enter into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative. I agree that if the company had come to an end by some independent circumstance, not created by the defendants themselves, it might very well be that the covenant would not have the effect contended for; but if it is put an end to by their own voluntary act, that is a breach of covenant for which the plaintiff may sue."

Hamlyn & Co. v. *Wood & Co.* (2), was a case in which the Court declined to imply a covenant because it was not necessary, but the principle above stated was recognized and reasserted.

Applying that principle, and in order to attribute proper efficacy to the instrument of gift, the implication appears to me irresistible that the donor by the conveyance of all his personal property undertook at law that he would under no circumstances exercise any rights of ownership over it. Reverting again to the case of *Kekewich* v. *Manning* (3), it is important I think to recall the words of *Knight Bruce* L.J. so as to observe them from the standpoint of regarding a gift under seal as a covenant.

Speaking of an intention to make a voluntary gift, he says:—"A gratuitously expressed intention, a promise merely voluntary, or to use a familiar phrase, '*nudum pactum*' does not (the matter resting there) bind legally or equitably." But then the learned Lord Justice proceeds to make observations which appear to me of the very highest importance in this connection. He continues:—"I have been speaking of transactions without any sealed writing. But though it is true that in cases where such an intention, such a promise, is expressed in a deed, it may bind generally at law as a covenant by reason of the light in which the particular kind of instrument called a deed is regarded at law, yet in equity, where at least the covenantor is living, or where specific performance of such a covenant is sought, it

(1) 5 B. & S., 840, at p. 852. (2) (1891) 2 Q.B., 488.
(3) 1 De G. M. & G., 176, at p. 188.

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stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed." I find in this passage a recognition of the principles that equity will give no assistance to complete a voluntary imperfect gift even though under seal, but that such a deed at law importing consideration, implies also a covenant which binds generally at law. The position then resolves itself into this: William Anning by deed assigned absolutely a legal chose in action which by law he had then power to do; he also by the same deed assigned all his personal effects which included the deposit receipt, though I regard this as immaterial to the conclusion I arrive at on this branch of the case. No power of attorney was necessary to enable the assignees to sue, but the Act of Parliament itself gave authority, which William Anning must be taken to have known and to have intended, to notify the fact of assignment to the debtor and also effect a complete transfer of the legal title to the chose in action. This authority must have been intended to be acted upon, if the disposition was intended to be effectual. On the principle of the cases I have referred to, and on the principle adverted to by *Lindley* L.J., in *In re Patrick* (1), that a deed should be construed so as to give effect to it, there was an implied covenant on the part of the grantor that he would do nothing to derogate from his deed or render impossible the completion of the legal title on the part of the donees by their giving the statutory notice to the debtor. The debt having been paid, the bank is no longer the debtor, and notice to the bank would not now comply with the requirements of the Statute, and consequently the legal title cannot be perfected. The executrix of the donor has therefore committed a breach of the implied covenant for which she is liable to the other donees for their shares. As to whether the rights of the children thus arising can be given effect to in this action: The donor's undertaking, implied from his sealed instrument, is a covenant, and binding in law. The donees therefore require no aid from a Court of Equity to create their rights, and are now legally entitled to be considered as creditors upon the estate for the amount of their shares.

In *Cox* v. *Barnard* (2), *Wigram* V.C., held that the Court of

(1) (1891) 1 Ch., 82.

(2) 8 Hare, 310.

Chancery undertook to administer the estate of the deceased person and it was the duty of the Court to do so, if practical, without sending the parties to a Court of law; and there was no reason for sending this case to a Court of law.

He did not say the Court would specifically enforce the covenant which was voluntary, but all the covenantee required was damages, and these damages a Court of Chancery could in such a case estimate and give better than a Court of law.

In *Williamson* v. *Codrington* (1), a case of voluntary assignment, Lord *Hardwicke* refused to send the case to law to make two suits out of one and dealt with the right of a party on a covenant. Under the *Judicature Act*, where law and equity are administered by the one tribunal, this course is still more advisable.

The grant of the partnership share, being an equitable chose in action, was a complete gift judged by the test already indicated. With respect to the mortgages, which are securities upon New South Wales lands and are registered under the provisions of the *Real Property Act* of that State, the defendants, by the application of the same test, must fail.

The mortgages are, according to the law of New South Wales, transferable in one specified manner only, namely by transfer in the prescribed form which must be signed by the mortgagor, and by registration of the transfer.

The donor did not execute any such transfer, consequently he did not do all such acts as were necessary to be done by him to vest the property in the mortgages in the donees. The gift is therefore imperfect: see *Nanney* v. *Morgan* (2), and *West* v. *West* (3). The donees could not sue either at law or equity, nor could they obtain a legal title without some further act by the donor.

On the authority of *Payne* v. *Reg.* (4), it was sought to support the gift as to the mortgage debts by regarding them as simple contract debts in Queensland. But apart from other obvious difficulties arising from the lack of analogy between a gift *inter vivos*, and the determination of the locality of debts upon the death of a creditor, it has been authoritatively held, even in the

(1) 1 Ves., 511.
(2) 37 Ch. D., 346, at p. 356.
(3) 9 L.R. Ir., 121.
(4) (1902) A.C., 552.

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class of cases cited, that the residence of the debtor is essential to the locality of a simple contract debt: *Commissioner of Stamps* v. *Hope* (1).

A quite distinct question arose under the *Bills of Sale Act* 1891. It was urged that under that Act the deed of gift required registration to give it validity, and therefore, as no registration has ever taken place, the right to the chattels has not passed. So far I agree with the argument: *Tuck* v. *Southern Counties Deposit Bank* (2). There is, however, nothing to prevent registration of the bills of sale even now, no limit of time having been prescribed; but by the terms of the Statute the title dates from registration, and if the chattels had ceased to exist, as is very probably the case, the bill of sale though valid would have nothing to operate upon. The antecedent dealings with the chattels by the executrix were valid and cannot now be impeached.

HIGGINS J. One William Anning, a grazier of Hughenden in Queensland, executed on the 13th June 1899, a deed poll, by which he purported to "freely and voluntarily convey" to his wife and five children all his personal estate wheresoever situate. He died on the 16th June 1899; but inasmuch as he did not hand over any of the property, there is no ground for holding the gift to be a *donatio mortis causâ*. The personal property at the time consisted, in Queensland, of furniture, plate, stock, implements and other chattels in possession, money on current account in the Bank of Australasia, Hughenden, money on current account and fixed deposit in the Bank of New South Wales, Townsville, and 11/120ths share in a partnership in Mount Sturgeon Station with live stock thereon, a pastoral lease of Chudleigh Park Station with live stock thereon; and certain book-debts, bonds, and bills. Anning had also personal property in New South Wales, consisting of furniture and other chattels in possession, fixed deposits in the Bank of New South Wales, a deposit in the Savings Bank, and a mortgage over land in New South Wales. On the 13th June 1899, he made a will devising all his real estate to his widow and five children in equal shares, and appointing his widow his executrix. The intention of the deed seems to have been to avoid

(1) (1891) A.C., 476. (2) 42 Ch. D., 471.

payment of succession duty; but it is not contended that this intention affected the validity of the gift. It is also conceded by the plaintiff that the deed poll was duly delivered. The executrix, who has proved both in Queensland and in New South Wales, brings an action, which she treats as an administration action, against her five children, to have it determined whether the deed of gift is effectual. If it is not, she will be entitled to one-third of the personal property as on an intestacy; if it is, she will be entitled to one-sixth. We have to consider how far this deed poll is effectual to convey the personal property; and we must consider each kind of personal property separately. Fortunately, as to the most of the properties referred to in the deed, the members of this Bench are unanimous—unanimous as to the property other than the bank deposits—unanimous as to all except about £3,000 out of what we are told is worth more than £60,000.

Now, with regard to the partnership interest in Mount Sturgeon, I entertain no doubt that it has been effectually conveyed. The interest of a partner is an equitable interest—an interest recoverable in equity. The interest of a partner consists of such sum as on a final winding up of the partnership, payment of the creditors and adjustment of accounts, may be found to be payable to him or to his representatives. It is what is called an equitable chose in action. Such a chose in action has always been freely assignable whether for value or as a gift, and it can be assigned effectually by a deed. There is no better mode of assurance for such property. So far as this interest is concerned, the deceased could have done nothing further to make the assignment complete.

As to the chattels in possession—such as the furniture, plate, stock, implements, &c.—the only objection to the deed as an effective instrument of assignment is the *Bills of Sale Act* 1891. The deceased did not give up possession of these chattels; and the fourth section of the Act makes the assignment invalid (see sec. 3 (1) (2) for definition of bill of sale). The statement of claim is wide enough to cover the question as to these chattels; but, by inadvertence of the plaintiff, the objection founded on the *Bills of Sale Act* was not noticed until this appeal was nearly concluded.

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The title was treated by the plaintiff executrix as having duly passed under the deed to the widow and the defendants; and it was so treated accordingly in the judgment of the Chief Justice of Queensland. The Chief Justice has also declared in that judgment that the deed poll is effectual to pass all the personal property of William Anning to the donees. By the notice of appeal to this Court from that judgment, the plaintiff claims that the whole judgment may be reversed; but she claims an adjudication of intestacy only as to the properties "other than chattels" —meaning, no doubt, by chattels the chattels in possession. I am of opinion, now that the point under the *Bills of Sale Act* has been raised, that we have no option but to declare that the deed poll is ineffectual to convey these chattels in possession.

As regards the choses in action, and in particular the bank deposits, the position is more difficult. The bank deposits were debts owing to the deceased—what are called legal choses in action. At common law such a chose in action could not be assigned. This is the central fact of the position, and gives rise to the main difficulty. Those who support the deed have to show that there is some Act of Parliament, or some recognized principle, by virtue of which these deposits can be assigned by this deed. Of late years, a mode of assignment has been created by Statute (*Judicature Act* 1876, sec. 5 (6)); and if this mode be adopted, the assignee can sue the debtor direct (the bank in this case) without making the assignor the plaintiff. But this mode has not been adopted in this case before this action. There has been no notice in writing given to the bank of the assignment as required by the Act. Counsel for the defendants has urged that as the deed was left with the manager of the Bank of New South Wales, after the death, this constituted notice in writing to the bank. But I cannot accede to such an argument. The Statute requires that the notice in writing is to be "given" to the debtor; and the notice contemplated is a notice addressed to the debtor, either expressly or by implication, calling his attention specifically to the fact of assignment. A notice to quit would not be treated as given to a tenant if there fell into his hands a letter, say, from the landlord to his agent, stating that he wished the tenant to leave possession. Knowledge of the contents of the

deed—even assuming that the bank manager's casual holding of the deed can be treated as knowledge on the part of the bank—is not notice in writing given to the bank of the assignment.

But it is said that in Courts of Equity a legal chose in action has always been treated as assignable. This is true, with limitations. Courts of Equity gave effect to *contracts* for the assignment of legal choses in action; but the contracts, from their very nature, were for valuable consideration. In the case of this deed there was no valuable consideration; there is not even mention of any "meritorious" consideration, such as love and affection for the family. But Courts of Equity, in their anxiety to give effect to intentions of persons owning property, have gone even further. Although the Courts of Equity do not aid incomplete voluntary gifts—do not compel a donor (or his representatives) to make complete a gift which he has left incomplete—yet if the legal title is not vested in the donor, is for instance outstanding in a trustee, and if the donor execute a deed purporting to assign his interest to a donee, the Courts will treat the gift as effectual, and insist on fulfilment. They treat the trustee as being under an obligation henceforth to hold on trust for the donee, as he had been for the donor. In such a case the assignor has done all that in him lies to divest himself of his property in the asset. The position is like that in the case of a mere equitable chose in action, and nothing remains that the donor can do personally. These exceptions to the general rule that equity will not interfere so as to compel completion of voluntary gifts have to be scanned closely before they are applied, in order that the existing confusion as to the subject may not be still worse confounded. The question here is, as to the deposit receipts, and money on current account, do they pass to the wife and children by virtue of a mere deed without valuable consideration, and without transfer of the deposit receipts, or other *indicia* of title? I shall deal with this question, (1) as if the *Judicature Act* 1876, sec. 5 (6), had not been passed; and (2) having regard to the provisions of that Act.

Now, as to (1), there is no instance that I can find of a mere voluntary assignment by deed, without anything more, of a legal chose in action being treated as valid or enforceable by Courts of Equity. Equity operated on the conscience of the owner of

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property, where he received value on a contract to assign. But the theory was, that a man who forms an intention to make a gift is under no conscientious or other obligation to complete the gift. "There is a *locus pœnitentiæ*, as long as it is incomplete": *Antrobus* v. *Smith* (1). The owner may alter his intention before the gift be actually completed; and equity would not compel him to complete it. In the present case, the intending donor did not enable the donees to receive the money from the bank. He did not hand over the deposit receipt for presentation to the bank; he did not give the donees any power of attorney to receive the money or to sue the bank; and he did not even hand over the deed to any of the donees, but to his station manager, Geldring. Nor did Anning in any way deprive himself of the power to receive the money himself, for as he kept the deposit receipts he could produce them and claim payment. I shall refer to the cases presently. As for (2), the effect of the *Judicature Act*, it is clear that he could, ever since that Act, have made use of the provisions of that Act, so as to vest the legal title to these deposits in the donees, but he did not do so. He could have given notice, or caused notice to be given, to the bank of the assignment, and this would have operated as a complete legal transfer of the debts, but he failed to do so. He did not do everything that was in his power at the time to make the gift complete, and equity, therefore, would not compel the completion of the gift. If it be urged that sec. 5 (6) of the *Judicature Act* does not alter substantive rights, but merely gives an additional remedy, that is probably true. But the remedy is there, and the fact that the remedy is there, and has not been made use of, may indirectly affect the position of those who claim under deeds of gift. It is quite true that Lord *Macnaghten* has shown, in *William Brant's Sons & Co.* v. *Dunlop Rubber Co.* (2) that the power to make an equitable assignment still remains, notwithstanding the *Judicature Act* and its provisions as to assignments. The two modes of assignment exist, side by side. But what I am submitting is that the time-honoured rules as to equitable assignments should be applied; and that, according to these rules, there can be no equitable assignment if the donor has failed to

(1) 12 Ves., 39, at p. 46.

(2) (1905) A.C., 454.

avail himself of such powers of transfer (if any) as are given him, whether by the *Judicature Act* or otherwise. The point is, that the claimants under the deed cannot now show that the donor has done all that lay in his power to make the gift complete; and the facts, therefore, do not bring them within the exception to the rule laid down in *Ellison* v. *Ellison* (1). This view as to the effect of the *Judicature Act* is confirmed by the judgment of the Court of Appeal in Ireland, in *Lee* v. *Magrath* (2), and by the distinctly expressed opinion of *Hall* V.C. in *Bizzey* v. *Flight* (3). It may be thought that the fact of the instrument of assignment being under seal might supply the lack of valuable consideration; but the remarks of Lord Justice *Knight Bruce*, in *Kekewich* v. *Manning* (4) disposes of this view. For it is shown there that although Courts of Equity give full effect to the legal doctrine as to the seal supplying the lack of valuable consideration, they do not, in applying their own peculiar doctrine as to imperfect gifts, treat deeds executed without valuable consideration as if they had been executed for valuable consideration. (See also *per* Lord *Eldon* in *Ellison* v. *Ellison* (1); *In re Earl of Lucan*; *Hardinge* v. *Cobden* (5).

As might be expected with a class of transactions so numerous and rules so technical, the cases are puzzling. In *Fortescue* v. *Barnett* (6) there was a voluntary assignment by deed of a policy of assurance on a life, and the Court gave effect to the gift as between the donees and the representatives of the donor. But, as Lord *Cottenham* L.C. pointed out in *Edwards* v. *Jones* (7), that case was decided on the ground—whether right or wrong does not concern us now—that by the contract with the assurance company the policy was assignable. The deed was treated as transferring completely the title. See the comments in *Bizzey* v. *Flight* (3). In *Donaldson* v. *Donaldson* (8) the equitable owner of stock, which stood in the names of trustees, executed a voluntary assignment by deed. This transaction was enforced, for a reason which I have previously mentioned, that the assignor had done all that

(1) 1 Wh. & Tud. L.C. Eq., 6th ed., p. 291.
(2) L.R. 10 Ir., 313.
(3) 24 W.R., 957.
(4) 1 DeG. M. & G., 176.
(5) 45 Ch. D., 470.
(6) 3 Myl. & K., 36.
(7) 1 My. & C., 226.
(8) Kay, 711.

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he personally could do towards passing the property. Sometimes, as in *Milroy* v. *Lord* (1) the Courts use such expressions as that the donor has done, or not done, all that was "necessary to be done." But the word so used obviously means, not *necessary* in the sense of obligatory on the donor, but necessary for the purpose of passing the property. *Turner* L.J. explains the words by adding the phrase "according to the nature of the property." The donor is under no necessity, no obligation; he is under no duty to do more than he has done. What the Courts look at is what the donor *might* have done. This point has been put so fully in the judgment of Mr. Justice *Isaacs* that I need not deal with it further. The case of *Walker* v. *Bradford Old Bank* (2) is very close to the point. By a deed, all moneys then—in 1881—*or thereafter* standing to the credit of the assignor at a bank were purported to be assigned. After the death of the assignor, notice in writing was given to the bank; and such notice was held to satisfy the *Judicature Act*. This was sufficient to give the legal title to the assignee; but the Court also seems to have thought that, apart from the *Judicature Act*, there was a good equitable assignment. However, the explanation of this *dictum* seems to lie in the fact that it was a *future debt* which was assigned and claimed; and that, on the principle of *Holroyd* v. *Marshall* (3) the future debt was property cognizable in Courts of Equity; and, as already stated, an equitable chose in action can always be assigned by mere deed. The case of *In re Patrick*; *Bills* v. *Tatham* (4), is strongly urged in favour of the validity of this gift. On 11th August 1873, Patrick assigned to trustees debts owing on certain securities, with power to sue and receive, and power to enforce the securities. Patrick received the debts before his death in 1888, and it was held that his estate was liable to the trustees, because the gift was as complete as the donor could at the time have made it. But as to this case, it has to be noticed (i.) that the assignment took place before the *Judicature Act* came into force, and before the provisions of that Act were available for the purpose of making perfect the assignment of a legal chose in action; and the Act is

(1) 4 DeG. F. & J., 264.
(2) 12 Q.B.D., 511.
(3) 10 H.L.C., 191.
(4) (1891) 1 Ch., 82.

not retrospective (*In re Joseph Suche & Co.* (1); *Sherwin* v. *Selkirk* (2); *Annual Practice*, 1906, vol. II., 436); and (ii.) that the assignor, by the power of attorney, put it completely in the power of the trustees to receive the debt, and to enforce the securities. In *In re Griffin* (3), a deposit receipt, endorsed "pay my son," was handed to the son—who also became the executor. The deceased had put it out of his own power to receive payment himself; and it was found by the Judge that the bank would have paid the money on production of the receipt so endorsed. Besides, the appointment of the defendant as executor completed the title, and enabled the defendant to sue the bank as the legal owner.

As for the case of *Aulton* v. *Atkins* (4), and the case of *Gerard* v. *Lewis* (5), which substantially follows it, I cannot see how they are relevant to the present question. *Aulton* v. *Atkins* (4), was a decision on demurrer; and for the purpose of the demurrer it had to be assumed that the property in the document itself—a bill of exchange — had passed, and for value received; and the defendant was treated as liable under an implied covenant not to do anything in derogation of his assignment of the document. Here, we have no question of covenant; there has been no value given; and the question is simply one of title. I may add that I cannot admit that the property in the deposit receipts—the paper documents—passed under this deed of Anning's. What Anning wanted to assign was the right to get the money—not the paper. The right to the paper is merely incidental to the right to the money—not the right of the money to the paper. As regards title deeds to real estate, it has even been laid down that title deeds are not chattels; and that they pass by conveyance of the land, without being named: *Copinger, Title Deeds*, p. 2. If there were a will devising real estate to A., and all the personalty to B., I should have no hesitation in ruling that the title deeds to the real estate pass to A.

Whatever may be thought about the refinements of distinction on which these cases turn, there is no authority for saying that where there are mere words of voluntary assignment as to a

(1) 1 Ch. D., 48.
(2) 12 Ch. D., 68.
(3) (1899) 1 Ch., 408.
(4) 18 C.B., 249.
(5) L.R. 2 C.P., 305.

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legal chose in action in a deed, without delivery of the deposit receipt or other *indicia* of title, without power of attorney to collect, without abandonment of power to receive on the part of the intending assignor, there is a transaction which a Court of Equity, or any other Court, will aid and bring to completion. As for the cases in which the appointment of the debtor, or the appointment of the donee, as executor, has been treated as making the gift complete, I cannot think that they have any application. It is sufficient for the present to say that the debtor has not been appointed executor, that only one of six donees has been appointed, and that the other five donees are as helpless against the bank as they were before the death. Moreover, in my opinion, the fact that the widow is guardian of the infants does not make the gift complete. It is true that under the Queensland *Guardianship &c. Act* 1891, she is guardian, and has all such powers over their estate as a guardian has who is appointed under the Act 12 Car. II. c. 24. But it is still doubtful whether a guardian appointed under the Act of Charles II. has power to receive the capital of an infant's share (see *Lewin, Trusts,* 11th ed., p. 406); and even if she has such power, she has no better right to receive the share than the infant would have if adult. The property, the legal or other title to claim payment from the debtor, is not vested in her as guardian as it would be in the case of an executor or trustee. If the infant cannot claim payment, the guardian cannot. There is, in my opinion, nothing in the cases to compel us to depart from the plain rule of common sense, that a man may give what he likes, but he must give it; and that the Court will not compel him to make the gift when he has only taken some steps towards making it. My opinion is, therefore, that the fixed deposits, and the deposits on current account, do not pass under the deed of gift.

Perhaps I ought to add here that I decline, in this action, on these pleadings, to discuss the point which was referred to incidentally, but not argued, as to the liability of the deceased's estate on any alleged or implied covenant. It is said now that there is a covenant to be implied from the word "convey." I know of no such implication. But the only question raised here is as to title to certain property; there is not any covenant

alleged from first to last; and an executrix cannot be plaintiff in an action to enforce a covenant against the estate which she represents. If a case of covenant be made, it may be dealt with after both sides have had full opportunity for argument. At present, I may say, I cannot find any such covenant implied. There is usually no implication unless the estate passes. "A covenant in law is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate, so that *after they have had their primary operation in creating the estate*, the law gives them a secondary force by implying an agreement on the part of the grantor to protect and preserve the estate so by those words already created": *Williams* v. *Burrell* (1). Yet on this point, of the liability of the donor under this alleged implied covenant—a point not raised in the pleadings, and not argued between the parties—turns the decision in this case as to the bank deposits, for, without that point, the decision of the majority of the Court would be against the defendants.

As to the mortgage over land in New South Wales, it has been decided in the New South Wales Supreme Court that they do not pass under this deed of gift (2); but the judgment of the New South Wales Court has not been put in evidence. I do not see how this judgment can be used as an estoppel by the executrix. Treating this case, however, as if it were an action brought against the Queensland executrix—the executrix of the domicile as well as the executrix in New South Wales—by claimants under a deed of gift, the executrix holding the proceeds of the New South Wales assets, the same principles would apply as to the deposits in the banks. As for the mortgage, it is a mortgage under the *Real Property Act* of New South Wales. The only mode of transferring that mortgage is that prescribed by secs. 39, 42 and 47 of that Act, and that mode has not been followed; and as the mortgage has not been transferred, equity would not supply the defect. In my opinion, the debt cannot be treated as transferred, if the mortgage cannot be treated as transferred. The right to sue for the debt passes on transfer of the mortgage, and not otherwise (see sec. 48).

(1) 1 C.B., 402.

(2) 21 N.S.W.L.R. (Eq.), 13.

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On the same principles I am of opinion that the pastoral lease of Chudleigh Park—a lease transferable by registration only—did not pass by this deed; also, the book debts, bonds and bills.

The defendants to this action have raised no objection to the form of this action; and as we have jurisdiction to deal with the questions in some form, I think that it is our duty to decide as if the action were properly framed. But lest this action should be treated as a precedent, I feel bound to say that, in my opinion, this action is undoubtedly not an administration action, as it purports to be. The questions are not, as alleged in the statement of claim, questions arising "in the administration" of the estate of William Anning (paragraph 7). For the claim is between strangers to the estate, *pro hâc vice*, and the executrix as representing the estate. If, as in *In re Griffin* (1), the executrix were claiming these assets *as her own, against the interests of the estate*, the beneficiaries in the estate would be entitled to come to the Court to compel the executrix to deal with the assets as part of the estate. It would then be an action to compel the executrix to account for assets which, as the beneficiaries allege, belong to the estate. Some confusion of thought has arisen from the fact that the beneficiaries under the deed are the beneficiaries in the estate, so far as there is an intestacy. But the position must logically be regarded as if a stranger were converting to his use assets which are alleged to belong to the estate, or, as if it were, say, an action of conversion, brought by claimants under the deed against the estate left by the testator; and, in such an action, the executrix would, under the Rules of Court, represent the estate (Queensland Rules of Court, Order III., r. 9); whereas the claimants would fight against the estate. The only persons who can launch an administration action against an executrix are creditors, or beneficiaries (or their assigns); and there is no precedent for a stranger launching an administration action merely because he alleges that he is entitled, and that the estate is not entitled, to certain assets. Much less can an executor who has found a horse in the paddock, and taken it, and sold it, and received the proceeds, bring an administration action against a neighbour who alleges that the horse was his. An action for

(1) (1899) 1 Ch., 408.

administration, or execution of the trust fund, can, as has been rightly said, be brought for the administration of any trust fund. But the question here is, is there any trust fund. Moreover, if this action is, as contended, to be treated as an action on implied covenant, brought by the defendants (some of the covenantees) against the plaintiff (executrix of the covenantor as well as one of the covenantees), it cannot at the same time be treated as an action for administration. Under these circumstances, I am of opinion that there is no power to award costs out of the estate.

Order varied. Costs of both parties out of estate.

Solicitors, for appellant, *Feez & Baynes.*

Solicitors, for respondents, *Ruthning & Jensen.*

[HIGH COURT OF AUSTRALIA.]

BAXTER . . . . . APPELLANT;
DEFENDANT,

AND

THE COMMISSIONERS OF TAXATION, NEW SOUTH WALES . . . } RESPONDENTS.
PLAINTIFFS,

THE COMMONWEALTH OF AUSTRALIA INTERVENING.

ON APPEAL FROM A DISTRICT COURT OF NEW SOUTH WALES.

SYDNEY, *May* 8, 9, 10, 13, 14, 15; MELBOURNE, *June* 7.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Legislative powers of States—Taxation of income of Commonwealth officer—Interference with free exercise of Commonwealth power—Implied prohibition in Constitution—Weight to be attached to American decisions—Question as to limits inter se of constitutional powers of Commonwealth and State—Conflicting decisions of Privy Council and High Court—Duty of High Court—Appeal from State Court exercising federal jurisdiction to High Court—Powers of Commonwealth Parliament—Judiciary Act 1903 (*No.* 6 *of* 1903), *sec.* 39—