

J. F. Keeler*

SOME REFLECTIONS ON HOLROYD v. MARSHALL

It is axiomatic that when once consideration has been given there may be a valid assignment of future¹ property in equity, though there cannot be any assignment of future property at law. It is similarly axiomatic that this is "a compendious way of putting the matter"², for courts of equity do not contemplate an immediate assignment of property to be acquired in the future or not yet in existence; they share the opinion of the courts of common law that such an assignment would be a practical and a juristic impossibility. Where consideration has been given, however, equity will treat an assignment of future property as a contract to assign the property and will compel performance of the contract, with the effect that the beneficial interest passes to the assignee immediately upon the acquisition of the property by the assignor. At this point, however, the law becomes much less clear. Even if it is assumed that the construction of the transaction as a contract is correct (and for the purposes of this article this assumption will be taken as correct, although there is some authority against it³), the preceding account of the law provides no indication as to how equity will compel performance of the contract: in particular, it does not indicate whether the assignment is achieved in some way through the application of the doctrine of specific performance or whether some other principle is called in aid. On this question there is some conflict of authority; one line, descending from the speech of Lord Westbury L.C. in *Holroyd v. Marshall*⁴, appears to assert that the assignment can only be effective if specific performance of the contract to assign could have been decreed at the date on which the property the subject of the assignment came into the hands of the assignor. The other line, stemming from the speech of Lord MacNaghten in *Tailby v. Official Receiver*⁵, asserts quite unequivocally that this is incorrect and that it would be practically of very great inconvenience if it were true; it holds that the doctrine of equitable assignment is entirely distinct from, and independent of, that of specific performance. In this article an attempt will be

* M.A., B.C.L., (Oxon.), Senior Lecturer in Law, University of Adelaide.

1. Throughout this article the phrase "future property" includes (a) goods not in existence at the time of the purported assignment and (b) goods not then in the ownership of the assignor but to be acquired later (after-acquired property). It does not include "potential property", where the subject-matter is the anticipated procedure of some chattel already owned. Cf. Sykes: *Law of Securities* (1962) 348; Benjamin on Sale (8th ed., 1950), 136 ff.
2. Maitland: *Equity* (2nd ed., 1949, ed., Brunyate) 150.
3. The principal authority against it is *In re Lind* [1915] 1 Ch. 744, [1915] 2 Ch. 345, (C.A.). See too *Palette Shoes Pty. Ltd. v. Krohn* (1937) 58 C.L.R. 1. The great bulk of authority is, however, in accord with Maitland's account of the law; and it is hoped that a later edition of this Review will contain a detailed critique of *In re Lind*.
4. (1862) 10 H.L.C. 191.
5. (1888) 13 App. Cas. 523.

made to reconcile this conflict by an examination of the precise significance to be accorded to the remarks of Lord Westbury and of the validity of Lord MacNaghten's criticism of them, and by a consideration of the consequences which should follow from a conclusion that the two doctrines are entirely independent.

The source of the controversy on this issue is the judgment of Lord Westbury in *Holroyd v. Marshall*, and this must be examined in some detail. This judgment, more than most, however, depends on the background against which it was delivered, so it will be necessary to look at it in the context of the difficulties existing in the law at the time of its delivery. The facts were rather more complex than those of most of the cases in this branch of the law. The appellants had purchased the machinery and implements in a mill belonging to one Taylor, who was financially embarrassed, but had agreed to resell it to him for £5,000. Taylor did not possess such a sum, and the property was therefore transferred to a third party as trustee for Taylor until the appellants should demand payment; if at that time he paid the price with interest the trustee was to hold the property for him absolutely, but if he defaulted the trustee was to sell the property and use the proceeds of the sale to pay the appellants, holding any surplus remaining after that for Taylor. The indenture transferring the machinery to the trustee and setting out the trusts also contained this clause:

“That all machinery, implements, and things, which, during the continuance of this security, shall be placed in or about the said mill, buildings and appurtenances, in addition or in substitution for the said premises, or any part thereof, during such continuance as aforesaid, be subject to the trusts, powers, provisoes and declarations hereinbefore declared and expressed concerning the said premises, and that the said Taylor . . . will at all times during such continuance as aforesaid, at the request . . . of the said Holroyds . . . do all necessary acts for assuring such added or substituted machinery, implements, and things, so that the same may become vested accordingly.”

The transaction was thus not the more common one in this field of a loan on security, but the presently existing machinery and the machinery to be acquired in the future were to be the security for the payment of the purchase price and interest charges arising from a sale on credit. Although Taylor brought more machinery on to the mill after the execution of the indenture (which was registered as a bill of sale) he made no conveyance to the appellants of that machinery, and they performed no act amounting to a formal taking of possession of it. Taylor then fell into further financial difficulties, and eventually agents of the respondent (who was the High Sheriff of York) levied execution against the new machinery on behalf of two judgment creditors, though they had notice of the bill of sale over it. Holroyds thereupon brought an action against Marshall, claiming that there had been a valid equitable assignment of the new machinery to the trustee, and that the assignment was good against the judgment creditors. Stuart, V.C., at first instance, decided both points in favour of Holroyds in an unreported judgment; but on appeal his decision was reversed by Lord

Campbell, L.C.⁶. Lord Campbell agreed that as between Holroyds and Taylor there had been some sort of equitable assignment; but he thought that in order for Holroyds to claim priority over the judgment creditors they would have to perfect their title to the new machinery by taking possession of it. Until this was done, Holroyds had only a *ius ad rem*, an equitable right to have the machinery assigned to them, and such a right was not strong enough to stand against the claims of the judgment creditors.

Although the rule at common law is that there cannot be an assignment of property not yet acquired or in existence, the rule is subject to one qualification. If the deed which contains the purported assignment also contains a licence to seize the property when it comes into the hands of the assignor a subsequent seizure by the assignee is sufficient to pass title, or if there is a "novus actus interveniens" (e.g. delivery of the property by the assignor to the assignee, or a taking of possession of it by the assignee with the consent of the assignor) that again is effective to pass title. All this is expressed in a maxim of Bacon upon which Lord Campbell relied: "Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio praecedens quae sortiatur effectum interveniente nova actu"⁷. The maxim, however, says nothing of the equitable view of such an assignment. It was this confusion of the legal and equitable positions that Lord Westbury set out to dispel. The points on which Lord Campbell had reached his decision were strenuously supported by counsel for the respondents, who put their argument firmly on the basis that on the acquisition of the property referred to in an assignment of future property various rights immediately arose in favour of the assignee against the assignor, but that they operated in equity "as a mere personal equity, valid as against the assignor. No trust attaches on future property; no personal equity can attach on land; nor can there be any trust of a personal chattel unless the equity is perfected by some subsequent act between the assignor and the assignee . . . The contract here . . . gave the Appellants no right in equity beyond that of asking for specific performance"⁸. In support of this argument they relied on a dictum of Parke B. in *Mogg v. Baker*⁹, a case decided at common law: "If the agreement was to mortgage certain specific furniture, of which the *corpus* was ascertained, that would constitute an equitable title in the defendant, so as to prevent it passing to the assignees of the insolvent, and then the assignment would make that equitable title a legal one; but if it was only an agreement to mortgage furniture to be subsequently acquired—to give a bill of sale on a future day of the furniture and other goods of the insolvent—then it would cover no specific furniture, and would confer no right in equity"¹⁰. It is important to notice that, apart from any possible inference from this dictum that future property cannot be specific property, it was not contended that the transaction was of such a

6. (1860-61) 2 De G., F and J. 596.

7. Bacon, *Maxims*, Reg. 14.

8. (1862) 10 H.L.C. 191 at 203, 208.

9. (1838) 3 M. and W. 195.

10. *Id.*, at 198. Parke B. said of this dictum: "While argument was going on, I have had an opportunity of consulting a very high authority, and it must be taken that the rule in equity is as I have stated it." According to counsel for the appellants in *Holroyd v. Marshall*, the authority was thought to be Lord Cottenham.

nature that specific performance could not have been decreed against the assignor; on the contrary, it was accepted by the respondents that if the machinery had remained in their hands that would have been the proper remedy for Holroyds to seek. Their argument was devoted to examining what should be the proper consequence of that fact when the machinery was claimed by a judgment creditor before the assignees had taken possession of it or before they had obtained their decree.

It is against this background that the judgment of Lord Westbury must be read. His first point is that equity does not require a formal deed of conveyance in order for an assignment of existing property to be effective to transfer a beneficial interest in it; where there is a contract for valuable consideration for an immediate transfer of property which would be enforceable by a decree of specific performance the beneficial interest in the property passes immediately, so that it can be said (using the language of Lord Thurlow¹¹ and of counsel for the respondents) that a trust is raised in favour of the assignee. Although the argument of the counsel for the respondents was confined in cases of future property, their proposition that a right to specific performance of an agreement to transfer property is a "mere personal equity", valid only against the assignor, was obviously capable of more general application, and as such constituted, as Lord MacNaghten noticed later¹², an attack which struck at the root of a very considerable class of equitable titles. Moreover, this proposition had been accepted by Lord Campbell as Lord Chancellor, and the judgment of Lord Wensleydale¹³ in *Holroyd v. Marshall* makes it clear that it was only the death of Lord Campbell which prevented it from being accepted by the House of Lords. This goes much of the way to explaining the vehemence with which Lord Westbury opposed the argument. Having given examples (not all of which are convincing) in support of his first point, he goes on to consider the equitable doctrine of conversion as another instance where, in a case where specific performance is available to enforce a transaction, equity does not stand idly by until the decree has been made or until the parties have acted in such a way that their agreement has been given its full legal effect, but on the contrary immediately treats the transaction as effectual. It is not surprising to find that Lord Westbury eventually applies the principle which he has just emphasised at such length to the type of case actually before him: ". . . if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance"¹⁴.

11. In *Legard v. Hodges* (1792) 1 Ves. Jun. 477.

12. *Tailby v. Official Receiver* (1888) 13 App. Cas. 523, 546.

13. (1862) 10 H.L.C. 191, 213.

14. *Id.*, at 211.

Before examining the precise significance which should be accorded to this proposition, which has proved the source of much of the difficulty to which this branch of the law has given rise, it may be useful to notice how Lord Westbury disposed of the argument based on the dictum of Parke B. He took as crucial to the dictum its final words—that the agreement there under consideration “would cover no specific furniture and would confer no right in equity”. Ignoring completely the implication of Parke B. that an agreement relating to future property could not relate to specific property, Lord Westbury simply agreed that in a case where the agreement did not define any specific property to which it was to relate the equitable principles applicable to the present case could not apply; but if the agreement which Parke B. was discussing had sufficiently defined the furniture subject to it, then an equitable interest in it would have passed to the mortgagee immediately upon its acquisition.

It is clear that much of the emphasis which Lord Westbury laid so heavily on the doctrine of specific performance must be attributed to the argument which had been put to him. It had been conceded that the case was one for which specific performance could have been decreed; so it was strictly unnecessary for him to decide whether or not the equitable assignments he had to consider were based on any principle other than its availability. It is at least possible that it would be a legitimate view of his judgment that he was confining his opinion to cases in which specific performance is available and saying nothing as to the position where it is not, rather than that he was basing the whole doctrine of equitable assignments on the availability of specific performance. Such a view would be in accordance with the comments of Lord MacNaghten in *Tailby v. Official Receiver* to the effect that Lord Westbury’s judgment was devoted to showing “how real and substantial were equitable interests springing from agreements based on valuable consideration”¹⁵ and that his reference to the doctrine of specific performance was purely illustrative; it could only support this view that *Holroyd v. Marshall* was accepted by the respondents as a case where specific performance was available, for then the illustration would have direct reference to the case under consideration. On the other hand his references to the connection between specific performance and equitable assignments were couched in terms sufficiently strong to convince more than one judge in subsequent cases that the doctrines are inseparably connected; and it is clear enough that the fact that he terminated his discussion of the equitable doctrine of conversion by saying that all depended on the contract being “one of which a Court of Equity will decree specific performance”¹⁶ is strong evidence that he did mean to find some substantial connection between them. This does, however, raise the question of what precisely Lord Westbury meant when he referred to a contract as “being one of that class of which a Court of Equity would decree the specific performance”¹⁷. It is important to notice first that Lord Westbury did not treat the availability of specific performance in cases of assignments of future property in quite the same way as he dealt with it when discussing

15. (1888) 13 App. Cas. 523, 547.

16. (1862) 10 H.L.C., 191, 209.

17. *Id.*, at 211.

immediate assignments of existing property. In discussing the latter class of assignment he indicated that for the assignment to be effective the particular contract under review had to be one for which the Court would decree specific performance (" . . . provided the contract is one of which a Court of Equity will decree specific performance")¹⁸; in discussing the former, where the consideration had been executed, he only required that the contract concerned be "one of that class of which a Court of Equity would decree the specific performance"¹⁹. This is a significant difference, for it implies that factors which may be relevant in determining the availability of the remedy and the consequent effect of the contract as an equitable assignment where the contract is wholly executory may cease to be so once the consideration has been executed. It would therefore follow that even if there were some connection between the doctrines of specific performance and of equitable assignment not all the rules which are applicable to the former doctrine would necessarily be equally applicable to the latter, since the execution of the consideration is a necessary precondition of the assignment.

It is submitted, moreover, that the tenor of Lord Westbury's judgment makes it possible to determine his notion of a contract "of that class" to be specifically performed with some precision. The judgment treats all assignments of realty and personalty as being subject to the same principles, so the "class" referred to cannot be defined by reference to the distinctions between sale and mortgage or between realty and personalty. Lord Westbury had given as his example of an executory contract which could be enforced by a decree of specific performance a case concerning the sale of tea; it is therefore scarcely possible that the "class" can be defined by reference to those cases in which equity refuses specific performance because it considers the award of damages would provide an adequate remedy as distinct from cases in which specific performance is normally granted. It would be absurd to suppose that in a case dealing with assignments of property Lord Westbury was simply pointing to the distinction between cases such as contracts for personal services and the like in which, for various reasons, equity refuses specific performance and other cases involving the grant of interests in property where those reasons are inapplicable and it does not refuse the remedy; it would in any event be nonsensical to refer to transfers of the beneficial interest in property in relation to cases where no transfer of property is involved at all. It is submitted that the only possibility left open is a distinction between that class of contract where there is a reference to specific and identifiable property and that where there is not; this interpretation is borne out by the weight that Lord Westbury gave to this distinction while he was dealing with purely executory contracts and by the way in which he went on to deal with the dictum of Parke B. If this is accepted, then Lord Westbury was merely making the point that the property assigned must be sufficiently identifiable to be the subject-matter of a decree of specific performance, and not making the doctrine of specific performance the basis of the law of equitable assignments.

It is therefore suggested that there are really two points being made in

18. *Id.*, at 209.

19. *Id.*, at 211.

Lord Westbury's judgment: first, that in a case where specific performance is available and the consideration has been executed the equitable assignment takes place immediately upon the acquisition of the property by the assignor; and secondly, that whenever the property is sufficiently identifiable for the courts to be able to compel performance of the contract, then so long as the consideration has been executed (and the parties intend an immediate transfer) the equitable assignment again operates from the time the property reaches the hands of the assignor. Neither of these points supports the proposition that the equitable assignment depends on the availability of specific performance for any particular contract which may be under review. Yet for a quarter of a century after the decision in *Holroyd v. Marshall* it was generally accepted that such was the proposition for which the case stood. After the judgment of Lord MacNaghten in *Tailby v. Official Receiver* had unequivocally denied it most courts elected to ignore the apparent contradiction between the views of Lord Westbury (as they had commonly been interpreted) and those of Lord MacNaghten and to follow the latter. Cussen A.C.J., in *King v. Greig*²⁰, did make an effort to explain the seeming contradiction away by saying that Lord Westbury had used the phrase "specific performance" in a wide sense, which included the doctrine of the enforcement of equitable liens. This view has not received acceptance from commentators²¹. The most recent discussion is that of Professor Sykes²², who considers that Lord Westbury used the phrase in its normal meaning, though with the proviso that the tests for specific performance should be applied at the time the property reaches the hands of the assignor rather than at the time of the execution of the contract. He goes on to submit that "it is always an essential element to pass an equitable title by way of sale, mortgage or lease under a contract that the contract should be capable of specific performance"²³; though this statement is somewhat qualified by his insistence that "capable" should be read in a wide sense so as to cover any case where equity would "entertain a suit"²⁴. This includes all those contracts for the sale of chattels where equity would not normally grant specific performance, considering the award of damages as an adequate remedy, for this is merely a matter going to the exercise of the discretion to grant or withhold the decree. The distinction between matters going to the exercise of the discretion to grant or withhold a decree of specific performance and matters going to the entertaining of suit is not entirely clear; it may be that it amounts to no more than a reassertion that before an equitable interest in property can pass under a contract the property must be sufficiently defined. If this is so, then neither Lord Westbury nor Professor Sykes were using the phrase "specific performance" in its normal meaning.

The judgment of Lord Westbury has been examined in detail because of its influence and because of the controversy it has aroused; the judgment of Lord Chelmsford in the same case may be looked at much more briefly.

20. 1931 [V.L.R.] 413, 435.

21. See particularly Dean: "Equitable Assignment of Chattels" (1932) 5 Australian Law Journal 289.

22. Sykes: *Law of Securities* (1962) 349.

23. *Ibid.*

24. *Ibid.*

Lord Chelmsford did not find it necessary to determine precisely what the law is where the original parties to the transaction are the only parties to a dispute, but turned to two issues: firstly, the importance of drawing a clear distinction between the rule at law that a *novus actus interveniens* is necessary to perfect title to after acquired property and the rule in equity that it is not, and secondly, to establishing that where property becomes bound in equity by a contract for valuable consideration, the assignee in equity is entitled to priority over a subsequent judgment creditor. In the course of dealing with these he did not at any stage find it necessary to refer to the doctrine of specific performance, and there is consequently nothing in his judgment which can possibly be construed as indicating any connection between that doctrine and the effectiveness of an equitable assignment of future property. Indeed, he only referred once to specific performance in his whole judgment. Dealing with the example of a mortgage of furniture to be acquired in the future mentioned by Parke B., he interpreted his last words—that the agreement “would confer no right in equity”—to mean that no equitable assignment would occur, although specific performance would clearly be available; but he went on to suggest that the example dealt only with an agreement to execute a bill of sale over the furniture, and not an agreement purporting to operate as an immediate assignment of the furniture. In this way Lord Chelmsford emphasises that the mere availability of a decree of specific performance does not of itself produce an equitable assignment of property which will ultimately be subject to that decree; whether an assignment takes place or not depends equally on other factors, such as the intention of the parties.

The cases immediately following *Holroyd v. Marshall* all accepted the judgment of Lord Westbury as an authoritative exposition of the law of equitable assignments of future property, but all agreed that in some way the assignment depended on the availability of specific performance. Unfortunately the first case on the matter after *Holroyd v. Marshall*, *Belding v. Read*²⁵, was decided by the common law judges of the Court of Exchequer, and led to an error which it took many years to eradicate. The assignor in that case had assigned to Read all his personal estate and effects “thereafter to be upon or about his dwelling house, farm and premises, situate at Reedham . . . or elsewhere in Great Britain”. The defendant had seized and sold personalty acquired by the assignor since the bill of sale, some of that property having been in the dwelling-house at Reedham and some having been taken from Yarmouth. The plaintiff, the trustee in bankruptcy of the assignor, demanded an account of the proceeds of sale of the property treated in this way, and the Court of Exchequer unanimously held that they were entitled to one, in respect of both the property seized from the premises at Reedham and that seized from Yarmouth. Pollock, C.B., held that there was

25. (1865) 3 H. and C. 955. Followed in *In re D'Epineuil* (1882) 20 Ch. D. 758; distinguished in *Leatham v. Amor* (1878) 47 L.J.Q.B. 581; *Lazarus v. Andrade* (1880) 5 C.P.D. 318; *Clements v. Matthews* (1883) 11 Q.B.D. 808 (C.A.); *Coombe v. Carter* (1887) 35 Ch. D. 109 (Kay J.), (1888) 36 Ch. D. 348 (C.A.). In the last two cases the court introduced the idea of a “divisible” assignment; if the property assigned included property to come on to a given property and then any future-acquired property the former assignment would be held valid by severing it from the whole. This device was disapproved by the House of Lords in *Talby v. Official Receiver*, especially at 544 *per* Lord MacNaghten.

nothing inconsistent with *Holroyd v. Marshall* in simply applying the rule that a person cannot assign what he does not at the time possess; this is clearly wrong, and is mentioned solely as an extreme example of the inability of common law judges of the period to appreciate the different approach of equity to the problem. Martin, Channell and Bramwell, BB., were rather more sophisticated than this; they said that the principle of *Holroyd v. Marshall* was inapplicable to the facts, since the principle depended on the availability of specific performance and the deed of assignment did not define the property to be subject to it with sufficient precision for a decree of specific performance to have been granted. This initiated a period of confusion. The Chancery judges felt bound by the reasons given by the majority of the court in *Belding v. Read*, though they were generally emphatic that they were incorrect and they tended to distinguish the case on the facts wherever possible. On the other hand, they also accepted that *Holroyd v. Marshall* made the availability of specific performance the criterion of whether an effective assignment took place on the property subject to an assignment coming into the hands of the assignor, though in the most important of the cases decided during the period, *Coombe v. Carter*²⁶, Cotton L.J. said that once the consideration for the assignment had been given, the principle that where damages would be a sufficient remedy specific performance would not be granted did not apply, and Fry L.J. said that cases where a contract was wholly executory were materially different from those where the whole consideration had been paid, but did not suggest wherein the difference lay. Despite this, it is clear that the error made in *Belding v. Read* related only to the circumstances in which a decree of specific performance could be granted, and that the confusion which followed was attributable to that error rather than to any intrinsic weakness in the view that the equitable assignment depends on the availability of specific performance. It was, moreover, the view of what amounted to sufficient definition of property for a decree of specific performance to be granted as put forward in *Belding v. Read* that was particularly criticised by the Chancery judges, who often said that quite general assignments of future property had long been enforced in cases arising out of marriage settlements, and that there was no distinction in principle between the enforceability in equity of an assignment contained in a marriage settlement and a similar assignment contained in a mortgage²⁷. Apart from the comments just cited from *Coombe v. Carter* (and even there the decision turned on another point) there was, however, universal acceptance of the view that the equitable assignment depends on the availability of specific performance. Nevertheless, a position in which the Court of Appeal felt bound by a decision which it considered to be wrong, and which judges tried to avoid by making every case purely a decision on its own facts, was obviously intolerable and required clarification from the House of Lords; this it received in *Tailby v. Official Receiver*, the second great nineteenth century authority on this branch of the law.

The assignment in *Tailby* was of all the assignor's stock in trade and of "all the book debts due and owing or which may during the continuance

26. (1888) 36 Ch. D. 348.

27. See especially *Coombe v. Carter* (supra); *In re Lind* (1915) 1 Ch. 744; (1915) 2 Ch. 345 (C.A.).

of this security become due and owing to the said mortgagor . . . ”, and was made as security for a loan. The contest was between the assignor’s trustee in bankruptcy and a person who had bought the assignor’s rights to some of the book debts, including some which had accrued after the date of the original assignment. The course of the case in the lower courts is indicative of the confusion which prevailed at the time; in the Queen’s Bench Division two judges had found for the purchaser from the assignee²⁸, but the Court of Appeal, relying on *Belding v. Read*, had reversed that decision²⁹. The Court of Appeal, in so doing, reasoned that the effectiveness of the assignment depended on the availability of specific performance and that the description of the future property was too vague and indefinite for a decree to be available. These were the points which were emphasised in the argument of counsel for the respondent; for the appellant the principal point argued was that the description of the property was sufficiently precise for specific performance, but it was also argued that once consideration had been given for the assignment it ceased to depend on the availability of specific performance at all. With the exception of Lord Fitzgerald, who felt that the issues argued did not arise on the facts and who refrained from giving any opinion on them, all the Lords found for the appellant on the main point; and Lords Watson and MacNaghten emphatically accepted the second argument as well. All agreed that the true principle is that the only condition which must be fulfilled for the assignment of future property (or choses in action) to be effective in equity in a case in which consideration had been given is that when the future property (or chose in action) comes into existence, “it shall be capable of being identified as the thing, or as one of the many things assigned”³⁰; and all agreed that *Belding v. Read* had been wrongly decided. The only way in which the assignment may fail in equity is that it may be impossible to identify the property the subject of the assignment when it comes into existence; any other doctrine of “vagueness”, “indefiniteness”, and “width” in the description of the property is erroneous. The judgment of Lord Herschell goes little further than this; he offered no basis for the true doctrine, though he did not seem in the least sure what Lord Westbury had meant by limiting it to the the class of cases in which a Court of Equity would decree specific performance. Lord Watson too did not consider what the basis of the doctrine is, though he explicitly rejected the theory that it is based on the availability of specific performance by calling Lord Westbury’s reference to the doctrine “an illustration not selected with his usual felicity”. There is, however, no doubt that the most powerful and influential judgment has been that of Lord MacNaghten, and he both endeavoured to destroy the theory that the assignment is based on the availability of specific performance and offered another basis for it.

It has already been suggested that the confusion in the law which had been caused by *Belding v. Read* could have been cleared away very easily without any fundamental enquiry into the basis of the doctrine of equitable assignment; it was in no way an inevitable corollary of the view that the

28. (1886) 17 Q.B.D. 88.

29. (1887) 18 Q.B.D. 25.

30. (1888) 13 App. Cas. 523, 533 per Lord Watson.

assignment is based on the availability of specific performance. The question then arises as to why Lord MacNaghten was so emphatic in his approval of the argument that the doctrines of equitable assignment and specific performance are separate. He gave two reasons for his conclusions: first that as a matter of authority the doctrines were independent, for there are cases in which specific performance is available although there is no question of any equitable assignment, and, conversely, there are cases in which there is a valid equitable assignment although no decree of specific performance can be obtained, and secondly, that there are strong practical reasons for holding the doctrines independent of each other. It remains to examine the validity of these criticisms.

Beginning with the arguments based on authority, the first group of cases he cited may be quickly dismissed. It comprises cases in which a person has covenanted to charge part of his property with the payment of a sum of money, but has done nothing to mark out which of his property is to be subject to the charge³¹. Here it is possible to bring an action for specific performance, but there can be no equitable assignment because there is no identifiable property to which the assignment can attach. That this result depends on the inadequate definition of the property rather than on any essential distinction between executed and executory contracts is readily apparent since it obtains equally in cases where the consideration has been executed and where it has not³², and since if the covenant is to charge all the property owned at a particular date with the payment, then the charge duly comes into existence at that time³³. In any event, the crucial point here is that any conveyance must mark out what it is that is being conveyed; even if the effectiveness of the assignment does depend on the availability of specific performance in that there can be no assignment unless the court can decree delivery of the relevant property it would be perfectly consistent to hold that there can be no assignment while the property remains inadequately defined and the decree of specific performance that is available compels the assignor to define the property before delivering or conveying it.

The second group, however, merits closer consideration. In these cases an equitable assignment has been held effective, though at the time the suit was brought specific performance could not have been obtained. The case most relied on by Lord MacNaghten was *Metcalf v. Archbishop of York*³⁴. The incumbent of a benefice had granted an annuity charged on his benefice to one Cottle, in consideration of £900. The indenture charging his benefice, which he executed in 1811, also contained a covenant that if he should be promoted or preferred to another benefice in future, he would fully charge that benefice with payment of the annuity within three months, and demise it to the trustee of his present one; "in the meantime, the same should be

31. Lord MacNaghten cited *Mornington v. Keane* (1858) 2 De G. and J. 292. See also *Fremoult v. Dedire* (1718) 1 P. Wms. 429; *Montague v. Earl of Sandwich* (1886) 32 Ch. D. 525, especially *per* Cotton L.J. (dissenting on a point of construction of a will). See also Ashburner: *Equity* (2nd ed., 1933), 258-259; Marshall: *The Assignment of Choses in Action* (1950) at 82-4.

32. In all the cases cited in n. 31 the consideration had in fact been executed.

33. *Montague v. Earl of Sandwich* (1886) 32 Ch. D. 525.

34. (1836) 1 My. and Cr. 547.

charged, and chargeable with, the annuity". In 1814, he exchanged benefices, but he did not execute a legal charge over his new one until 1818. In 1817 the charging of benefices had been statutorily prohibited. In 1832 his creditors obtained a sequestration order against his benefice, though they had notice of the charge; the case was essentially brought to establish priorities between Metcalfe, the assignee of the annuity and the charge, and the creditors. No valid legal charge had ever been created over the benefice, nor could the court decree specific performance of the contract by the execution of a legal charge; but it was held that the effect of the indenture was to create an equitable charge over the new benefice immediately upon its acquisition in 1814, and that a validly created equitable charge survived the Act of 1817. A similar point is raised by *Pullan v. Koe*³⁵. The children of a marriage wanted to enforce the after-acquired property clause in a marriage settlement more than six years after the property had been acquired by the recalcitrant parent. Had their claim depended solely on the availability of a contractual remedy, it would have been statute-barred; but Swinfen-Eady J. had no hesitation in holding that as soon as the property had been acquired it had become subject to the trusts of the settlement and that the beneficiaries could still enforce their claim.

These cases clearly establish that it is not fatal to an equitable assignment that at the time an action is brought specific performance can not be granted. They are, however, explicable on the basis that the relevant time for determining the effectiveness of the assignment is the date that the property comes into the hands of the assignor, and not the date of the action; and at that time specific performance might have been granted, or at least, no ground existed for refusing specific relief. On whichever basis the assignment is put, an equitable interest in the property concerned passes immediately upon its acquisition, so that the absence of the strict contractual remedy at the time of suit becomes irrelevant. The language used in the judgments in these cases supports Lord MacNaghten's view that the doctrines of equitable assignment and specific performance should be regarded as independent; in *Metcalfe v. Archbishop of York*, Lord Cottenham expressly opposed the view that the equitable charge rested on the availability of the legal one; and in *Pullan v. Koe* the court cited Jessell M.R. for the view that the property is bound "under the doctrine of equity that that is considered as done which ought to be done. That is the nature of specific performance of the contract, no doubt"³⁶. It is nevertheless clear that the chief importance of these cases is that they emphasise that the assignment takes place when the property comes into the hands of the assignor and that once the assignment has been effectuated and the assignee is in much the same position as a beneficiary under a constructive trust his rights and remedies cease to be merely contractual. They do not say that it had been illegal to decree specific performance at the time the property came into existence the assignment would nonetheless have been effective; and it is submitted that if, in a case otherwise like *Metcalfe v. Archbishop of York*, the Act prohibiting the

35. [1913] 1 Ch. 9. The old cases of *Frederick v. Frederick* (1721) 1 P. Wms. 710; (1731) 1 Bro. P.C. 253 (H.L.) and *Coventry v. Coventry* (1724) 2 P. Wms. 222; 1 Stra. 596 raise very similar issues.

36. *Smith v. Lucas* (1881) 18 Ch. D. 531, 534.

charging of benefices had been passed before the new benefice was acquired, the Court could not have held the charge valid. This would probably be true on whatever basis the equitable assignment is put, but the point is obscured by an insistence on a complete independence of the assignment either from the doctrine of specific performance or from all those considerations which would be relevant in determining whether specific performance would be given.

The chief reason given by Lord MacNaghten in *Tailby v. Official Receiver* for his holding that the availability of specific performance is an appropriate criterion to apply to cases of equitable assignment was that cases of specific performance raise some of "the nicest distinctions and most difficult questions that come before the Court"³⁷. To apply principles which had been worked out with such delicacy in relation to executory contracts to cases of equitable assignments of future property would, he thought, not so much guide courts as perplex them. Hence the doctrines of specific performance do not afford a test or measure of the rights created when consideration has been given. In cases of "equitable assignment or specific lien", as he called them, the most important question in issue is what the parties intended as the true scope and effect of the agreement. Once that has been resolved, "you have only to apply the principle that equity considers that done which ought to be done if the principle is applicable under the circumstances of the case"³⁸. It appears from the rest of his judgment that the principle is so applicable if the agreement relates to adequately defined property and if the parties intended the assignment to operate either immediately or as soon as the property subject to it came into existence; subsequent cases have made it clear that the agreement may display an intention that the assignment should be effective upon the fulfilment of conditions beyond that of the property merely coming into the hands of the assignee and that the assignment will then be treated as effective from the time of the fulfilment of those conditions³⁹.

There is considerable support in the cases for this practical differentiation between cases in which the consideration for an agreement has been executed and cases in which it has not. The courts have often held that there is a distinction to be drawn between cases of the specific performance of executory contracts, where the court orders the defendant to execute a deed or a conveyance, or perform some other formal act to complete a transaction, and cases where the consideration on one side has been fully executed and an attempt is made to compel the other party to perform his contract in specie. Where this distinction is made, courts often go on to hold that considerations appropriate to the former class of case are not equally appropriate to the latter. So in *Wolverhampton and Walsall Railway Co. v. London and North-western Railway Co.*⁴⁰ Lord Selborne L.C. granted the plaintiff an injunction to prevent the defendant from carrying goods over railway lines other than the plaintiff's when the plaintiff had executed the consideration for the

37. (1888) 13 App. Cas. 523, 547.

38. *Id.*, at 547-548.

39. *Palette Shoes Pty. Ltd v. Krohn* (1937) 58 C.L.R. 1.

40. (1873) L.R. 16 Eq. 433.

defendant's promise to carry the goods on his line, despite the defendant's argument that they were thereby being indirectly compelled to carry out a contract of which specific performance could not have been decreed since the agreement related to the provision of services; once the plaintiffs had fully executed their side of the bargain, such considerations became irrelevant. Again, in *Coombe v. Carter*⁴¹, as has already been noticed, Cotton L.J. said that where a lender had actually advanced money on the faith of a security, and the security that had been promised had not been provided, specific performance might be decreed against the borrower because once the consideration had been given the normal principle that damages would be a sufficient remedy did not apply. There is thus a good deal of support for Lord MacNaghten's view that considerations which would be relevant in determining the availability of a decree of specific performance are irrelevant in a case of equitable assignment or lien. The question, however, remains whether the fact that some considerations which are of crucial importance in cases of the specific performance of executory contracts become irrelevant once the consideration for an assignment has been executed, necessarily indicates that the doctrine of equitable assignment is wholly distinct from that of specific performance. In order to determine this, one may start by examining those factors which are relevant to the grant of a decree of specific performance where the contract remains wholly executory in order to see how far they may be applicable to cases of equitable assignment.

It is agreed on all hands that in most cases before a decree of specific performance can be made in relation to property which has been the subject of a contract that property must be identifiable as such, and that this is equally true of cases of equitable assignment. Apart from this, it is accepted that specific performance of a contract to assign personalty will not be given because damages provide an adequate remedy in such a case⁴²; this is the rule that Cotton L.J. thought inapplicable once consideration had been given. It is submitted that as a general proposition Cotton L.J.'s view is wrong and that the principle that specific performance should not be decreed if damages would be an adequate remedy should be equally applicable to cases of equitable assignment. The most important effects of that principle are that specific performance is only exceptionally given for a contract for the sale or exchange of personal property⁴³, on the ground that the award of damages enables the plaintiff to go elsewhere in the market to obtain the desired commodity, and that specific performance will not be granted of a contract to give security for a loan where the loan has not yet been made⁴⁴, for the lender can invest his money elsewhere. (In this latter example the principle of mutuality also vitally affects the issue: equity will not decree specific performance of a contract to lend money, and will not specifically

41. (1888) 36 Ch. D. 348. See *J. C. Williamson Ltd. v. Lukey and Mulholland* (1931) 45 C.L.R. 282 at 297 *per* Dixon J., and at 313-314 *per* McTiernan J.: Ashburner: *Equity* (2nd ed., 1933), 245-246, 258, and Dean: "Equitable Assignment of Chattels" (1932) 5 Australian Law Journal 289.

42. Fry: *Specific Performance* (6th ed., 1921, ed. Northcote), s.78 and cases there cited. A further reason given is that the variation in value of chattels is often such that a decree of specific performance might work injustice.

43. *Id.*, at 78 ff.

44. *Id.* s.54.

enforce the contract against the borrower if it will not do so against the lender.) In cases concerning sale of goods, the most recent authorities agree that specific performance is equally unavailable whether or not the price has been paid and that payment of the price does not give rise to any equitable assignment⁴⁵. In *Re Wait*⁴⁶ Lord Hanworth M.R. relied on the principle that specific performance would not normally be granted for a contract of sale of goods, though in that case the consideration had been executed and he seemed disposed to accept that the doctrines were different. Atkin L.J. in the same case pointed out that there is no good reason why a buyer who has paid the price of goods should have any better rights in a bankruptcy than a seller who has supplied them, and the latter clearly may only prove in the bankruptcy for the price. Moreover, the mere fact that the purchase price has been paid should not increase the rights of the buyer, particularly when he is competing against other creditors in the bankruptcy of the seller. There is no good reason why a buyer who has paid the purchase money should be treated as a secured creditor, or as otherwise outside the bankruptcy, while a buyer who has not should have to prove in the bankruptcy; each has entered into the same sort of commercial transaction with the seller and the difference in their loss is adequately reflected in the sum for which each person may prove in the bankruptcy. But these considerations are irrelevant to a contract for a loan on security once the money has been paid to the borrower. Firstly, the failure to provide the security contracted for is very difficult to translate into terms of pecuniary injury: assessment of any damages would have to depend partly on the value of the security and partly on the state of solvency of the borrower at the date for the transfer of the security, a date which may be long in advance of the date on which repayment is due. Up to that time it is well-nigh impossible to determine the loss likely to be suffered from the failure to provide the promised security, and specific performance seems the only appropriate remedy⁴⁷. Secondly, the parties have contracted on the basis that a subsequent insolvency or financial difficulties on the part of the borrower may very well render damages an inadequate remedy; that is the point of the security. In these circumstances it would be unreasonable to treat the agreement to give security as one for which damages would be a sufficient remedy. Whether the contract under review in a particular case be one of sale, exchange or a loan on security where the lender has not yet paid money to the borrower, or whether it be one of loan on security where the money has already been so paid, these considerations are equally as applicable to cases of assignment of future goods as they are to cases concerned with existing property. Damages are just as adequate a remedy for a breach of contract to sell future goods as they are of a contract to sell existing ones, whether or not the price has been paid; they are just as inadequate a remedy for breach of a contract to assign future goods by way of security as they are

45. *Re Wait* [1927] 1 Ch. 606 (C.A.); *King v. Greig* [1931] V.L.R. 413 (Full Court of Victoria) (*semble*). See too Sutton: *Sale of Goods* (1967), 354 ff; Atiyah: *Sale of Goods* (3rd ed.), 238-239; Fridman: *Sale of Goods* (1966), 329-30. For a different view see Treitel: "Specific Performance in the Sale of Goods" (1966) *Journal of Business Law* 211.

46. [1927] 1 Ch. 606 (C.A.), 613.

47. Williston: *Sales* (1948) Vol. I, s.139; Horack: "Insolvency and Specific Performance" (1918-1919) 31 *Harvard Law Review* 702.

of a contract to assign existing goods by way of security, when once the loan has been made. Hence the principle that where damages are an adequate remedy specific performance will not be given is as relevant to cases of equitable assignment as to those of specific performance proper; the importance of the execution of the consideration in one class of case (of which *Coombe v. Carter* and, indeed, virtually all the other cases where it has been held that there has been a valid equitable assignment of future goods are examples) is that it renders damages an inadequate remedy. It is, however, not true that in every case where the consideration for the assignment of present or future goods has been executed the principle that the parties should be left to their remedy in damages where it would be adequate should no longer apply; there are strong reasons for holding that it does apply to such cases, and the general attitude of the courts where they have been asked to hold that there has been an equitable assignment of goods in cases concerning sale tends to bear them out.

Other factors which cause difficulties in cases of specific performance of executory contracts clearly have little room for operation once the consideration for an assignment of property has been executed. It is accepted that the principle that specific performance will not be decreed unless the court can execute the whole contract does not apply when the consideration has been paid⁴⁸; hence if a contract provides for the assignment of property and for the provision of services the court will not decree specific performance of it (unless the contract is divisible) while it remains executory, but once the assignee has paid over the consideration, the court may decree performance of the contract in specie by enforcing the assignment and, in appropriate cases, the grant of an injunction⁴⁹. It is regarded as irrelevant that the court may not be able to compel the assignor to perform the whole of his contract in specie. Again, the difficulties which arise in connection with the doctrine of mutuality—the doctrine that a court will not decree specific performance in favour of one party to a contract unless it could equally order it against him—clearly become irrelevant once the person seeking specific relief has performed the whole of his part of the contract. When he has done that, it is nothing to the point that he could not have been compelled to do it. This becomes even clearer if Ames' view⁵⁰ of the doctrine of mutuality—that specific performance will not be ordered against a person who after performance of his side of the contract, would be left with only an action in damages as his security for performance of the contract by the other party to it—is accepted. But it is not necessary to say that these factors are irrelevant once the consideration has been executed by the assignee because the doctrine of equitable assignment is distinct from that of specific performance and in no way based on or connected with it; they are irrelevant simply because the execution of the consideration makes them so. That being the case, there is no basis for Lord MacNaghten's fear that courts

48. Fry: *Specific Performance* (6th ed., 1921) s.841.

49. *Wolverhampton and Walsall Ry. Co. v. London and North-Western Ry. Co.* (1873) 16 Eq. 433.

50. "Mutuality in Specific Performance": *Lectures on Legal History* (1913), 370 *et. seq.* For views consistent with Ames' statement of the principle see *J. C. Williamson Ltd. v. Lukey and Mulholland* (1931) 45 C.L.R. 282 at 298 per Dixon J.

might become perplexed if they tried to apply the subtleties arising from these principles to cases of equitable assignment or specific lien; the principles themselves could not be applicable to such cases.

Similar points can be made in relation to the other factors which affect the grant of a decree of specific performance; either they cannot possibly be relevant to a case of equitable assignment (for example, the principle that a decree will not be ordered where it would prove useless) or, if they can be relevant to such a case, they should be applied to it (to this group belongs the principles that specific performance will not be granted where there has been some mistake or misrepresentation, or where to grant it would cause undue hardship). It is therefore submitted that Lord MacNaghten's reasons for rejecting specific performance as the basis of the doctrine of equitable assignment are inadequate, and that where considerations affecting the availability of specific performance can be relevant to cases of equitable assignment they should be applied to them. Some support for this view may be derived from the opinion of the Privy Council in *Australian Hardwoods Pty. Ltd. v. Commissioner for Railways*⁵¹, though the facts of the case were such that they did not give rise to either a question of specific performance or to one of equitable assignment. The respondent had licensed the appellant to use a sawmill which had been licensed by the Forestry Commission; in return the appellants were to pay rent, and to supply the respondents with sleepers and sawn timber from the supply of millable timber they were to receive from the Forestry Commission through the intermediation of the respondents. The agreement included the grant of an option to purchase the mill, on the exercise of which by the appellants the respondents were to request the Forestry Commission to transfer the sawmill licence to them. The terms of the contract were very detailed, and covered the obligations of the parties both before and after the exercise of the option. The appellant claimed that they had validly exercised the option and sought to compel the respondent to transmit to the Forestry Commission a request for the transfer of the licence. Had the case been regarded as one for specific performance the appellants would have failed on the ground that they had themselves been in breach of obligations imposed by the contract and that they could not demonstrate a willingness to perform other obligations arising from it. Accordingly, they argued that their action was not one for specific performance "proper", on the basis that the phrase ought to be confined to the specific performance of agreements which were not intended in their nature to be the final instrument regulating the mutual relations of the parties; and that considerations relevant in cases of specific performance proper were to be disregarded where the issue was the enforcement of such an instrument. The Board accepted that there is a distinction of the kind suggested, but rejected the consequences which it had been sought to attach to it; their Lordships could see no obvious reason why, even if the terms of a contract do not call for the execution of a further instrument, the equitable right to specific relief in respect of it should be tried by principles different from those applicable to executory agreements proper. The final answer to the argument was that "unless the court is to ignore equitable principles alto-

51. [1961] 1 All E.R. 737.

gether in considering the right to specific relief in the present case, the relief sought cannot be granted⁵². Obviously this was not a case of equitable assignment; but the distinction relied on derived partly from *Tailby v. Official Receiver*, and the Privy Council expressly refused to draw from it the consequence that considerations appropriate to cases of the specific performance of executory contracts are necessarily irrelevant when another form of specific enforcement of a contract is sought⁵³.

It is therefore submitted that as a matter of principle considerations applicable to cases of the specific performance of executory contracts are equally applicable to cases of equitable assignment, except insofar as the execution of the consideration necessarily renders them irrelevant. If this conclusion be accepted, it is clear that Lord MacNaghten did not give any strong practical reason for insisting that equitable assignment and specific performance are entirely separate doctrines when he spoke of the difficulty of applying principles evolved in cases of specific performance to cases of equitable assignment. On the other hand, the mere fact that similar considerations should be borne in mind in relation to both doctrines does not necessarily point to any dependence of one upon the other. Each doctrine concerns a form of specific relief; the situations in which one or the other is applicable display some broadly similar features and raise some identical issues. It is only to be expected that these issues should be dealt with in the same way, or, to revert to the language of the Privy Council in the *Australian Hardwoods* case, that there should be some broad "equitable principles" which should be considered by a court examining a "right to specific relief". A rejection of this part of the argument of Lord MacNaghten therefore furnishes no ground for an assertion that the doctrines are in any way interdependent, though it does deny one reason for holding that they are not.

It may then be concluded that the reasons given by Lord MacNaghten to support his proposition that the doctrines of specific performance and equitable assignment are entirely independent are inadequate to establish it. This apparently leaves the problem of the basis of the law of equitable assignments unresolved. It is submitted, however, that the two doctrines are distinct, although some principles which govern the award of a decree of specific performance are equally applicable to cases of equitable assignment. The reasons for this are threefold. First, since Lord MacNaghten asserted that the two doctrines are distinct, the great majority of courts have accepted his point, which is thus now supported by the weight of recent authority⁵⁴.

52. *Id.*, at 743.

53. See also *Western Wagon Co. v. West* [1892] 1 Ch. 271, where Chitty J. distinguished the specific performance of executory contracts from the doctrine of equitable assignment, but nonetheless was able to apply the rule that equity will not decree the specific performance of a loan to a case which was much nearer equitable assignment than specific performance.

54. *Western Wagon Co. v. West* [1892] 1 Ch. 271; *In re Lind* [1915] 1 Ch. 744, [1915] 2 Ch. 345 (C.A.); *Palmer v. Carey* (1924) 34 C.L.R. at 391 *per Isaacs J.* and at 329 *per Starke J.*; *In re Wait* [1927] 1 Ch. 606 (C.A.) at 647 *per Sargant L.J.*; *King v. Greig* [1931] V.L.R. 413; *Palette Shoes Pty. Ltd. v. Krohn* (1937) 58 C.L.R. 1; *Norman v. Federal Commissioner of Taxation* (1963) 109 C.L.R. 9 at 24 *per Windeyer J.* *Contra: In re Wait* (*supra*) at 634 *per Atkin L.J.* *Performing Right Society v. London Theatre of Varieties* [1922] 2 K.B. 433 at 454 *per Young L.J.*, and at 450 *per Atkin L.J.*; *Palmer v. Carey* [1926] A.C. 703

Secondly, those courts and commentators who have preferred to base the doctrine of equitable assignment all rely on the judgment of Lord Westbury in *Holroyd v. Marshall*⁵⁵. It has already been suggested that his judgment must be read in the light of the argument that even in a case where specific performance is conceded to be available no equitable interest in the future property passes; that in consequence it is doubtful whether he intended to make the availability of specific performance the basis of the whole law relating to equitable assignments; and that from the illustrations he uses it seems that his view of specific performance involves no more than the proper definition of the property to be assigned. Thirdly, it has been accepted from the seventeenth century that a debt can be assigned in equity once consideration has been given; and in case of assignment of choses in action, courts have scarcely ever talked in terms of specific performance. One reason for this, of course, is that until 1873 no decree of specific performance of a contract to assign a debt could have been made, since there was no simple method of assigning a debt at law. Hence unless one is prepared to suggest that cases concerning the assignment of future goods and those concerning the assignment of future debts are based on entirely different principles—a point which no court has ever conceded—it seems necessary to conclude that the effectiveness of the equitable assignment cannot be made to depend on the availability of a decree of specific performance.

The conclusions that have been reached are therefore that the doctrines of specific performance and equitable assignment are distinct, and that the effectiveness of the latter does not depend on the availability of the former. But the consequences of these conclusions are much less sweeping than have commonly been supposed, since in cases concerning the transfer of future goods, factors which apply to the specific performance of executory contracts apply equally to cases of equitable assignment where the consideration has been executed by the assignee, though the execution of the consideration necessarily renders matters relating to the ability of the Court to execute the whole contract, to the doctrine of mutuality and the like, irrelevant. If this be accepted, it follows that Lord Westbury was wrong in holding that the doctrine of equitable assignments applies in precisely the same way to all contracts for the sale or mortgage of any property, whether real or personal, and that Lord MacNaghten was wrong in trying to exclude all matters which may affect the award of a decree of specific performance from consideration in a case of equitable assignment⁵⁶. The necessary prerequisites for the

55. E.g., *In re Wait* (supra n. 54) at 634 per Atkin L.J.; *Performing Right Society v. London Theatre of Varieties* (supra n. 54); *Palmer v. Carey* [1926] A.C. 703.

56. The fact that the assignment operates immediately from the time the property comes into the hands of the assignor makes it clear that at that time the assignee obtains an equitable interest; there is no question of him having to make good any "preliminary equity" (his right to specific performance) by a court order. The distinction between a "mere equity" and an equitable interest was made by Lord Westbury himself in *Phillips v. Phillips* (1862) 4 De G. F. and J. 208, and though there is still some doubt as to the nature of the distinction, Lord Westbury in *Holroyd v. Marshall* expressly rejected the argument that the right of the assignee is a mere personal equity and asserted strongly that it amounts to a full equitable interest. On the relationship between a mere equity and an equitable interest see now *Latec Investments Ltd. v. Hotel Terrigal Pty. Ltd.* (1964-65) 113 C.L.R. 265; *National Provincial Bank v. Ainsworth* [1965] A.C. 1175; White, "The Illusion of the Mere Equity" (1967) 5 Sydney Law Review 499.

doctrine of equitable assignments to come into effect remain as Lord MacNaghten had them: the parties must have intended an assignment and the property must be identifiable as the subject matter of the assignment; but to them should be added that the equitable assignment depends also on the initial agreement being such that the common law remedies for breach of the contract to assign would be inadequate in the eyes of equity, and that there must be no reason for equity to deny its assistance according to its own general principles in the award of its discretionary remedies.