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Gratuitous Partial Assignments

Edwin D. Dickinson
University of Michigan Law School

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GRATUITOUS PARTIAL ASSIGNMENTS

EDWIN D. DICKINSON
Professor of Law, University of Michigan

Is it possible to make an effective and irrevocable assignment by way of gift of part of a chose in action? There are no obvious reasons why it should not be possible. Gifts of a great variety of valuable rights are favored and protected by the law. Why not a gift of part of a chose in action? An answer deduced from the decided cases is not in all respects as certain and satisfactory as one might anticipate. Perhaps it is not too much to say that the answer is problematical. The problem invites interest, not only because it appears to be unsettled on authority, but also because it requires some attention to the broader question of the nature of partial assignments.

A discussion of the problem may be prefaced advantageously by restating certain familiar principles which are applicable to partial assignments generally. In the first place, it is common learning that part of an entire debt or demand cannot be assigned so as to enable the assignee to maintain an action at law either in his own name or in the name of his assignor.[1] The entire debt or demand is a single obligation in which the obligor has undertaken to pay an integral sum to one person, not to pay in fractions to several persons, and, if con-

[1] This is true of partial assignments properly so-called. It is necessary to distinguish two other transactions which are similar in some respects and are sometimes erroneously described as partial assignments: (1) the assignment of an entire chose, part of the proceeds when collected to be retained by the assignee and the remainder paid over to the assignor; *Wood v. Wallace* (1865) 24 Ind. 226; *Curtis v. Walpole Tire & Rubber Co.* (1914, C. C. A. 1st) 218 Fed. 145; Ames, *Cases on Trusts* (2d ed. 1893) 64, note; 1 Williston, *Contracts* (1920) sec. 441, note 74; (2) an undertaking by the so-called assignor that he will collect the

troversy arises, he may fairly insist that his liability be determined in a single litigation. As was said by Mr. Justice Story, in the well known case of *Mandeville v. Welch,*

"A creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor,[2] since it may subject him to many embarrassments and responsibilities not contemplated in his original contract."[3]

A court of law is incapable of assisting the partial assignee without splitting up the cause of action because it has no adequate way of dealing with a three-sided controversy. Accordingly, it refuses to assist the partial assignee.

The same difficulty does not exist in a court of equity. Equity has always been competent to compel the presence of numerous interested parties and settle their rights in a single decree. Equity may require the debtor to bring the fund into court, so to speak, and may then distribute it among the creditor and as many partial assignees, parties

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entire chose and pay over a part of what he collects to the so-called assignee. See 1 Williston, *op. cit.,* sec. 441.

On assignment by an owner of part of a chose in action of his entire interest, see *Groves v. Ruby* (1865) 24 Ind. 418; *Fordyce v. Nelson* (1883) 91 Ind. 447.

On assignment of a specified sum due under an installment contract, see *Timmons v. Citizens Bank* (1912) 11 Ga. App. 69, 74 S. E. 798.

[2] If the debtor assents to the splitting up of the cause, there is, of course, no objection to an action at law by the partial assignee; but the action in this event does not, strictly speaking, rest upon the assignment. It would probably be more accurate to say that the debtor's assent completes a novation whereby two new contracts, one between the debtor and the creditor-assignor, and another between the debtor and the partial assignee, are substituted for the original contract. The partial assignee's action is based upon a new contract, which accomplishes in some respects the same purpose as the partial assignment, but depends for its validity upon the debtor's promise. See *Weinstock v. Bellwood* (1876) 75 Ky. 139, 140; *Getchell v. Maney* (1879) 69 Me. 442, 444; *James v. City of Newton* (1886) 142 Mass. 366, 371, 8 N. E. 122, 124; *Bank of Harlem v. Bayonne* (1891) 48 N. J. Eq. 246, 253, 21 Atl. 478, 480; *Lanigan v. Bradley and Currier Co.* (1892) 50 N. J. Eq. 201, 204, 24 Atl. 504, 506; 1 Williston, *op. cit.,* sec. 442. On the question of consideration for the debtor's promise to the partial assignee, see *Barlow v. Lande* (1915) 26 Calif. App. 424, 427, 147 Pac. 231, 232; *Welch v. Mayer* (1894) 4 Colo. App. 440, 444, 36 Pac. 613, 614. Cf. *Moor v. Wright* (1826) 1 Vt. 57, 63 (total assignment). There are practical differences, of course, between the position of an assignee of the old debt and a promisee under the new promise. See Ames, *Lectures on Legal History,* tit. Novation, (1913) 298, 303.

[3] (1820, U. S.) 5 Wheat. 277, 288. See also *Weinstock v. Bellwood* (1876) 75 Ky. 139; *Getchell v. Maney* (1879) 69 Me. 442; *Gibson v. Cooke* (1838, Mass.) 20 Pick. 15; Ames, *Cases on Trusts,* 63, note; 1 Williston, *op. cit.,* sec. 442; Ann. Cas. 1912 A, 673, note. But the partial assignee has been permitted to maintain an independent action where the debtor had notice of the assignment and made no objection thereto. *Cross v. Page & Hill Co.* (1911) 116 Minn. 123, 133 N. W. 178.

to the suit, as are found to be entitled.[4] The debtor's right to stand upon the singleness of his obligation is adequately protected, while the assignees are assisted to secure whatever has been assigned. So it has long since been settled that an assignment of part of a chose in action, unenforceable at law, will be given effect in equity, and consequently that the debtor who has had notice of a partial assignment is bound to pay the assignee.[5]

The enforcement of partial assignments in equity has made it possible to use the device extensively in the world of commerce and affairs. It has been used, for illustration, as a means of transferring part of an existing debt or demand arising under an insurance policy,[6] a builder's contract,[7] or any one of a great variety of other transactions.[8] It

[4] In the leading case of *Exchange Bank v. McLoon* (1882) 73 Me. 498, 505, the Court said: "In a court of equity, however, the objections to a partial assignment of a demand which are formidable in a court of law disappear. In equity, the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court, and run no risks as to its proper distribution. If he be in no fault, no costs need be imposed upon him, or they may be awarded in his favor. If he be put to extra trouble in keeping separate accounts, he can, if it is reasonable, be compensated for it. In many ways a court of equity can, while a court of law, with its present modes, cannot, protect the rights and interests of all parties concerned."

[5] *Row v. Dawson* (1749, Ch.) 1 Ves. Sr. 332; *Yeates v. Groves* (1791, Ch.) 1 Ves. Jr. 280; *Ex parte South* (1818, Ch.) 3 Swanst. 392; *Lett v. Morris* (1831, Ch.) 4 Sim. 607; *The Elmbank* (1896, N. D. Calif.) 72 Fed. 610; *Grain v. Aldrich* (1869) 38 Calif. 514; *Rivers v. Wright & Co.* (1902) 117 Ga. 81, 43 S. E. 499 (*semble*); *Phillips v. Edsall* (1889) 127 Ill. 535, 20 N. E. 801; *Columbia Finance & Trust Co. v. First National Bank* (1903) 116 Ky. 364, 76 S. W. 156; *Palmer v. Palmer* (1914) 112 Me. 149, 91 Atl. 281; *James v. City of Newton* (1886) 142 Mass. 366, 8 N. E. 122 (*semble*); *Andrews Electric v. St. Alphonse Society* (1919) 233 Mass. 20, 123 N. E. 103; *Schilling v. Mullin* (1893) 55 Minn. 122, 56 N. W. 586; *Hutchinson v. Simon* (1880) 57 Miss. 628; *Superintendent and Trustees v. Heath* (1862) 15 N. J. Eq. 22; *Brown v. Dunn* (1887) 50 N. J. L. 111, 11 Atl. 149; *Todd v. Meding* (1897) 56 N. J. Eq. 83, 820, 38 Atl. 349; *Field v. Mayor, &c. of New York* (1852) 6 N. Y. 179; *Hall v. City of Buffalo* (1864, N. Y.) 2 Abb. App. 301; *McDaniel v Maxwell* (1891) 21 Ore. 202, 27 Pac. 952; *Sykes v. First National Bank* (1891) 2 S. D. 242, 49 N. W. 1058; *Gardner v. Smith* (1871) 52 Tenn. 256; *Harris County v. Campbell* (1887) 68 Tex. 22, 3 S. W. 243; *First National Bank v. Kimberlands* (1880) 16 W. Va. 555; *Dudley v. Barrett* (1909) 66 W. Va. 363, 66 S. E. 507; Ames, *Cases on Trusts*, 64, note; 3 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) sec. 1280; 1 Williston, *op. cit.*, sec. 443; Ann. Cas. 1912 A, 675, note.

Burnett v. Crandall (1876) 63 Mo. 410; *Bland v. Robinson* (1910) 148 Mo. App. 164, 127 S. W. 614; *Vetter v. Meadville* (1912) 236 Pa. 563, 85 Atl. 19 (obligor a municipal corporation); *Skobis v. Ferge* (1899) 102 Wis. 122, 78 N. W. 426 (obligor the board of regents of state university), *contra.*

[6] *Daniels v. Meinhard* (1874) 53 Ga. 359.

[7] *Harris County v. Campbell* (1887) 68 Tex. 22, 3 S. W. 243.

[8] *Grain v. Aldrich* (1869) 38 Calif. 514 (a debt); *Lapping v. Duffy* (1874) 47 Ind. 51 (a judgment); *Hutchinson v. Simon* (1880) 57 Miss. 628 (a note); *Etheridge v. Vernoy* (1876) 74 N. C. 800 (a note).

has been used with equal facility to transfer part of a debt or demand having, at the time of the assignment, only a potential existence. Partial assignments have been made, for example, of a debt or demand to arise in the future on an insurance policy,[9] an attorney's retainer,[10] a client's recovery,[11] a contract to sell goods,[12] the assignment of a lease,[13] an agreement to pay rent,[14] or a contract to build a ship[15] or repair a house.[16] The device has even been used successfully on occasion to transfer part of a chose in action existing only in possibility at the time the assignment is made. Examples are found in the assignment of part of a debt or demand anticipated from a claim which it is hoped to establish against a foreign government,[17] an invalid agreement to pay for procuring credits on a city's military quota,[18] or a contract existing only in contemplation.[19] One of the most common uses of partial assignments is that made by contractors and builders, who frequently satisfy or secure their obligations by means of orders drawn

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[9] *Pomeroy v. Manhattan Life Insurance Co.* (1866) 40 Ill. 398.

[10] *Columbia Finance & Trust Co. v. First National Bank* (1903) 116 Ky. 364, 76 S. W. 156.

[11] *Phillips v. Edsall* (1889) 127 Ill. 535, 20 N. E. 801; *Canty v. Latterner* (1883) 31 Minn. 239, 17 N. W. 385.

[12] *Brooksville Granite Co. v. Latty* (1913, Sup. Ct.) 83 Misc. 384, 144 N. Y. Supp. 1042.

[13] *Yeates v. Groves* (1791, Ch.) 1 Ves. Jr. 280.

[14] *Alger v. Scott* (1873) 54 N. Y. 14.

[15] *Brice v. Bannister* (1878) L. R. 3 Q. B. Div. 569.

[16] *Brill v. Tuttle* (1880) 81 N. Y. 454. See also *The Elmbank* (1896, N. D. Calif.) 72 Fed. 610 (a claim to salvage); *Schilling v. Mullen* (1893) 55 Minn. 122, 56 N. W. 586 (a contract of employment); *Sykes v. First National Bank* (1891) 2 S. D. 242, 49 N. W. 1058 (a builder's contract).

[17] *Peugh v. Porter* (1885) 112 U. S. 737, 5 Sup. Ct. 361.

[18] *Kingsbury v. Burrill* (1890) 151 Mass. 199, 24 N. E. 36. See also *Lawson v. Lyon* (1911) 136 Ga. 214, 71 S. E. 149.

[19] *Field v. Mayor, &c. of New York* (1852) 6 N. Y. 179. See *Lawson v. Lyon, supra* note 18. It is sometimes said that the chose in action must have at least a potential existence. See *Mulhall v. Quinn* (1854, Mass.) 1 Gray 105 (assignment of future wages, there being no contract of employment); *Huling, Brockerhoff & Co. v. Cabell* (1876) 9 W. Va. 522 (assignment of proceeds expected from an agricultural fair to be held in a few days); *First National Bank v. Kimberlands* (1880) 16 W. Va. 555, 588, 592. But in equity, unless considerations of public policy are involved, there would appear to be no reason for making a distinction between choses having a potential existence and choses existing only in possibility. See *Bridge v. Kedon* (1912) 163 Calif. 493, 126 Pac. 149; *In re Lind* [1915, C. A.] 2 Ch. 345. In *Field v. Mayor, &c. of New York, supra,* 186-7, a case involving partial assignment of the proceeds anticipated from a contemplated contract to supply the city with job-printing and stationery, the Court said: "It is contended by the counsel for the appellants, that the assignment of Bell to Garread did not pass any interest which was the subject of an assignment, for the reason that there was no contract, at the time, between Bell and the corporation of the city, by which the latter was under any binding

upon the particular funds which are due or are to become due when their contracts have been performed.[20]

It is apparent, of course, that most partial assignments will be made for a valuable consideration. But is consideration indispensable? Will equity give effect to a gratuitous partial assignment? As between the partial assignee and the obligor, no good reason appears why it should lie in the mouth of the latter, the obligor, to object that the partial assignment was gratuitous.[21] As between the assignor and the obligor, however, or as between the assignor and the partial assignee, the case may conceivably wear a different aspect. Suppose that the assignor sues the obligor to recover the entire debt or demand, encounters the objection that part of the debt or demand has been assigned, and replies that the alleged assignment was without consideration.[22] Again, suppose that the assignor, who is in general a necessary party to a suit in equity by the partial assignee, objects to any recovery by the assignee on the ground that the assignment was made without consideration and claims the entire debt or demand for himself.[23] The partial assignee

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obligation to furnish the former with job printing, or to purchase of him paper or stationery; and that therefore the interest was of too uncertain and fleeting a character to pass by assignment. There was indeed no present, actual, potential existence of the thing to which the assignment or grant related, and therefore it could not and did not operate *eo instanti* to pass the claim which was expected thereafter to accrue to Bell against the corporation; but it did nevertheless create an equity, which would seize upon those claims as they should arise, and would continue so to operate until the object of the agreement was accomplished. . . . Whatever doubts may have existed heretofore on this subject, the better opinion, I think, now is, that courts of equity will support assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them."

[20] Cases of this type are very common. Among cases already cited, see *Lett v. Morris, supra* note 5; *Rivers v. Wright & Co., supra* note 5; *James v. City of Newton, supra* note 5; *Bank of Harlem v. Bayonne, supra* note 2; *Brill v. Tuttle, supra* note 16; *McDaniel v. Maxwell, supra* note 5; *Sykes v. First National Bank, supra* note 5.

[21] As between the partial assignee and the obligor who has accepted the order, it is no defence that the order was without consideration. *Barlow v. Lande* (1915) 26 Calif. App. 424, 147 Pac. 231; *Welch v. Mayer* (1894) 4 Colo. App. 440, 36 Pac. 613. In any case a recital of consideration in the order would be sufficient prima facie evidence of consideration. *Palmer v. Palmer* (1914) 112 Me. 149, 154, 91 Atl. 281, 283; and see *Central National Bank v. Spratlen* (1896) 7 Colo. App. 430, 43 Pac. 1048; *Bank of Spring City v. Rhea County* (1900, Tenn. Ch.) 59 S. W. 442; *Dickerson v. Spokane* (1901) 26 Wash. 292, 66 Pac. 381, (1904) 35 Wash. 414, 77 Pac. 730. See also *Caulfield v. Saunders* (1861) 17 Calif. 569 (total assignment); *Robinson Reduction Co. v. Johnson* (1897) 10 Colo. App. 135, 50 Pac. 215 (total assignment).

[22] *Alger v. Scott* (1873) 54 N. Y. 14. Cf. *Pomeroy v. Manhattan Life Insurance Co.* (1866) 40 Ill. 398.

[23] See *Kingsbury v. Burrill* (1890) 151 Mass. 199, 24 N. E. 36. If the partial assignee sues the assignor after the debtor has refused payment, he sues, of course, on the original undertaking of the assignor, whatever that may have been, and not on the assignment, and consideration would be required. *Maynard v. Maynard* (1909) 105 Me. 567, 75 Atl. 299.

has no recourse at law. May he be thwarted in equity by invoking the dogma that equity does not aid the volunteer?

That the assignee of part may be so thwarted is an impression easily derived from the common statement of the rule that partial assignments are good in equity. More often than otherwise, it seems, the statement premises expressly a partial assignment made *for a valuable consideration.* Thus, it is said, in the leading case of *Harris County v. Campbell,*

". . . it now seems to be held by the great weight of authority that an assignment of a part of a chose in action, for a valuable consideration, is good in equity, and that it may be made either by direct transfer, or by an order drawn upon the particular fund."[24]

Such a statement loses its apparent significance, however, when it is shown, as it can readily be shown in *Harris County v. Campbell* and many other cases like it, that there was a valuable consideration in the case in respect to which the statement was made. A partial assignment for a valuable consideration is good in equity, but quite obviously it does not follow that a partial assignment without valuable consideration is not good in equity.

There are a few cases, however, in which it is suggested, with more or less of relevancy to the point to be decided, that a partial assignment without consideration cannot be sustained in equity. What is to be said of such cases? In *Alger v. Scott,*[25] probably the most important case of this sort, the lessor gave her husband's creditor an order on the lessee to be charged to the rent account. Enough rent to satisfy the order was not then due and would not be due for several months to come. The draft was accepted by the lessee, but was mislaid. It was not found and delivered to the payee until after the lessor had commenced an action to recover the entire rent. The lessee relied upon the order and acceptance; but it was held that the order could not be given effect as an equitable assignment because it was not supported by consideration. The decision appears to have been reached after somewhat superficial attention to the questions involved, and it would probably be fair to dismiss it with a suggestion that it is erroneous both in holding that there was no consideration for the order and in refusing to give effect to the lessee's acceptance.[26] If it be conceded that there was neither consideration nor acceptance, the decision may be supported on the ground that, as regards rent not due, the assignment was of part of an expectancy. There was an existing lease, to be sure, and so the future rent could have been said to have potential existence. Part

[24] (1887) 68 Tex. 22, 27, 3 S. W. 243, 246.

[25] (1873) 54 N. Y. 14.

[26] See the opinion of Earl, C., dissenting, *ibid.,* 16. Cf. *Pomeroy v. Manhattan Life Insurance Co.* (1866) 40 Ill. 398. See also *Barlow v. Lande* (1915) 26 Calif. App. 424, 147 Pac. 231; *Palmer v. Palmer* (1914) 112 Me. 149, 91 Atl. 281; *Kingsbury v. Burrill* (1890) 151 Mass. 199, 24 N. E. 36.

of this potential rent could have been assigned for valuable consideration. On principle, it may be argued that it ought to have been possible to assign part of it by way of gift. As a matter of authority, however, an assignment of part of a chose in action having potential existence seems to be viewed in the same way as an assignment of part of a chose existing only in possibility. In either case, the assignment is regarded as in effect an executory agreement to assign which will operate to transfer an interest in the chose in action as soon as the chose comes into existence.[27] An executory agreement of any sort, it is commonplace to observe, will not be enforced in equity unless it is supported by consideration. Equity has gone as far as it can be expected to go when it gives effect to a partial assignment of a future chose in cases where the assignment is supported only by prima facie consideration arising out of formal recitals unrefuted by the assignor.[28]

There are a few cases, indeed, in which it is suggested that a partial assignment of an existing chose in action, the assignment having been made in the form of a bill of exchange drawn on the particular fund, cannot be given effect in equity unless supported by consideration. It is well settled that such an order may operate as an equitable assignment without acceptance by the drawee. It has been said, however, that it ought not so to operate if it is gratuitous. The notion seems to be that equity is giving an extraordinary effect to a particular kind of instrument and that this should not be done in aid of a mere volunteer.[29] The notion rests, it is submitted, on no substantial foundation. It is characteristic of equity that the substance rather than the form of a

[27] See *Kingsbury v. Burrill, supra; Bank of Harlem v. Bayonne* (1891) 48 N. J. Eq. 246, 21 Atl. 478. See also *In re Lind* [1915, C. A.] 2 Ch. 345 and *Bridge v. Kedon* (1912) 163 Calif. 493, 126 Pac. 149, cases of total assignment for security of an heir's expectancy. In *Field v. Mayor, &c. of New York, supra,* note 19, at p. 186, the Court said: "The assignment of Bell to Garread was valid and operative as an agreement, by which Garread and his assigns became entitled to receive payment of the bills in question, when the same should become due, to the amount indicated in the assignment, subject to the two prior assignments. It did not operate as an assignment *in praesenti* of the choses in action, because they were not in existence, but remained in possibility merely. A possibility, however, which the parties to the agreement expected would, and which afterwards did in fact ripen into an actual reality; upon which, by force of the agreement, an equitable title to the benefit of the bills thus mature and due, became vested in the respondent as assignee of Garread."

[28] See *Pomeroy v. Manhattan Life Insurance Co.* (1866) 40 Ill. 398; *Kingsbury v. Burrill* (1890) 151 Mass. 199, 24 N. E. 36.

[29] In *Tallman v. Hoey* (1882) 89 N. Y. 537, 539, a case of total assignment by an order in the form of a bill of exchange drawn upon a particular fund, the Court said: "But the circumstance which justifies and induces that equitable construction which treats as an assignment what is not strictly and legally such, is the existence of a valuable consideration for the imperfect transfer. . . . That element is wanting in the present case." See also *Brokaw v. Brokaw* (1886) 41 N. J. Eq. 215, 4 Atl. 66 (*semble*); *Shaw v. Tonns* (1897) 20 App. Div. 39, 46 N. Y. Supp. 545; *Moffatt v. Bailey* (1897) 22 App. Div. 632, 47 N. Y. Supp. 983. Cf. *Tyrrell v. Murphy* (1913) 30 Ont. L. R. 235.

transaction should be controlling.[30] An order in the form of a bill of exchange drawn on a particular fund is not different in substance from an order in the form of an assignment. It is believed, therefore, that such suggestions have no peculiar merit, and that they should be approved or rejected as it is settled that consideration is or is not required for partial assignments.

Whether a partial assignment of an existing chose in action requires consideration ought to depend, it would seem, upon the view which the courts take of the nature of partial assignments. If a partial assignment is regarded as something inherently executory and incomplete, equity may be expected to refuse aid to the volunteer. On the other hand, if it is viewed as an executed transaction, if significance is attributed to the circumstance that the assignor has done everything of which he is capable in order to invest the assignee with the intended interest, then there would seem to be quite as much reason for protecting the voluntary assignee as there is for protecting the donee of an executed gift or the beneficiary of a voluntary declaration of trust.

What, in the view of the courts, is the nature and effect of a partial assignment of an existing chose in action? For one thing, it is more than a mere executory contract. If it were a mere contract, then, in the event of the assignor's bankruptcy before the assignee has collected, the assignee should be obliged to take his dividend along with the other creditors. It is held, however, that the assignment divests the assignor of the equitable property in the interest assigned before bankruptcy and that the assignee is entitled to the whole of it.[31] A similar result is reached where the assignor himself receives payment, appropriates the

[30] See *Goldman v. Murray* (1912) 164 Calif. 419, 129 Pac. 462; *Bower v. Hadden Blue Stone Co.* (1878) 30 N. J. Eq. 171, 340.

[31] *Row v. Dawson* (1749, Ch.) 1 Ves. Sr. 331; *Yeates v. Groves* (1791, Ch.) 1 Ves. Jr. 280; *Ex parte South* (1818, Ch.) 3 Swanst. 392; *In re Hanna* (1900, E. D. Pa.) 105 Fed. 587; *Andrews Electric v. St. Alpohnse Society* (1919) 233 Mass. 20, 123 N. E. 103. In *Yeates v. Groves,* holding the partial assignee entitled as against the assignee in bankruptcy, Lord Chancellor Thurlow said: "If he could transfer, he has done it; and, it being his own money, he could transfer. The transfer was actually made. . . . It is not an inchoate business. The order fixed the money the moment it was shown to Groves and Dickinson." See also *Lawson v. Lyon* (1911) 136 Ga. 214, 71 S. E. 149; *James v. City of Newton* (1886) 142 Mass. 366, 8 N. E. 122; *Willard v. Bullen* (1902) 41 Ore. 25, 67 Pac. 924.

So, also, an assignment for security of an heir's expectancy will be given effect as an executed transfer of an equitable lien or charge although the heir becomes bankrupt before the death of the ancestor. *In re Lind* [1915, C. A.] 2 Ch. 345; *Bridge v. Kedon* (1912) 163 Calif. 493, 126 Pac. 149.

Compare the contractor's case, where the contest is between an obligor, on the one hand, who has stipulated that if the contractor fails to pay for labor or materials he may withhold moneys earned and apply them to the payment of such debts, and a partial assignee on the other hand. *Shannon v. Mayor of Hoboken* (1883) 37 N. J. Eq. 123.

Compare also the case where, after partial assignment, the assignor's property is seized under the confiscation acts. *Risley v. Phenix Bank* (1881) 83 N. Y. 318.

proceeds, and becomes bankrupt. The equitable property in the interest assigned having been transferred to the assignee, the assignor is regarded as a trustee of the sum collected.[32] It seems clear that the problem of consideration for partial assignments of existing choses in action is not to be solved by invoking principles of contract.

For another thing, a partial assignment, unlike a total assignment, is not a power of attorney to sue in the assignor's name.[33] Since the assignor himself can bring only one suit, he has no way of authorizing an assignee to sue for part while retaining in himself the right to sue for another part. The partial assignee never sues at law in his assignor's name. He sues in equity in his own name, joining the assignor to avoid splitting up the cause of action.[34] It seems equally clear, therefore, that the problem of consideration for partial assignments of existing choses in action cannot be solved by reference to the parallel problem presented in total assignment cases.[35]

It is sometimes said that a partial assignment creates a trust. On the one hand, it has been thought that its effect is to constitute the assignor a trustee for the assignee.[36] More often, perhaps, it has been suggested that the obligor becomes trustee for the assignee.[37] If the assignor

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[32] *Hinkle Iron Co. v. Kohn* (1920) 229 N. Y. 179, 182, 128 N. E. 113, 114. The Court said: "The instrument of assignment was not an agreement by the contractor to pay its debt to the plaintiff out of the designated payment. It consisted of words of transfer rather than of contract. It, as between the parties to it, operated as an equitable assignment, and in equity created an ownership in the plaintiff of so much of the designated fund, when created, as was specified and assigned in it." See also *Gallinger v. Pomeroy* (1851, Iowa) 3 G. Greene 178.

[33] See *supra*, note 3, at p. 2.

[34] See *Dulles v. Crippen Mfg. Co.* (1907, C. C. D. N. J.) 156 Fed. 706; *Campbell v. Holehan* (1920, Calif.) 192 Pac. 121; *Rivers v. Wright & Co.* (1902) 117 Ga. 81, 43 S. E. 499; *Schilling v. Mullen* (1893) 55 Minn. 122, 56 N. W. 586; *Cook v. Genesee Mutual Ins. Co.* (1853, N. Y. Sup. Ct.) 8 How. Pr. 514; *Chambers v. Lancaster* (1899) 160 N. Y. 342, 54 N. E. 707.

[35] On the question of consideration for total assignments, see Jenks, *Consideration and the Assignment of Choses in Action* (1900) 16 L. QUART. REV. 241; Anson, *Assignment of Choses in Action* (1901) 17 *ibid.*, 90; Costigan, *Gifts Inter Vivos of Choses in Action* (1911) 27 *ibid.*, 326; Scott, *Cases on Trusts* (1919) 155, note, 162, note, 162-3, 165, note, 168, note.

[36] *Elledge v. Straughn* (1841, Ky.) 2 B. Mon. 81; *Bank of Galliopolis v. Trimble* (1846, Ky.) 6 B. Mon. 599; *Gardner v. Smith* (1871) 52 Tenn. 256, 261. In *Elledge v. Straughn*, the Court said: "It is well settled that a partial assignment does not pass the legal title or right of action, but that they remain in the original payee, who, to the extent of the interest assigned, must be regarded as holding the title in trust for the assignee." *Todd v. Meding* (1897) 56 N. J. Eq. 83, 820, 38 Atl. 349.

[37] *Phillips v. Edsall* (1889) 127 Ill. 535, 547, 20 N. E. 801, 804; *Warren v. First National Bank* (1893) 149 Ill. 9, 23, 38 N. E. 122, 125; *Smith v. Bates Machine Co.* (1899) 182 Ill. 166, 169, 55 N. E. 69, 70; *Palmer v. Palmer* (1914) 112 Me. 149, 152, 91 Atl. 281, 282; *Bank of Harlem v. Bayonne* (1891) 48 N. J. Eq. 246, 253, 21 Atl. 478, 180; *Hall v. City of Buffalo* (1804, N. Y.) 2 Abb. App. 301, 305; *People v. Comptroller* (1879) 77 N. Y. 45, 48; 2 Story, *Equity* (12th ed. 1877) sec. 1044.

were trustee for the assignee, there would be no great difficulty in resolving the problem of gratuitous partial assignments. It has long since been settled that a gratuitous declaration of trust is good in equity.[38] If a gratuitous partial assignment has the effect of a declaration of trust, there is no reason why it should not be equally good in equity. But this is not a correct analysis of the situation. The assignor does not intend to make himself trustee, with all that trusteeship implies, nor does the assignee so regard him. Nor is it a correct analysis to regard the obligor as trustee. Certainly the obligor is not to be made a trustee at the mere pleasure of his creditor. If a trustee, he must be trustee of part of his own obligation, a manifest incongruity. Neither between the assignor and assignee nor between the obligor and assignee is there any real fiduciary relationship. The transaction is not intended to create a trust, nor does it have that effect; it is intended to transfer an equitable interest in the chose in action.

It is generally recognized to-day that a partial assignment operates as a transfer of an equitable interest in the chose. If the assignment is of part of a future chose in action, and is supported by a valuable consideration, the assignee acquires an equitable interest in the chose as soon as it comes into being.[39] If the assignment is of part of an existing chose in action, the assignee acquires at once an equitable interest in the chose.[40] In either case the assignor has actually done

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[38] *Ex parte Pye* (1811, Ch.) 18 Ves. Jr. 140; 1 Perry, *Trusts* (6th ed. 1911) sec. 96.

[39] *Yeates v. Groves* (1791, Ch.) 1 Ves. Jr. 280; *Hinkle Iron Co. v. Kohn* (1920) 229 N. Y. 179, 128 N. E. 113; *MacDaniel v. Maxwell* (1891) 21 Or. 202, 27 Pac. 952; *Peugh v. Porter* (1884) 112 U. S. 737, 5 Sup. Ct. 361. See also the opinion of Earl, C., dissenting, in *Alger v. Scott* (1873) 54 N. Y. 14, 16. In *MacDaniel v. Maxwell,* the Court said: "By such an assignment the assignee obtains an interest in the property or fund, and not simply a right of action against the drawee. In order, therefore, that there may be an equitable assignment creating an equitable property, there must be a specific fund, sum of money, or debt actually existing or to become due in the future, and the order must be in effect an assignment of that particular fund or some designated portion thereof. No particular form of words or particular form of instrument is necessary to effect such assignment. Any binding appropriation of it to a particular use is an assignment, or what is the same, a transfer of the ownership." In *Hinkle Iron Co. v. Kohn,* the Court said: "The test of an equitable assignment is the inquiry whether or not an assignment makes an appropriation of the fund, so that the debtor would be justified in paying the debt or the assigned part to the person claiming to be the assignee."

[40] See *Fidelity and Deposit Co. v. Exchange Bank* (1897) 100 Ga. 619, 28 S. E. 393; *Palmer v. Palmer* (1914) 112 Me. 149, 91 Atl. 281; *Harris County v. Campbell* (1887) 68 Tex. 22, 3 S. W. 243; *Raesser v. National Exchange Bank* (1902) 112 Wis. 591, 88 N. W. 618. "The doctrine that the equitable assignee obtains, not simply a right of action against the depositary, mandatary, or debtor, but an equitable property in the fund itself, is carried out into all of its legitimate consequences." 3 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) sec. 1280. In *Harris County v. Campbell,* the Court said: "Mr. Pomeroy says, when a part of

everything of which he is capable in order to invest the assignee with the intended interest. The transfer is as unqualified and complete as it is possible to make of this particular kind of property.

One question of considerable importance remains. What is the nature of the partial assignee's equitable interest? Is it an equitable lien upon the entire debt or demand, or is it an undivided equitable interest in the debt or demand? It is frequently said that a partial assignment creates a lien.[41] Dean Ames seems to have thought that a partial assignment should be regarded as in effect an equitable charge, and from this he deduced the rule that a partial assignment must be supported by a consideration.[42] Conceding, for the sake of argument, that the partial assignee acquires an equitable lien or charge upon the chose in action, it is not an inevitable conclusion that the assignment must be supported by consideration. If the lien or charge depends upon contract, it may be taken as settled that consideration is indispensable.[43] But it is possible to create a lien or charge apart from any personal obligation.[44] There is no apparent reason why it should not be possible to make a gift of a lien or charge apart from any personal obligation.[45]

Whatever doubts there may be on this point, it certainly need not be conceded that a partial assignment necessarily gives rise to an equitable

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a debt is assigned, the assignee acquires a right of action in equity against the debtor, and not only a lien upon the fund but a property in the fund itself. (3 Pomeroy's *Equity*, sec. 1280, p. 292.) There are cases not going to this extent, but we think it the better doctrine and well supported by authority."

[41] *Hassie v. Congregation* (1868) 35 Calif. 378, 388; *Phillips v. Edsall* (1889) 127 Ill. 535, 547, 20 N. E. 801, 804; *Warren v. First National Bank* (1893) 149 Ill. 9, 23, 38 N. E. 122, 125; *Gallinger v. Pomeroy* (1851, Iowa) 3 G. Greene 178, 179; *Exchange Bank v. McLoon* (1882) 73 Me. 498; *Richardson v. Rust* (1841, N. Y.) 9 Paige, 243; *Davis & Goggin v. State National Bank* (1913, Tex. Civ. App.) 156 S. W. 321; 1 Jones, *Liens* (3d ed. 1914) secs. 43, 44, 45, 47, 50; 2 Story, *Equity* (12th ed. 1877) sec. 1044.

[42] Ames, *Cases on Trusts* (2d ed. 1893) 148, note 2, in part as follows: "Although, as the principal case shows, a *cestui que trust* may make a valid gratuitous assignment of his trust, he cannot without consideration create a valid equitable charge upon his interest. *In re Lucan* (1890) L. R. 45 Ch. Div. 470. On the same principle, a so called partial assignment of a chose in action, being in effect an equitable charge, is inoperative, if not supported by a consideration. *Alger v. Scott*, 54 N. Y. 14." See (1893) 7 HARV. L. REV. 313.

[43] *In re Lucan, supra.*

[44] *Pomeroy v. Manhattan Life Insurance Co.* (1866) 40 Ill. 398.

[45] A gift of a mortgage lien is good in equity. *Brigham v. Brown* (1880) 44 Mich. 59 (*semble*); *Campbell v. Tompkins* (1880) 32 N. J. Eq. 170; *Bucklin v. Bucklin* (1864, N. Y.) 1 Abb. App. 242; 1 Jones, *Mortgages* (7th ed. 1915) sec. 614. So, also, a gift by deed of a charge. *In re Lucan* (1890) L. R. 45 Ch. Div. 470 (*semble*). And the deed is not essential in an assignment by way of gift. *Lambe v. Orton* (1860, Ch.) 1 Dr. & Sm. 125.

lien or charge. An equitable lien or charge upon a chose in action is said to be of the nature of an incumbrance.[46] Its usual function is to provide security for debt. Of course a great many partial assignments are made for security, and without doubt their effect is to create an equitable lien or charge upon the chose in action.[47] Other partial assignments, however, are made expressly of a certain undivided interest in the chose.[48] The lien theory would seem to afford an entirely inadequate explanation for these transactions. Suppose, for illustration, that A owns a doubtful demand against D for $2000, that A assigns a one-half interest in this demand to E "for value received," the actual consideration being $500, and that the demand proves to be worth the full $2000. On the lien theory, E would recover only $500.[49] In fact, can it be doubted that E would ordinarily recover $1000? Probably the greater number of partial assignments are made simply of a certain sum. More often than otherwise they are made in the form of an order drawn upon a particular fund. If such a transaction creates a lien, it would seem that the assignor ought to be able to discharge it by payment, and, indeed, that the assignee ought to afford an opportunity to discharge it before proceeding against the fund. Such an opportunity is neither afforded by the assignee nor expected by the assignor. It would seem also that the partial assignee's suit ought to be for the sale or sequestration of the security so that the proceeds or the profits could be applied to satisfy his charge.[50] Actually, in the common case,

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[46] "An equitable lien is not an estate or property in the thing itself nor a right to recover the thing,—that is, a right which may be the basis of a possessory action; it is neither *jus ad rem* nor *jus in re*. It is simply a right of a special nature *over* the thing, which constitutes a charge or encumbrance upon the thing, so that the very thing itself may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree, and its proceeds in the one case, or its rents and profits in the other, applied upon the demand of the creditor in whose favor the lien exists." 3 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) sec. 1233.

[47] *Pomeroy v. Manhattan Life Insurance Co.* (1866) 40 Ill. 398; *Phillips v. Edsall* (1889) 127 Ill. 535, 20 N. E. 801; *Columbia Finance & Trust Co. v. First National Bank* (1903) 116 Ky. 364, 76 S. W. 156; *Exchange Bank v. McLoon* (1882) 73 Me. 498; *Bower v. Hadden Blue Stone Co.* (1878) 30 N. J. Eq. 171, 340; *Davis & Goggin v. State National Bank* (1913, Tex. Civ. App.) 156 S. W. 321.

[48] *Campbell & Co. v. Holehan* (1920, Calif.) 192 Pac. 121; *Kingsbury v. Burrill* (1890) 151 Mass. 199, 24 N. E. 36; *Hughes-Buie Co. v. Mendoza* (1913, Tex. Civ. App.) 156 S. W. 328.

[49] *Exchange Bank v. McLoon* (1882) 73 Me. 498.

[50] "Some cases and books speak of the interest as merely an equitable lien or charge. That it is more than a lien, and is an equitable *property*, is plain from the remedy allowed. An equitable lien is never enforced by a suit to obtain possession, much less dominion over the thing; the remedy is, at most, a sale of the thing, so that its proceeds may be applied upon the obligation secured. In this case, however, the assignee recovers possession and dominion of the fund as his own. The only equitable feature of the transaction is, in fact, the *mode of transfer*." 3 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) sec. 1280, note 2.

the partial assignee sues on an ownership theory to recover the proceeds of a part of the chose in action. On the lien theory, perhaps the obligor ought to insist upon knowing the sum secured before he pays the assignee. This he need not and cannot do.[51] On the lien theory, the debt secured ought to be the measure of the assignee's recovery rather than the sum assigned. Suppose that A, owning a doubtful demand against D for $2000, assigns $1000 of this demand to E "for value received," the actual consideration being $500, and that the demand proves to be worth the full $2000. On the lien theory, E would recover $500. In fact, nothing more appearing, it is believed that E would ordinarily recover $1000.[52] On the lien theory, not only should the partial assignee's recovery be limited to the amount of the debt secured, but he should recover up to that amount whatever happens to impair the value of the chose in action. Suppose that A owns a demand against D for $2000, that he assigns $1000 of this demand to E "for value received," the actual consideration being $1000, and that D becomes insolvent and able to pay only fifty cents on the dollar. On the lien theory, E should nevertheless recover $1000. In fact, nothing more appearing, it is believed that E would ordinarily recover only $500.[53] While a partial assignment may be and not infrequently is made for the purpose of security, and hence gives rise to an equitable lien or charge, this appears to be by no means its most common use. More often than otherwise, it is believed, a partial assignment is intended and actually operates in equity as an executed transfer of an undivided interest in the chose in action.

If a partial assignment of an existing chose in action is neither an executory contract, a power of attorney, nor a trust, but an executed transfer of an equitable interest in the chose, and if it is as unqualified and complete a transfer as it is possible to make of this particular kind of property, then, whether it is intended to transfer a lien upon the chose or an undivided fractional interest therein, it is submitted that there is no reason why it may not pass as well by gift as by sale. There are dicta opposed to this conclusion, but to date the present writer has found no case in which it is really held that such a gift will not be given effect. On the other hand, there are cases of a different sort, presenting somewhat similar problems, from which it is entirely plausible to argue *a fortiori* for giving effect to such a gift. If it is possible to make an irrevocable gift by parol of an undocumented chose in action,[54] it ought to be possible by order drawn upon an existing debt or demand to make an irrevocable gift of part of a chose in action. If it is possible

[51] See *Palmer v. Palmer* (1914) 112 Me. 149, 91 Atl. 281; *Dickerson v. Spokane* (1901) 26 Wash. 292, 66 Pac. 381, (1904) 35 Wash. 414, 77 Pac. 730.

[52] See *Lawson v. Lyon* (1911) 136 Ga. 214, 71 S. E. 149; *Fourth National Bank v. Noonan* (1885) 88 Mo. 372.

[53] See *First National Bank v. Kimberlands* (1880) 16 W. Va. 555.

[54] *Dinslage v. Stratman* (1920, Neb.) 180 N. W. 81. Cf. *Poff v. Poff* (1920, Va.) 104 S. E. 719.

to make an irrevocable gift by assignment of an equitable interest in land or personalty,[55] it ought to be possible to make an irrevocable gift by assignment of part of a chose in action. If gratuitous declarations of trust are binding,[56] *a fortiori,* it would seem, gratuitous partial assignments ought to be binding.

It is believed, therefore, that an answer to the question propounded at the beginning of this paper may be summarized as follows:—An assignment of part of a chose in action which exists potentially or in possibility only requires consideration. Such an assignment operates as an agreement and the usual principles of contract apply. An assignment of part of an existing chose, on the other hand, does not depend upon contract. Whether the assignee acquires a lien or a fractional interest, there is a transfer to him of an equitable property in the chose in action. And this equitable property in the chose, it is believed, may come to him by gift as well as by purchase.

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[55] "No doubt a person by a transaction *inter vivos* may *give* to another an equitable, as well as a legal estate, in property, without consideration, and if the conveyance be *executed,* so as to pass the estate, a court of equity will support the title of the volunteer, and in the absence of fraud or imposition, will not permit the donor to revoke it, unless there be a clause reserving that right." Rodman, J., in *Pace v. Pace* (1875) 73 N. C. 119, 125. See cases cited by Jenks, *op. cit.,* 16 L. QUART. REV. 241, 245.

[56] *Supra,* note 38, p. 8. And see Pound, *Consideration in Equity* (1919) 13 ILL. L. REV. 667, 678-9.