CHAPTER 1

Equity History

A The History of Equity in England Before 'Fusion'

Introduction

[1-005] *Equity described*

Equity can be described but not defined. It is the body of law developed by the Court of Chancery in England before 1873. Its justification was that it corrected, supplemented and amended the common law. It softened and modified many of the injustices in common law, and provided remedies where at law they were either inadequate or non-existent.

[1-010] *Difficulties in recounting equity's history*

To describe its growth over the centuries would be impossible: space does not permit it; the basic records are not available, the great bulk of the early petitions in Chancery being still unpublished; and its growth progressed in a haphazard ad hoc manner, never travelling on any given course or developing any clear doctrinal basis. As one writer put it:[1]

> ... the accidents of history made equity a fragmentary thing. First one point, then another was developed, but at no time was it the theory or the fact that equity would supplement the law at all places where it was unsatisfactory; consequently it has not been possible to erect a general theory of equity. In the last resort, we are always reduced to a more or less disguised enunciation of the historical heads of equity jurisdiction.

The mediaeval period

[1-015] *The office of Lord Chancellor*

Some points, however, might be briefly noted.[2] In the first period of equity, the mediaeval period, it was at its most incoherent. It centred around the person of the Lord Chancellor of England. His position was unique. He was the head of the King's Council; 'the King's natural prime minister';[3] the source of enormous ecclesiastical patronage; the head of the Chancery, which by 1300 had become a great department of state; the keeper of the Great Seal, 'a transcendent, multifarious and indefinable office';[4] and the possessor of a multitude of other heads of power. Two aspects of his power deserve particular note: the receipt of petitions and the issuing of writs.

[1-020] *The receipt of petitions*

One aspect of the Chancellor's power was that, in his position as head of the Council, he received all manner of petitions addressed to the King, the King-in-Council, or to himself; and gradually — over a process of centuries — it became the practice to address petitions not to the King, or to the Council, but to the Chancellor or the Chancery. He was the emanation of the Crown whose function it became to receive, digest and deal with all petitions. Selections of these petitions have been translated and published.[5] There seems no limit to their variety.

1. T F T Plucknett, *A Concise History of Common Law*, 4th ed, Butterworths, London, 1948, p 635.
2. More comprehensive treatments of the subject can be found in W S Holdsworth, *History of English Law*, 7th ed, Methuen, London, 1972, Vol I, pp 395–476; D M Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery*, Cambridge University Press, Cambridge, 1890; and the various writings of Professors Ames, Baldwin and Hazeltine. See also G B Adams, 'The Origin of English Equity' (1916) 16 *Col L Rev* 87; G B Adams, 'The Continuity of English Equity' (1917) 26 *Yale LJ* 550.
3. T F Tout, *The Place of the Reign of Edward II in English History*, Manchester University Press, Manchester, 1914, pp 181–3.
4. The expression is Bentham's, cited by J L Parkes, *History of the Court of Chancery*, Longman, Rees, Orme, Brown and Green, London, 1828, p 437.
5. See particularly *Select Cases in Chancery 1364-1471*, Selden Society, London, 1896, Vol 10. Even the (numerically much smaller) Fine Rolls of Henry III are only now being published: D Carpenter, P Dryburgh and B Hartland, *Calendar of the Fine Rolls of the Reign of Henry III*, Boydell & Brewer, Suffolk, 2007.

They petition that a common law writ of a recognisable type may issue;[6] that a remedy be found for some grievance described therein;[7] that a trust be enforced;[8] that a stranger be restrained from interfering with an executor's possessory rights;[9] that a parson's tenure of his church be not interfered with;[10] that a mortgage be discharged;[11] and much else besides. The petitions addressed to the Chancellor are not significantly different from the petitions addressed to the Council. They all conclude with the ritual supplication 'for God and in way of charity'. Some make it plain that they appeal to 'conscience'. Others make it plain that there is no, or no sufficient, remedy at law. Sometimes the threads are drawn together; for example, one ending 'may it please your most gracious lordship, for the honour of God and the cause of righteousness, to grant writs summoning the said Walter and Reginald [the persons whose conduct is complained of] to appear before you in the King's Chancery, which is a Court of Conscience, there to make answer in this matter, as is demanded by reason and conscience; otherwise the said petitioner is and shall be without remedy — which God forfend!'.[12] Each of them prays that the person whose conduct is complained of be summoned before the Chancery, and this in fact was done by the writ of subpoena. Once in Chancery, the person was examined and dealt with.

[1-025] *From Royal delegate to court*

It will be observed that in the petition quoted above, which was proffered in about 1400, the Chancellor is frankly acknowledged as holding a 'court'. To begin with, nobody seemed to imagine that the Chancellor was conducting anything of the sort. As a delegate of the Royal fount of justice, the Chancellor simply received petitions. That to accord a reasoned consideration to the mounting tide of petitions would be impossible without machinery became apparent only slowly. It is not until the Statute of 1340 that one first hears a Court of Chancery mentioned along with the older courts.[13]

[1-030] *The issue of writs*

The other source of the Chancellor's jurisdiction was the issue of writs. Every writ required the use of the Great Seal. He kept the Great Seal. Ergo, he controlled the whole process of issuing writs. And the Chancellors were not slow to realise that the power to issue writs amounted to the power to legislate. It was for this reason that the Chancellor's wings were clipped by parliament — first, in 1258 in the Provisions of Oxford, and secondly, in 1285 by the second Statute of Westminster. The effect of these provisions was to deprive the Chancellor of the power of issuing novel writs, to ensure that no new writs were invented save with statutory sanction and to leave him with nothing but a residual power to vary slightly the form of writs so that justice might be done in similar cases. But the Chancellors made good use of the power, even so circumscribed.

[1-035] *The Chancellor's jurisdiction*

Turning from the machinery of the court to its jurisdiction, one finds that the Chancellor had both a common law jurisdiction and an equitable jurisdiction. The common law jurisdiction, which is of secondary importance, comprised: (*a*) jurisdiction over certain writs (for example, pleas on the writ of *scire facias* to repeal letters patent or recognisances); this eventually extended to issuing writs of habeas corpus; (*b*) cases concerning the King or a grantee of the King (for example, petitions of right to recover property from the Crown); and (*c*) personal

6. *Select Cases in Chancery 1364-1471*, Selden Society, London, 1896, p 11.
7. *Select Cases in Chancery 1364-1471*, Selden Society, London, 1896, pp 123, 137.
8. *Select Cases in Chancery 1364-1471*, Selden Society, London, 1896, p 120.
9. *Select Cases in Chancery 1364-1471*, Selden Society, London, 1896, pp 68, 120.
10. *Select Cases in Chancery 1364-1471*, Selden Society, London, 1896, p 44.
11. *Select Cases in Chancery 1364-1471*, Selden Society, London, 1896, p 37.
12. *Select Cases in Chancery 1364-1471*, Selden Society, London, 1896, p 120.
13. 14 Ed III st 1 c 5.

actions brought by or against officers of the Court of Chancery, each court having jurisdiction over its own officials.

The equitable jurisdiction, which is of enormous importance, comprised: (*i*) the recognition, protection and development of uses and trusts — equity's greatest contribution to the law, outside the scope of this volume; (*ii*) the enforcement of contracts on principles unknown to the common law — for example, sometimes recognising contracts not under seal, long before the simple contract was accorded recognition at law; (*iii*) interference with the rigidity of the law in cases where the presence of fraud, forgery or duress would render the enforcement of strict legal rights unconscionable; (*iv*) the giving of remedies unavailable at law, for example, injunction or specific performance; (*v*) the development in the equitable action of account of a much more flexible and beneficial instrument than its common law counterpart; (*vi*) the giving of common law remedies where they theoretically existed at law, but in practice were not available — owing, for example, to local rebellion, bias and 'the violence' (as it was put in many petitions) of the defendant; and (*vii*) granting certiorari against inferior equity courts.[14]

[1-040] *Equitable relief outside Chancery*

Until the very end of this period, there seems to have been no real discord between the Court of Chancery and the traditional courts of common law. There are several reasons for this. One is that the Court of Chancery was, to a considerable extent, not dispensing really novel or unique remedies. Equitable remedies existed elsewhere. They can be found in the Mayor of London's Court,[15] the Court of the Cinque Ports,[16] the Chancery Courts of Lancaster and of the County Palatinate of Durham,[17] the Stannary Courts of Cornwall and Devon,[18] the Court of Duchy Chamber,[19] the General Eyre,[20] and the common law courts.[21] In the thirteenth and fourteenth centuries there are recorded instances in the courts of common law of relief against penalties and forfeitures,[22] of injunctions[23] and specific performance,[24] of upholding defences of delay, of accepting pleas of fraud and mistake, and of many other doctrines now thought of as characteristically equitable.

[1-045] *Common membership of courts*

Another factor was the mobility of the judges. On the one hand, the Chancellor and other members of the Chancery Office sat in the common law courts or consulted with the judges of these courts about proceedings pending in them.[25] On the other hand, they often requested the common law judges to sit in Chancery — to the extent, indeed, that in 1400 the Commons

14. See *Hilton v Lawson* (1559-60) Cary 48; 21 ER 26; *Portington v Tarbock* (1683) 1 Vern 177; 23 ER 398; *Stephenson v Houlditch* (1703-4) 2 Vern 325; 23 ER 915.
15. See E Coke, *Institutes of the Laws of England*, Professional Books, London, 1985, p 248.
16. K M E Murray, *Constitutional History of the Cinque Ports*, Manchester University Press, Manchester, 1935, p 106.
17. *Case of the Duchy of Lancaster* (1561) 1 Plowden 212; 75 ER 325; R Somerville, 'The Duchy of Lancaster Council and Court of Duchy Chambers', in *Transactions of the Royal Historical Society*, (1940), 4th series, 1941, Vol XXIII, p 159; provision for these courts to be merged into the High Court of Justice was made as late as the Courts Act 1971 (UK) s 41.
18. R R Pennington, *Stannary Law: A History of the Mining Law of Cornwall and Devon*, David & Charles, Newton Abbot, 1973, Ch 1. The last of these courts was abolished only in 1897.
19. R R Pennington, *Stannary Law: A History of the Mining Law of Cornwall and Devon*, David & Charles, Newton Abbot, 1973, p 159.
20. F Pollock, 'The Transformation of Equity' in P Vinogradoff (ed), *Essays in Legal History*, Oxford University Press, Oxford, 1913, p 291.
21. H D Hazeltine, 'The Early History of English Equity' in P Vinogradoff (ed), *Essays in Legal History*, Oxford University Press, Oxford, 1913, pp 261–85.
22. *Year Books of Edward II, Vol II, 2 & 3 Edward II*, Selden Society, London, 1904, Vol 19, pp xiii, 59.
23. Bracton, f 315b; H de Bracton, *Bracton's Note Book*, F B Rothman, Littleton, 1983, pp 27, 56.
24. H D Hazeltine, 'Early History of Specific Performance of Contract in English Law', in F Berolzheimer (ed), *Juristische Festgabe des Auslandes zu Josef Kohlers 60 Geburtstag*, Enke, Stuttgart, 1909.
25. See, for example, YB 16 Ed III (RS) ii, 113, and YB 47 Ed III Mich pl 14.

complained that the business of the common law courts was delayed because the judges were called from their courts to assist in the deliberation of the Chancellor and his officials.[26]

[1-050] *The decline of discretion at common law*

However, during the course of the fourteenth century, everything changed. The courts of common law surrendered their discretionary powers, disavowed any reliance on conscience and opted for *rigor juris*. They were constantly reminded, 'You must not allow conscience to prevent your doing law'.

[1-055] *The uniqueness of the English position*

The lines became drawn: the common law courts would henceforth dispense law according to the letter; if conscience were to be vindicated, it would have to be in Chancery.[27] English law is not, of course, unique in containing within itself the two different streams of law and equity. Roman law had drawn a distinction between the *ius civile* and the *ius honorarium*, and another between the *ius strictum* and the *ius aequm*. Similar distinctions can be found in many other systems of law. But what is singular is that in English law two entirely distinct sets of courts co-existed to develop and administer the two different streams.

The formative period

[1-060] *Characteristics of the Tudor-Stuart period*

The next period of equity, the formative period, covers the Tudors and the Stuarts. It has a number of distinctive characteristics. One is that the separation between law and equity, already noted, strengthened and developed. Another, and one which resulted largely from the first, is that a proliferation of lesser Chancery courts commenced. The Court of Requests,[28] a sort of poor man's Chancery, much to the chagrin of (and despite the prohibitions issued by) the courts of common law, flourished hugely; and the Court of Star Chamber[29] can really be considered a criminal outcrop of Chancery. Neither court survived this period. A third characteristic is the laicization of Chancery during this period. All Chancellors formerly were ecclesiastics, or at least not lawyers trained in the common law; if ecclesiastics, they would have known something of the canon law and something of the civil law, but common law they knew, if at all, only by accident. Henry VIII made a change in 1529 by appointing Sir Thomas More his Chancellor. From that time onwards the Lord Chancellor sometimes was, and sometimes was not, a lawyer; by the end of the period he was invariably a lawyer and but rarely was he an ecclesiastic.[30] Fourthly, during this period equitable doctrines really emerged as such: Chancery lawyers consciously began examining the doctrinal basis on which the Chancellors dispensed their remedies.

[1-065] *The Earl of Oxford's case*

One factor which more than any contributed to equity lawyers examining the foundation of their doctrines was the mounting dispute between the courts of common law and the Chancery.

26. RP iii, 474; 2 Hen VI No 95.
27. Although at the Reformation a new concept of 'conscience' emerged, it was no longer, as before, conscience according to the laws of God, but conscience according to the laws of England: see T A O Endicott, 'The Conscience of The King; Christopher St German and Thomas More and the Development of English Equity' (1989) 47 *Uni of Toronto Law Faculty Rev* 549.
28. On which, see A F Pollard, 'The Growth of the Court of Requests' (1941) 56 *English Historical Review* 300. D R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England*, Farnham, Ashgate, 2010; F T Roughley, 'The Development of the Conscience in Equity', in J T Gleeson, J A Watson, R C A Higgins and E Peden (eds), *Historical Foundations of Australian Law*, Federation Press, Sydney, Vol I, 2013, Ch 6.
29. On which, see A F Pollard, 'Council, Star Chamber and Privy Council under the Tudors. II. The Star Chamber' (1922) 37 *English Historical Review* 516.
30. Mary Tudor's appointments were an exception to the general trend in this as in other respects. Her Chancellors were Gardiner (1553–55) and Heath (1556–58), both ecclesiastics.

The common law courts saw that their supremacy was at stake. They opined that any Court of Chancery 'intermeddling' with freehold titles should be prohibited;[31] Sir Edward Coke even went to the extent of considering that for a court of equity to decree specific performance of a contract would be to subvert the common law by depriving the defendant of his election 'either to pay damages or to fulfil his promise',[32] a theme famously advanced by Holmes and dignified by the doctrine of 'efficient breach' centuries later.[33] Most particularly, the common law courts objected to the equity courts granting injunctions restraining a plaintiff from executing on an unconscionable judgment obtained at law.[34] This led to the celebrated confrontation of Sir Edward Coke, as Lord Chief Justice, and Lord Ellesmere as Chancellor in the *Earl of Oxford's case*[35] and the decision of James I in favour of Lord Ellesmere. The Court of Chancery asserted a jurisdiction to grant an injunction against a plaintiff at law from proceeding to execute upon a judgment in ejectment in his favour. Lord Ellesmere thought, and James I held him correct, 'that when a judgment is obtained by oppression, wrong and a bad conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party'. Thereafter equitable doctrines remained available to prevent the unconscientious exercise of a plaintiff's rights at law.

Two other features of the court's jurisdiction in this period should be noted. One is the growth of the injunction, and the other is the court's recognition of trusts by upholding the double use notwithstanding its apparent abolition by the Statute of Uses.[36]

The period of systemisation from 1660 to 1873

[1-070] *The development of equitable doctrine*

The third period, from the Tudors and Stuarts down to 1873, shows the systemisation of equity. This was mainly due to a series of great Lord Chancellors: Lord Nottingham (1673–82),[37] Lord Hardwicke (1736–56), Lord Thurlow (1778–83 and 1783–92), and (most famously) Lord Eldon (1801–06 and 1807–27) being the most prominent among them. During this period, equity developed positive rules and shed its ex tempore characteristics.[38] Equity henceforth had principles, just as the common law had rules. The whims of the Lord Chancellor were no longer sufficient. As Lord Nottingham once said: 'This has long been a controversial point and was never fully settled until by time … Therefore it is not fit to look too far backwards or to give occasion for multiplying suits'.[39] It was during this period that, for example, the Chancellors began a systematic classification of trusts; developed the modern rule against perpetuities; outlined the doctrine of specific restitution; invented the equitable doctrines governing contribution between co-sureties; invented the doctrine that, in equity, covenants

31. *Heath v Rydley* (1614) Cro Jac 335; 79 ER 286.
32. *Bromage v Genning* (1617) 1 Rolle 368; 81 ER 540; and see J H Baker, 'The Common Lawyers and the Chancery: 1616' (1969) 4 *Ir Jur* 368; C M Gray, 'The Boundaries of the Equitable Function' (1976) 20 *Am J Leg Hist* 192.
33. See *Zhu v Treasurer of NSW* (2004) 218 CLR 530; 211 ALR 159 at [128]–[129]; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; 253 ALR 1 at [13].
34. *Throckmorton v Finch* (1598) Third Instit 124. This was the 'common injunction'.
35. (1615) 1 Ch Rep 1; 21 ER 485, and see D Ibbetson, 'The Earl of Oxford's Case (1615)' in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity*, Hart Publishing, Oxford, 2012. On Lord Ellesmere, see the Introduction to L A Knafla, *Law and Politics in Jacobean England*, Cambridge University Press, Cambridge, 1977; J H Baker, 'The Common Lawyers and the Chancery: 1616' (1969) 4 *Ir Jur* 368.
36. N G Jones, '*Tyrrell's Case* (1557) and the Use upon a Use' (1993) 14 *JLH* 75; N G Jones, 'The Use upon a Use Revisited' (2002) 33 *Cambrian L Rev* 67; N G Jones, 'Wills, Trusts and Trusting from the Statute of Uses to Lord Nottingham' (2010) 31 *JLH* 273.
37. He is, of course, a Chancellor of Stuart times; but in spirit he belongs to the post-Stuart period. He is best considered as the first modern Lord Chancellor.
38. On the use of precedent in equity, see C Croft, 'Lord Hardwicke's Use of Precedent in Equity' (1989) 5 *Aust Bar Rev* 29.
39. *Thornborough v Baker* (1675) 3 Swans 628; 36 ER 1000.

could run with the land when they did not at law; and, in general, succeeded in making equity what in fact it is today.

[1-075] *The growth of equitable jurisdiction*

At the close of this third period, the equitable jurisdiction of the Court of Chancery, now much enlarged, included the following:[40]

(*a*) Jurisdiction connected with forms of property recognised in equity: this included trusts and powers; the doctrines of the married woman's separate estate; restraint on anticipation and equity in a settlement; the whole law of mortgages, including tacking, marshalling, consolidation and particularly the doctrine of the equity of redemption; equitable mortgages, including the notion of a charge by deposit of title deeds; the vendor's lien; equitable waste; and the doctrines governing the priorities of estates and interests.

(*b*) Jurisdiction over contracts: here equity developed the remedies of injunction and specific performance.

(*c*) Jurisdiction over torts: here equity developed the injunction.

(*d*) Jurisdiction over deceased estates: here equity developed such doctrines as satisfaction, performance, ademption and hotchpot.

(*e*) Jurisdiction to relieve against the rigidity of the law: under this head fell relief against penalties, forfeiture, fraud, undue influence, accident and mistake.

(*f*) Jurisdiction to assist the efficacious administration of legal procedures: this included account, set-off, interrogatories and discovery.

(*g*) The guardianship of infants, and all matters appertaining thereto.

(*h*) The management of the property (but not the person) of lunatics, by delegation from the Crown.

[1-080] *The Chancellor's common law and statutory jurisdictions*

The above list, which is far from exhaustive, deals only with the Chancellor's equitable jurisdiction. In addition, as has been seen, he had his common law jurisdiction — which always remained virtually unaltered from what it had been in 1500. And in addition to that, he exercised a statutory jurisdiction. From the earliest times statutes vested in the Lord Chancellor special jurisdictions to deal with all manner of things, including settling tithes to be paid in London after the Great Fire,[41] arbitration,[42] Jews,[43] friendly societies,[44] improperly litigating in Rome instead of England,[45] robberies committed anywhere upon alien friends,[46] and much else. These are now of historical interest only. But, between 1600 and 1900, three heads of jurisdiction of particular interest were conferred on the Chancery judges: bankruptcy,[47] companies[48] and lunacy[49] (conferring jurisdiction to deal with the person and not only the

40. The list is an expanded version of that to be found in W S Holdsworth, *History of English Law*, 7th ed, Methuen, London, 1972, Vol 1, p 466.
41. 22 & 23 Car II c 12, 15.
42. 9 & 10 Will III c 15, 2.
43. 1 Anne st 1 c 30.
44. 33 Geo III c 54.
45. 27 Ed III st 1 c 1; 38 Ed III c 1.
46. 31 Hen VI c 4.
47. In England see 4 Anne c 17; 4 Anne c 22; 5 Geo II c 30; 5 & 6 Vict c 122; 46 & 47 Vict c 52; 50 & 51 Vict c 66; 53 & 54 Vict c 71; 4 & 5 Geo V c 59.
48. In England see Companies Act 1862 (25 & 26 Vict c 89) s 81.
49. In England see Lunacy Act 1890, replaced by the Mental Health Act 2007 (UK); Mental Health Act 2007 (NSW); Mental Hygiene Act 2000 (Qld); Mental Health Act 2009 (SA); Mental Health Act 2013 (Tas); Mental Health Act 2014 (Vic); Mental Health Act 1996 (WA). See C Stebbings, 'Protecting the Property of the Mentally Ill: the Judicial Solution in Nineteenth Century Lunacy Law' [2012] *CLJ* 384.

property of lunatics). The first has been hived off to become an independent jurisdiction; the latter two remain within the grasp of the courts of equity.

[1-085] *The supplementary character of equity*

In endeavouring to summarise the growth of the equitable jurisdiction, one is always driven back to Maitland's dictum that equity is a gloss on the common law; and, to see equity in perspective, one must return to his statement:[50]

> We ought not to think of common law and equity as of two rival systems. Equity was not a self-sufficient system, at every point it presupposed the existence of common law. Common law was a self-sufficient system. I mean this: that if the legislature had passed a short Act saying 'Equity is hereby abolished', we might have got on fairly well; in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights, the right to immunity from violence, the right to one's good name, the rights of ownership and of possession would have been decently protected and contract would have been enforced. On the other hand, had the legislature said, 'Common law is hereby abolished', this decree if obeyed would have meant anarchy. At every point equity presupposed the existence of common law.

Equitable jurisdiction

[1-090] *The divisions of the equitable jurisdiction*

In England, before the Judicature Act of 1873, largely as a result of Story's *Equity Jurisprudence*,[51] all branches of equity were ordinarily classified as — or, more accurately, tortured into — three headings: the exclusive, concurrent and auxiliary jurisdictions. The exclusive jurisdiction was said to comprise matters (for example, the enforcement of trusts) in which a court of equity alone had jurisdiction to grant relief.

[1-095] *Concurrent jurisdiction*

The so-called concurrent jurisdiction comprised matters in which both the courts of equity and the courts of common law had jurisdiction. Thus, a court of equity when granting a decree of specific performance was said to be exercising its concurrent jurisdiction — equity had power to decree specific performance, law to award damages. In this respect the equitable doctrines of rescission, rectification, partnership and account all belong to the concurrent jurisdiction. Sometimes, it was said, in the concurrent jurisdiction there was power in either court to grant exactly the same remedy on exactly the same set of facts — but it is not easy to point to any example of this: the recovery of money paid under a mistake of fact, some actions for account or contribution, and possibly some actions for damages for fraud have been suggested as examples.[52]

[1-100] *Auxiliary jurisdiction*

The so-called auxiliary jurisdiction comprised matters in which a court of equity entertained jurisdiction in order to enable parties claiming legal rights the more conveniently or effectively to establish those rights in a court of common law. This included not only cases where a court of equity granted relief to prevent irreparable injury pending a decision at law (for example,

50. F W Maitland, *Equity*, 2nd ed, Cambridge University Press, Cambridge, 1936, pp 18–19.
51. J Story, *Commentaries on Equity Jurisprudence*, 13th ed, M M Bigelow (ed), Little, Brown & Co, Boston, 1886, p 82 ('The subject here naturally divides itself into three great heads — the concurrent, the exclusive and the auxiliary or supplementary jurisdiction'). Story probably borrowed it from Fonblanque: see D E C Yale, 'A Trichotomy of Equity' (1985) 6 *J Leg Hist* 193. See also, on the operation of the auxiliary jurisdiction, P Devlin, 'Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment' (1980) 80 *Col L Rev* 43; C A Bane, 'Uses of English Legal History in America' (1982) 2 *OJLS* 297.
52. How this theory worked in the case of interlocutory injunctions has been examined by J Leubsdorf, 'The Standard for Preliminary Injunctions' (1978) 91 *Harv L Rev* 525 at 527–40. As to damages for fraud, see *Demetrios v Gikas Dry Cleaning Industries Pty Ltd* (1991) 22 NSWLR 561 at 573–4; *Western Australia v Wardley Australia Ltd* (1991) 30 FCR 245 at 269–70; 102 ALR 213 at 236–8; and [12-025].

quia timet injunctions) or to prevent a multiplicity of suits once a legal right had been decided (for example, bills of interpleader), but also where relief was granted in order to facilitate proceedings already pending at law (for example, bills for discovery, bills for the perpetuation of testimony and bills for examination *de bene esse*).

[1-105] *Inutility of the distinctions as a whole*

Several points should be noted about the distinctions. First, the nature of some rights was in dispute, being said by some to belong to the auxiliary, and by others to the concurrent, jurisdiction (for example, suits for cancellation and delivery up). Secondly, some rights fitted into no category (for example, the right to declaratory relief). Thirdly, some rights changed their classification from time to time (for example, discovery ceased to exist as part of the auxiliary jurisdiction when it was permitted at law). Fourthly, some remedies straddled all three classifications (for example, injunctions to restrain breaches of trust were in the exclusive jurisdiction, injunctions to restrain breaches of contract were in the concurrent jurisdiction and common injunctions to restrain execution upon an inequitable judgment obtained at law were in the auxiliary jurisdiction). Fifthly, the classification resulted in some illogical concepts (for example, the classification in the auxiliary jurisdiction of the common injunction, the purpose of which was to frustrate, not to assist, the common law). Finally, the classification lacked both doctrinal validity and practical utility. There seems no point in endeavouring to distinguish the concurrent from the auxiliary jurisdiction. It was probably for these reasons that Maitland virtually ignored Story's trifurcation.

[1-110] *Utility of the distinction between the exclusive jurisdiction and the jurisdiction in aid of legal rights*

The distinction which is of greatest continuing importance is the distinction between the exclusive jurisdiction, on the one hand, and jurisdiction in aid of legal rights, on the other hand.

B The History of Equity in Australia Before 'Fusion'

The origin and growth of equity in New South Wales

[1-115] *The 1787 letters patent*

The establishment of a superior court in New South Wales, and the investing of that court with equitable jurisdiction, has a confusing history.[53] By a document then referred to as a 'Charter of Justice', on 2 April 1787 letters patent issued which purported to create courts of civil and criminal jurisdiction in New South Wales under the presidency of a Judge-Advocate and other officers. A second set of letters patent on 4 February 1814 purported to establish new courts — a 'Supreme Court' and a 'Governor's Court'; these letters patent were also at the time referred to as a 'Charter of Justice'. Serious doubts were entertained as to the validity of both these sets of letters patent, since they lacked statutory authorisation; and these doubts led to the enactment of 4 Geo IV c 96 (1823), authorising the establishment by 'Charters or Letters Patent under the Great Seal' of a Supreme Court of New South Wales. This Act is sometimes referred to as the New South Wales Act 1823, although it has no formal short title. It was expressed to operate until the end of the parliamentary session after 1 July 1827 but it was continued without amendment by 7 & 8 Geo IV c 73 (1827) to the end of the session after 31 December 1829. Little is known about the equitable jurisdiction of the court under the first Charter of Justice. The position, however, seems to be that it did exercise that

53. See E Campbell, 'The Royal Prerogative to Create Colonial Courts' (1964) 4 *Syd L Rev* 343; J M Bennett, *A History of the Supreme Court of New South Wales*, Law Book Co, Sydney, 1974, Ch 5. For the somewhat different experience of Canada, see E Brown, 'Equitable Jurisdiction and the Court of Chancery in Upper Canada' (1983) 21 *Osgoode Hall LJ* 275. And for the United States of America, see J H Beale, 'Equity in America' [1922-23] 1 *CLJ* 21.

jurisdiction, even though it probably did not have it.[54] An attempt was made by the courts established pursuant to the second Charter of Justice to assume equitable jurisdiction; and such a jurisdiction (in practice, somewhat shadowy) could have been justified, either under the express words of the Charter or according to the doctrine that the fact that New South Wales Governors were given custody of the Great Seal of the Colony impliedly invested them with equitable jurisdiction analogous to that of the Lord Chancellor in England.

[1-120] *The 1823 Charter of Justice*

Pursuant to the authority conferred by the 1823 Act 4 Geo IV c 96, letters patent dated 13 October 1823 issued, to take effect from their promulgation in Sydney, which took place on 17 May 1824. These letters patent were also referred to as a 'Charter of Justice', and nowadays the term 'The Charter of Justice' whenever used refers to the 1823 letters patent. It established the Supreme Court of New South Wales and made it a court of record.[55] It provided that the court should consist of a Chief Justice[56] who should keep the seal of the court,[57] that the first Chief Justice should be Sir Francis Forbes,[58] and that there should be various officers of the court including a Registrar, a Prothonotary, a Master and a Keeper of Records.[59] It contained lengthy provisions conferring on it the same ecclesiastical jurisdiction with regard to wills and intestacies as would be exercised in the diocese of London.[60] But it did not vest any equitable jurisdiction in the court. By s 18, the court was empowered to appoint guardians and keepers of the persons and estates of infants and lunatics. By ss 19–22, a limited right of appeal to the Privy Council was granted from decisions of the Court of Appeals, a judicial body whose existence is assumed by the Charter but not defined therein. But in these provisions the Charter is clearly referring back to s 15 of the 1823 Act, which provides that the Governor of New South Wales shall act as a Court of Appeals from the Supreme Court of New South Wales. However, as the Court of Appeals was abolished in 1828, by 9 Geo IV c 83, neither s 15 of the 1823 Act nor the consequential provisions of the Charter of Justice are of any moment. Curiously, no alternative provision was made before 1850 for any appeal from the Supreme Court.[61]

The Supreme Court of New South Wales so constituted was invested with equitable jurisdiction, not because of any of the provisions of the Charter of Justice (which does not mention the court's equitable jurisdiction) but because s 9 of 4 Geo IV c 96 provided that any Supreme Court of New South Wales when constituted by letters patent under that Act should have 'power and authority to administer justice, and to do, exercise and perform all such acts, matters and things necessary for the due execution of such equitable jurisdiction as the Lord High Chancellor of Great Britain can or lawfully may within England'.[62] By s 1 of 4 Geo IV c 96, provision was made for the augmentation of the judges of the court from one to three by Commission under the Sign Manual. This was done soon enough.

[1-125] *The Australian Courts Act 1828*

Before 31 December 1829, until which day the Act 7 & 8 Geo IV c 73 continued 4 Geo IV c 96 in force, the Imperial Legislature repealed the latter Act and re-enacted its provisions in a

54. See M L Smith, 'The Early Years of Equity in the Supreme Court of New South Wales' (1998) 72 *ALJ* 799 at 800.
55. Section 1.
56. Section 2.
57. Section 3.
58. Section 7.
59. Section 9.
60. Sections 14–17.
61. *Flint v Walker* (1847) 5 Moo PC 178 at 192–3; 13 ER 459 at 464. See also Order-in-Council of 13 November 1850, reprinted in A Oliver, *Collection of the Statutes of Practical Utility, Colonial and Imperial, in Force in New South Wales*, Government Printer, Sydney, 1879, Vol 2, p 1840.
62. Why this section of the 1823 Act was not echoed in the Charter of Justice is not entirely clear, when the next section (s 10 conferring ecclesiastical jurisdiction on the court) is so faithfully echoed.

substantially similar Act: 9 Geo IV c 83, called the Australian Courts Act 1828.[63] Its place in the context of the development of the Supreme Court of New South Wales is curious. It clearly contemplated the abolition of the existing court and authorised the Crown to issue yet further letters patent replacing it by a new court of identical nomenclature, and it made provision for the new court's attributes, which resembled those already conferred on the existing court by 4 Geo IV c 83 and the Charter of Justice. No new letters patent were ever issued under the Act: but s 2 of the Act continued the existing court until the new letters patent were issued — an event which was never to occur — providing that everything done by the existing court should have the same validity as it would have if done expressly by virtue of the Act. Thus, in a conspicuously tortuous way, it had the effect of slightly extending the existing jurisdiction of the Supreme Court of New South Wales. In looking to the growth of the Supreme Court's equitable jurisdiction, the only provision of the 1828 Act to note is s 11 which provides not only (as did s 9 of the 1823 predecessor) that the Supreme Court be invested with the Chancellor's equitable jurisdiction, but also that it be empowered to do, exercise and perform 'all such acts, matters and things as can or may be done by the said Lord High Chancellor within the realm of England, in the exercise of the common law jurisdiction to him belonging' — an intriguing addition when one considers what it means. The 1828 Act, 9 Geo IV c 83, was expressed to operate until the end of the parliamentary session after 31 December 1836. But it was continued annually on five separate occasions.

Finally, by the Australian Constitution Act 1842,[64] so much of the 1828 Act as related to the Constitution of the New South Wales legislature — which was the greater part of the Act — was repealed, and the residue — which dealt principally with the court — was continued for an unlimited time.[65]

[1-130] *Other legislation between 1828 and 1841*

Two of the Acts continuing the Australian Courts Act — that is, 2 & 3 Vict c 70 (1839) and 3 & 4 Vict c 62 (1840) — contained provisions other than those extending the operation of the 1828 Act. The 1839 Act provided that the local legislature was empowered to pass measures providing for the administration of justice, and the 1840 Act provided that it was empowered to make laws (subject to the Governor's confirmation) for the government of the colony generally. One thing which the 1828 Act had done was to institute a local Legislative Council with limited legislative powers; and from that date onwards, particularly when given the impetus of the Imperial Legislation of 1839 and 1840, the New South Wales legislature — as differently constituted from time to time — initiated a whole series of Acts affecting the Supreme Court's equitable jurisdiction. By 5 Wm IV No 8 (1834) (NSW), the provisions of the Imperial Act 2 Geo IV and 1 Wm IV c 36 enlarging the equity court's powers of dealing with contempts were adopted into New South Wales. By 6 Wm IV No 12 (1835) (NSW), the Supreme Court was empowered to do anything which any Imperial Act in force in the colony on 1 March 1829 authorised or permitted to be done by the courts at Westminster. More important than either was the Administration of Justice Act 1840 (NSW).[66] It provided for the appointment of two more judges, bringing the total number of Supreme Court judges to five;[67]

63. By the Short Titles Act 1896.
64. 5 & 6 Vict c 76.
65. There is an account of the operation of the equity jurisdiction of the Supreme Court in the early years in C H Currey, *Sir Francis Forbes*, Angus and Robertson, Sydney, 1968, pp 105–9. See also A C Castles, *An Australian Legal History*, Law Book Co, Sydney, 1982, pp 192–5; J M Bennett, *Sir Alfred Stephen*, Federation Press, Sydney, 2009, pp 116–17.
66. 4 Vict No 22.
67. Section 1.

empowered the court to examine witnesses *de bene esse* or on commission;[68] and it did much else besides.[69] But, most importantly, it provided by s 20:

> That it shall be lawful for the Governor of New South Wales for the time being to nominate and appoint from time to time either the Chief Justice or if he shall decline such an appointment then one of the Puisne Judges to sit and hear and determine without the assistance of the other Judges or either of them all causes and matters at any time depending in the said Supreme Court in Equity and coming on to be heard and decided at Sydney and every decree or order of such Chief Justice or of the Judge so appointed shall in all such cause or matter (unless appealed from in the manner hereinafter provided) be as valid effectual and binding to all intents and purposes as if such decree or order had been pronounced and made by the full Court.

Section 21 provided for an appeal from the equity judge to the other two judges of the court. Previously the court in banco had heard and disposed of equity matters; from now on until the Supreme Court Act 1970, the equitable jurisdiction of the court was always to be vested in one specially designated judge of the court.

[1-135] *Legislation between 1841 and 1850*

In the following year, 1841, there was passed an Act of considerable importance in the general procedural history of the court, but of limited importance so far as equity is concerned: the Administration of Justice Act 1841.[70] It provided, inter alia, that the court's equitable jurisdiction in Port Phillip should be exercised by the resident judge there[71] and that other judges could deputise for the judge in equity in the case of absence or illness.[72] It made minor alterations to the law governing equity appeals.[73] In 1847, by 2 Vict No 22, further provisions were enacted regarding equity appeals. The same year produced a more interesting Act[74] dealing with the situation which had arisen by the primary judges from time to time having exercised jurisdiction in lunacy and infancy matters, purportedly pursuant to the vesting in them of equitable jurisdiction by s 20 of 4 Vict No 22. That, however, had only invested inherent equitable jurisdiction (of which neither lunacy, which was purely statutory, nor infancy, which arose by delegation from the Crown, was part) in the judge. Hence the need for 2 Vict No 27 to validate past exercises of this power and to enable future exercises of it. The Act 12 Vict No 1 (1848), which was passed with the express aim of simplifying legal procedures, provided that motions could be preferred rather than petitions,[75] and — principally, so far as equity was concerned — that persons could obtain a rule nisi and injunction rather than filing a bill in equity.[76] The year 1849 saw two Acts which may be briefly noted: 13 Vict No 19 and 13 Vict No 31. By the former, trustees were permitted to invest in government debentures. The latter enabled equitable processes issuing out of the Supreme Court of New South Wales to be served outside the jurisdiction.

68. Section 14.
69. One of the things it did was invent the office of Primary Judge in Equity. Until the death of Mr Justice Dowling in 1844, he held both the office of Chief and the office of Primary Judge in Equity. In that year Mr Justice Stephen became Chief Justice but refused the position of Primary Judge. He said: 'I will not accept the Equity Judgeship, and Mr Justice Dickinson cannot, for he knows nothing whatsoever of either Equity practice or pleading'. Mr Justice Dickinson himself said: 'Shortly after I came here I endeavoured to get up Equity. Having never used any equity before I found myself dreadfully at fault whenever any equity cases came before the Court. However, I worked them up as well as I possibly could'. Mr Justice Roger Therry got the job. See generally M L Smith, 'The Early Years of Equity in the Supreme Court of New South Wales' (1998) 72 *ALJ* 799.
70. 5 Vict No 9.
71. Section 1.
72. Section 12.
73. Sections 13–14.
74. 2 Vict No 27.
75. Section 8.
76. Section 9. Ten years later, by 22 Vict No 14, the operation of s 9 was declared to have caused proceedings to be dilatory and expensive, and the section was repealed.

[1-140] *Legislation between 1851 and 1900*

There is silence until the years 1852 and 1853, which witness almost frantic legislative activity. The year 1852 saw the introduction of 16 Vict No 3, an Act facilitating and speeding the despatch by the equity judge of infancy and lunacy matters, and 16 Vict No 13 which permitted procedure in equity by the summary mode of summonses in 11 enumerated heads of jurisdiction. It is one of the ancestors of the fourth Schedule to the Equity Act 1901. The same year also produced a lengthy Act[77] facilitating the conveyance of property vested in trustees and mortgagees, dealing particularly with cases where they were absent, dead or lunatic; and it gave the equity judge extensive power to make vesting and other orders to meet such situations. The provisions of this Act were widened in 1853, by 17 Vict No 4; and the same year saw 17 Vict No 7, a most elaborate statute regulating almost every aspect of procedure in equity.

Another, but lesser, wave of legislative activity occurred in 1857–58. Provision was made for moneys lodged with the Master in Equity to be paid to the Colonial Treasury,[78] for the facilitation of the payment of debts out of real estate,[79] for trustees to pay into court in order to obtain a quittance[80] and for the abolition of the rules nisi and injunction introduced by 12 Vict No 1.[81] In 1862 there followed another full-scale Trustee Act.[82]

Finally, for present purposes, there was the Equity Act 1880,[83] which was eventually replaced by the not substantially different Equity Act 1901.[84] The latter provided that the jurisdiction of the Supreme Court should be exercised by the Chief Judge in Equity, that the Supreme Court should be 'be holden' by him for the determination of all proceedings in equity, that his decrees should be as final and binding (unless appealed from) as orders of the Full Court, and that the equitable jurisdiction of the court extended to the appointment of guardians of infants and their estates.[85] This should be read in conjunction with s 15 of the Supreme Court and Circuit Courts Act 1900 which provided, inter alia, that where any jurisdiction, power or authority was vested in the Chief Judge in Equity, any other judge of the Supreme Court could exercise that jurisdiction, power or authority in all respects as if he were the Chief Judge in Equity. Appeals from an equity judge lay, according to the circumstances, to the Full Court of the Supreme Court, to the High Court of Australia or to the Queen-in-Council. Other provisions of the Act will be noted separately in different contexts. The Act, as amended from time to time, regulated the equitable jurisdiction of the Supreme Court of New South Wales until 1972 when the Supreme Court Act 1970 came into operation.

[1-145] *The Master in Equity*

The position of the Master in Equity should be noted. The 1823 Charter of Justice made provision for a Master and a Keeper of Records.[86] This contemplated the appointment of a Master of the Court, not a Master in Equity. However, by 1828, without apparent justification, the Master confined himself to work in the equitable jurisdiction and was referred to as the Master in Equity. In 1832, Carter, the then incumbent of the office, was declared insolvent and was dismissed; the opportunity was taken to abolish the office. In 1840, by the New South Wales Administration of Justice Act,[87] provision was made for the 'revival' of the office of Master in Equity (although technically no such office had previously existed). In 1842 a Master in Equity was duly appointed and thereafter the office has continued. The Master has been an

77. 16 Vict No 19.
78. 20 Vict No 11.
79. 21 Vict No 6.
80. 21 Vict No 7.
81. 22 Vict No 14.
82. 26 Vict No 12.
83. 44 Vict No 18.
84. 1 Edw VII No 24.
85. Section 4.
86. Section 9.
87. 4 Vict c 22 s 22.

important judicial officer in the development of equity in New South Wales, handling, inter alia, next-of-kin inquiries, the taking of accounts, the examination of persons connected with companies in liquidation and any other inquiry directed by a judge to be held by the Master.[88]

The division in jurisdictions in New South Wales

[1-150] *Similarities between England before 1875 and New South Wales before 1972*

The significant feature of the administration of equity in New South Wales prior to 1972 was that it was administered as a body of law distinct from the common law. Supreme Court judges sitting at law had no jurisdiction in equity, and judges sitting in equity had no jurisdiction at law. The situation was essentially the same as in England before 1873, when one set of courts administered equity and another set of courts administered law. There were never, it is true, in New South Wales, two different sets of courts, but there were different modes of trials (equity cases being heard by a judge, common law cases being heard by a judge and jury), and distinct jurisdictions (judges in one jurisdiction having no power to try cases properly cognisable in another jurisdiction). Therefore, for purposes here relevant, there can be no distinction between the situation obtaining in England before 1875 when there were different courts, and the position obtaining in New South Wales before 1972 when there were two distinct and independent jurisdictions within the one court.

[1-155] *Differences between New South Wales and other colonies*

A suggestion has been made[89] that 'New South Wales legal procedure, when established by the Charter of Justice in 1824 on a civil basis, commenced (no doubt unknowingly) with a system akin to the Judicature System, but by later statutory separation of the equitable jurisdiction from the other jurisdictions of the Supreme Court of New South Wales, reverted to the rigid separation which then characterised civil procedures in England. This appears from the Privy Council decision in *Larios v Bonany y Gurety*'.[90] With great respect, this is not so. That case demonstrates that when there is both one court administering law and equity instead of a plurality of courts, and one set of procedural rules regulating both jurisdictions, one has the equivalent of a Judicature system. New South Wales before 1972 always had the former, but never had the latter. The Act 4 Geo IV c 96 (1823) itself, by virtue of which the Charter of Justice issued, made it clear in s 6 that issues in a trial at law were to be determined by the Chief Justice together with two magistrates or a jury. The equitable jurisdiction was to be administered by the court.[91] Nothing comparable occurred in Gibraltar in 1873, when the Charter of Justice applicable to that colony, as is evident from the report of *Larios v Bonany y Gurety*,[92] provided the same mode of hearing legal and equitable claims. In that case the Supreme Court of Gibraltar, having determined the facts of a case, refused the principal prayer for specific performance of an agreement to lend money, but granted common law damages, that is, not damages under Lord Cairns' Act. No such result could have occurred in New South Wales in 1824, because the findings of fact arrived at by the court in refusing equitable relief would not have been determined by a judge and magistrate or by a judge and jury so as to support a verdict at law. *Larios v Bonany y Gurety* itself recognises that the results achieved in that case would not have been possible in a situation where 'like some of the Courts created by

88. See R W Bentham and J M Bennett, 'The Development of the Office of Master in Equity in New South Wales' (1961) 3 *Syd L Rev* 504. With effect from 2005, the Masters were renamed Associate Justices: see Courts Legislation Amendment Act 2005 Sch 13. In November 2012, the last Associate Justice in the Equity Division was made a judge of the Supreme Court, and no Associate Justices have been appointed subsequently, although the power to do so has not been repealed.
89. K S Jacobs, 'Law and Equity in New South Wales after the Supreme Court Procedure Act, 1957, Section 5' (1963) 3 *Syd L Rev* 83.
90. (1873) LR 5 PC 346.
91. Section 9.
92. (1873) LR 5 PC 346 at 355–6.

CHAPTER 6

Assignments in Equity

A Introduction

Categories of assignments

[6-005] *Legal and equitable assignments*

'Assignment means the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee.'[1] This chapter relates to the equitable assignment of choses in action.[2] It does not deal with the Personal Property Securities Act 2009 (Cth). The subject seems to bristle with difficulties. But they are less great than appears at first sight. A chose in action is a personal right of property which can only be claimed or enforced by action as distinct from taking physical possession.[3] A chose in action may be legal or equitable. Legal choses are those historically enforceable in a court of common law, such as a debt, or a bill of exchange,[4] or a contract of insurance, or a share in a company. Equitable choses are those historically enforceable in a court of equity, such as a legacy in a completely or incompletely administered estate, or a share in a trust fund, or a mortgagor's equity of redemption, or an equitable mortgage or charge, or surplus proceeds of sale in the hands of a mortgagee,[5] or a right to relief against forfeiture of a lease for non-payment of rent,[6] or a partner's interest in partnership assets. While at common law choses in action were generally not assignable, both common law and equitable choses in action were assignable in equity.[7] And equity would restrain the assignor from enforcing the debt against the debtor.[8] Statutory modes of assignment of choses in action have now been introduced (for example, s 12 of the Conveyancing Act 1919 (NSW) and its equivalents).[9] Hence the rules relating to the assignment of choses in action are divisible into four categories. First, there are those relating to statutory assignments of legal choses. Secondly, there are those relating to statutory assignments of equitable choses. Thirdly, there are those relating to equitable assignments of legal choses. Fourthly, there are those relating to equitable assignments of equitable choses. But this chapter concentrates on the third and fourth categories. Each of them concerns equitable assignments. An equitable assignment is the immediate transfer of an equitable interest in property from assignor ('obligor' or 'creditor') to assignee by virtue of a voluntary inter vivos act by the assignor leaving the 'debtor' or 'obligee' liable to the assignee. It is to be distinguished from an agreement to assign (which is not an immediate transfer, but a promise to make a transfer in future, and requires consideration). It is also to be distinguished from a declaration of trust.[10] And it is to be distinguished from a revocable mandate.[11]

1. *Norman v Federal Cmr of Taxation* (1963) 109 CLR 9 at 26; [1964] ALR 131 at 146 per Windeyer J.
2. See G Tolhurst, *The Assignment of Contractual Rights*, Hart Publishing, Oxford, 2006; M Smith and N Leslie, *The Law of Assignment*, 2nd ed, Oxford University Press, Oxford, 2013. Some of the history is discussed in *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395; 230 ALR 56 at [185]–[194]. See also *Sprint Communications Co LP v APCC Services Inc* 171 L Ed 424 at 432–4, 450–2 (2008); G Tolhurst, *The Assignment of Contractual Rights*, Hart Publishing, Oxford, 2006, Ch 2.
3. *Torkington v Magee* [1902] 2 KB 427 at 439.
4. For the peculiar status of bills of exchange, see M Smith and N Leslie, *The Law of Assignment*, 2nd ed, Oxford University Press, Oxford, 2013, [2.75], [2.78].
5. *Bucknell v Bucknell* [1969] 2 All ER 998; [1969] 1 WLR 1204.
6. *Howard v Fanshawe* [1895] 2 Ch 581.
7. W T Barbour, 'The History of Contract in Early English Equity', in P Vinogradoff (ed), *Oxford Studies in Social and Legal History*, Vol 4, Oxford University Press, Oxford, 1914, p 108; W W Cook, 'The Alienability of Choses in Action' (1916) 29 *Harv L Rev* 816 at 821.
8. *Jeffs v Day* (1866) LR 1 QB 372.
9. See [6-025]–[6-030].
10. See [6-185]. But see J Edelman and S Elliott, 'Two Conceptions of Equitable Assignment' in J McKenna and H Jeffcoat (eds), *Queensland Legal Yearbook 2013*, Supreme Court Library Queensland, Brisbane, 2014, p 280.
11. See [6-420]–[6-425].

[6-010] *Capacity to assign and effective assignment: general*

'Anything that in the eye of the law can be regarded as an existing subject of ownership, whether it be a chose in possession or a chose in action, can today be assigned, unless it be excepted from the general rule on some ground of public policy or by statute.'[12] Thus virtually all property is assignable in equity. The few exceptions include property which by virtue of statute cannot be effectively assigned, for example, statutory rights which, expressly or impliedly, are made unassignable.[13] They include so-called bare rights of action.[14] They include the benefit of contracts involving personal skill and confidence.[15] They probably include public law rights of judicial review of administrative action.[16] They include the salaries and pensions of certain public officers, even subordinate ones.[17] A purported assignment in unreasonable restraint of trade may be against public policy and void.[18] There is a case and there are dicta asserting, and dicta doubting, that purported assignments which might deprive successors of the whole of their assets and their power to maintain themselves may be void even apart from questions of restraint of trade.[19] Courts which view confidential information as not constituting property maintain that it is not assignable, though it may be 'passed on'.[20] While a right of confidentiality is not assignable, the benefit of a contractual obligation of confidence is.[21] However, the benefit of a duty owed by a husband to a wife to keep secret the details of their life together is not assignable by the wife.[22] But, granted that any given property may be assigned in equity, the requirements which must be fulfilled before equity will treat it as effectively assigned depend principally upon:

(*a*) whether the property is legal or equitable;

(*b*) whether the purported assignment is voluntary or for consideration;[23] and

(*c*) if the property is legal and its purported assignment voluntary, whether the property is assignable at common law.

The word 'principally' in the last sentence takes account of a few particular exceptions. One example is the rule that the benefit of a guarantee cannot be assigned without the benefit of the principal debt.[24] It takes account also, among other things, of the position of the Crown. There is power in the Crown to grant or receive a chose in action by assignment, and there is no particular formality or procedure for the taking of assignments by the Crown.[25] How far — if

12. *Norman v Federal Cmr of Taxation* (1963) 109 CLR 9 at 26; [1964] ALR 131 at 146 per Windeyer J.
13. *Devefi Pty Ltd v Mateffy Perl Nagy Pty Ltd* (1993) 113 ALR 225 at 233.
14. See [6-470]–[6-485].
15. See [6-445]–[6-465].
16. M Smith and N Leslie, *The Law of Assignment*, 2nd ed, Oxford University Press, Oxford, 2013, [3.08]–[3.11].
17. *Mulvenna v Admiralty Cmrs* 1926 SC 842 (a field of the general law now for practical purposes taken over by statute). See M Smith and N Leslie, *The Law of Assignment*, 2nd ed, Oxford University Press, Oxford, 2013, Ch 22.
18. *Re Turcan* (1888) 40 Ch D 1 at 9; [1886-90] All ER Rep Ext 1552 at 1154; *Syrett v Egerton* [1957] 3 All ER 331 at 334; [1957] 1 WLR 1130 at 1134.
19. See [6-195].
20. *TB & B Retail Systems Pty Ltd v 3 Fold Resources Pty Ltd (No 3)* (2007) 158 FCR 444; 239 ALR 117 at [75] per Finkelstein J. See generally M Smith and N Leslie, *The Law of Assignment*, 2nd ed, Oxford University Press, Oxford, 2013, [7.96]–[7.101].
21. *Mid City Skin Cancer & Laser Centre Pty Ltd v Zahedi-Anarak* (2006) 67 NSWLR 569 at [194]–[195].
22. *Mid City Skin Cancer & Laser Centre Pty Ltd v Zahedi-Anarak* (2006) 67 NSWLR 569 at [222]–[227], approving the 4th edition of this work at [41-070].
23. Consideration is needed to support an equitable assignment of future property, an agreement to assign existing property in future, and the creation of a mere charge as distinct from a complete transfer (*Re Earl of Lucan; Hardinge v Cobden* (1890) 45 Ch D 470, criticised by P G Turner, 'Floating Charges — A "No Theory" Theory' [2004] *LMCLQ* 319 at 321–2). The point that consideration is necessary but absent may be taken by assignor against assignee, but it is not open to the debtor to refuse to pay the assignee on this ground: *Walker v Bradford Old Bank Ltd* (1884) 12 QBD 511.
24. *International Leasing Corp Ltd v Aiken* [1967] 2 NSWR 427; *Hutchens v Deauville Investments Pty Ltd* (1986) 68 ALR 367; 61 ALJR 65.
25. *Ling v Commonwealth* (1994) 51 FCR 88 at 93; 123 ALR 65 at 69.

at all — this principle affects the law of champerty[26] or, for example, the law as to priorities,[27] must await future authority.

In assessing whether a contractual chose in action has been assigned, it is wrong to separate out each contractual promise and assess whether, in isolation, it is proprietary in character. Instead the correct approach is to ask the question whether the contract as a whole creates rights enforceable by action, and to treat the complete chose in action as the aggregate of legal rights, privileges, powers and immunities — the sum of the jural relations under the contract. All the party's contractual rights, being part of a chose in action, have a proprietary character for the purposes of the law of assignment and are prima facie assignable, even though they or some of them may for a particular reason be unassignable. The reason may be statutory. It may be a public policy reason. It may be because the contract prohibits assignment. It may be because the identity of the obligee is material to the contractual relationship or the obligor's performance. It may be, 'less commonly, in the case of an assignment of a part of a composite chose, the fact that the various rights are not separable in the manner attempted'.[28]

B Equitable Assignment of Equitable Property

Rules for assignability of equitable property

[6-015] *General rules*

By 'equitable property' is meant any right or title, such as the right of a beneficiary under a trust, enforced in equity but not at common law. Property of this nature may, of course, be assigned only in equity and not at law. It may be assigned for value or, at least in the case where the assignment is an absolute assignment, and not one by way of charge, voluntarily.[29] Where the whole or some part of the property is not made over absolutely to the assignee but is assigned merely by way of charge as security for the payment of money or the performance of an obligation, consideration is necessary.[30] The same is true where the transaction is not an immediate transfer of the assignor's beneficial interest, but an agreement to assign it.[31] Examples of equitable property include the interest of a beneficiary under a trust, a mortgagor's equity of redemption under a legal mortgage, the interest of an equitable mortgagee or chargee, a partner's interest in the partnership assets, and a legatee's rights in an incompletely administered estate.

[6-020] *No formality required unless by statute*

Except for writing, where that is required by s 23C of the Conveyancing Act 1919 (NSW) (see Chapter 7) and unless s 12 of that Act requires writing and notice in certain cases,[32] no formality is required for the assignment of equitable property. All that is required is 'a clear expression of an intention to make an immediate disposition'.[33] What is needed is 'any form of words which expressed a final and settled intention to transfer the property to the assignee'.[34]

26. *Master v Miller* (1791) 4 TR 320 at 340; 100 ER 1042 at 1052–3.
27. *Dearle v Hall* (1828) 3 Russ 1; 38 ER 475.
28. *Pacific Brands Sport & Leisure Pty Ltd v Underwriter Pty Ltd* (2006) 149 FCR 395; 230 ALR 56 at [38]–[43].
29. *Kekewich v Manning* (1851) 1 De G M & G 176; 42 ER 519; *Voyle v Hughes* (1854) 2 Sm & G 18; 65 ER 283; *Norman v Federal Cmr of Taxation* (1963) 109 CLR 9 at 30; [1964] ALR 131 at 149. See also *Lord Carteret v Paschal* (1733) 3 P Wms 197 at 200–1; 24 ER 1028 at 1029; *Williams v Cmr of Inland Revenue* [1965] NZLR 395 at 399. Consideration is probably not needed for equitable assignments of legal property either: see [6-165].
30. *Re Earl of Lucan* (1890) 45 Ch D 615.
31. *Norman v Federal Cmr of Taxation* (1963) 109 CLR 9 at 30–1; [1964] ALR 131 at 149; *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 229 CLR 545; 224 ALR 79 at [70]. For an application of the distinction, see *J T Nominees Pty Ltd v Macks* (2007) 97 SASR 471.
32. See [6-025]–[6-045].
33. *Norman v Federal Cmr of Taxation* (1963) 109 CLR 9 at 30; [1964] ALR 131 at 149 per Windeyer J. See also *NT Power Generation Pty Ltd v Trevor* (2000) 23 WAR 482 at 488–9.
34. *Re Williams* [1917] 1 Ch 1 at 8 per Warrington LJ. See also *Watson v The Duke of Wellington* (1830) 1 Russ & My 602 at 605; 39 ER 231 at 232; *Thomas v Harris* [1947] 1 All ER 444; *IRC v Electric and Musical Industries*

'[A]n agreement which does not exhibit the intention of the parties that the property shall pass at once does not take effect as an equitable assignment at once, but only when, from the terms of the agreement, it can be gathered that the intention of the parties is that the equitable property shall pass.'[35] What is done need not purport to be an assignment or use the language of an assignment:[36]

> An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain.
>
> [T]here must be some outward expression by the assignor of his intention to make an immediate disposition … It must be possible to identify some act on the assignor's part from which his intention then and there to divest himself — in favour of the assignee — of the right or interest to be assigned … can be inferred.[37]

The validity of an equitable assignment does not depend on the assignor giving notice to the debtor.[38] But it is prudent for the assignor to do so. For this there are four reasons. First, the debtor, until given notice of the assignment, is entitled to treat the assignor as the creditor, so that payment by debtor to assignor will discharge the debtor's liability.[39] But a debtor who receives notice and disregards it by paying the assignor must pay the assignee as well. Secondly, until the debtor has given notice, the assignee's rights against the debtor may be defeated by a subsequent assignment for value by the assignor of which notice is given to the debtor before the debtor receives notice of the earlier assignment.[40] Thirdly, only debts in existence between the debtor and the assignor at the date the debtor receives notice of the assignment may give rise to a set-off enforceable against the assignee, so that the delay of an assignee in giving the debtor notice of an assignment may increase the scope of the set-off that can be asserted against that assignee.[41] Fourthly, to give notice of an absolute assignment under the hand of an assignor of a debt or other legal chose in action will convert it into a statutory assignment.[42]

Finally, the validity of an equitable assignment does not depend on giving notice to the assignee.[43] However, notice of a gratuitous assignment gives the assignee an opportunity to disclaim the gift.[44]

Impact of s 12 of Conveyancing Act 1919 (NSW)

[6-025] *Section 12: its terms*

There remains the question whether the law relating to the equitable assignment of equitable property is affected by s 12 of the Conveyancing Act 1919 (NSW). That section provides:[45]

Ltd [1949] 1 All ER 120 at 126; aff'd [1950] 2 All ER 261; *Re Wale, dec'd* [1956] 3 All ER 280 at 283–4; [1956] 1 WLR 1346 at 1350; *Letts v IRC* [1956] 3 All ER 588 at 591–2; [1957] 1 WLR 201 at 214.
35. *Re Casey's Patents; Stewart v Casey* [1892] 1 Ch 104 at 118 per Fry LJ.
36. *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462; [1904-7] All ER Rep 345 at 350 per Lord Macnaghten; *Sandford v D V Building & Construction Co Pty Ltd* [1963] VR 137 at 140; *Elders Pastoral Ltd v Bank of New Zealand* [1991] 1 NZLR 385 at 387; *Ifejika v Ifejika* [2010] FSR 29 at [26]; cf *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614; [1936] ALR 198; and see [6-430].
37. *Finlan v Eyton Morris Winfield (a firm)* [2007] 4 All ER 143 at [33] per Blackburne J.
38. See [6-435].
39. See [6-435].
40. See [8-095]–[8-215].
41. See [6-490]–[6-510].
42. See [6-025]–[6-045].
43. See [6-430].
44. See [6-430].
45. See generally G Tolhurst, *The Assignment of Contractual Rights*, Hart Publishing, Oxford, 2006, Ch 5 and [7.34]–[7.43]; J McGhee (ed), *Snell's Equity*, 32nd ed, Thomson Reuters (Legal) Ltd, London, 2010, [3005]–[3011]. For the meaning of 'absolute' (that is, non-conditional) and 'charge only' (as distinct from mortgage), see *Tancred v Delagoa Bay and East Africa Railway Co* (1889) 23 QBD 239 at 242; *Durham Bros v Robertson* [1898] 1 Ch 765; *Re Williams* [1917] 1 Ch 1; *Grey v Australian Motorists & General Insurance Co Pty Ltd* [1976] 1 NSWLR 669; *The "Halcyon the Great"* [1984]

12 Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor: Provided always that if the debtor, trustee, or other person liable in respect of such debt or chose in action has had notice that such assignment is disputed by the assignor or anyone claiming under the assignor, or of any other opposing or conflicting claims to such debt or chose in action, the debtor, trustee or other person liable shall be entitled, if he or she thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he or she may, if he or she thinks fit, pay the same into court under and in conformity with the provisions of the Acts for the relief of trustees.

[6-030] *'Legal chose in action' includes 'equitable chose in action': the older cases*

The section adopts s 25(6) of the Judicature Act 1873 (UK) (now s 136 of the Law of Property Act 1925 (UK)). It has equivalents in every Australian jurisdiction.[46]

The function of the section is to reform procedure. Before 1873 (and to this day[47]), where *equitable* choses in action were assigned, assignees could bring proceedings to recover them in their own names, that is, without joining the assignor. But before 1873, an assignee of a *legal* chose in action was obliged to join the assignor in proceedings to enforce the assignee's rights against the debtor — as plaintiff if the assignor agreed, as defendant if the assignor did not agree. The assignee had to indemnify the assignor against costs.[48] The section represents a widening of earlier exceptions to this cumbersome procedure: negotiable interests became assignable under the law merchant and statute made policies of life and marine assurance assignable.[49] The section made that unnecessary. The assignee could come to court 'not in the name of the assignor but in his own name as assignee'.[50] It applies to the assignment of a 'debt or other legal chose in action'. But it contemplates that the 'person liable in respect of such debt or chose in action' could be so only if the expression 'legal chose in action' included, for the purposes of the section, equitable choses in action. That equitable choses were included might well be inferred from the original context of the provisions in s 25 of the Judicature Act 1873: it might

1 Lloyd's Rep 283; *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] QB 825; [2001] 3 All ER 257 at [74]; *Austino Wentworthville Pty Ltd v Metroland Australia Ltd* (2013) 93 ACSR 297; [2013] NSWSC 59 at [41]–[62]. The section does not apply to assignments of part only of a larger debt, which can be made valid equitable assignments: *Jones v Humphreys* [1902] 1 KB 10 at 13, 14; *Forster v Baker* [1910] 2 KB 636 at 638–40; *Re Steel Wing Co Ltd* [1921] 1 Ch 349 at 354; *G & T Earle (1925) Ltd v Hemsworth RDC* (1928) 44 TLR 605; *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81; *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584; [1953] 1 All ER 843; *Sandford v D V Building & Constructions Co Pty Ltd* [1963] VR 137 at 139; *Deposit Protection Board v Dalia* [1994] 2 AC 367 at 380; [1994] 1 All ER 539 at 548. On 'subject to all equities', see *Re Harry Simpson & Co Pty Ltd and Companies Act 1936* [1964-5] NSWR 603 at 605. Consideration is not needed: *Harding v Harding* (1886) 17 QBD 442; *Re Westerton; Public Trustee v Gray* [1919] 2 Ch 104; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 5. The function of the notice requirement is to enable the debtor to know whom to pay in future: *Denny Gasquet and Metcalfe v Conklin* [1913] 3 KB 177 at 180; *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1969] 1 QB 607 at 613; [1968] 3 All ER 824 at 826. An assignment which fails to satisfy s 12 in any of these respects may nonetheless be a valid equitable assignment.

46. Civil Law (Property) Act 2006 (ACT) s 205; Law of Property Act 2000 (NT) s 182; Property Law Act 1974 (Qld) ss 199, 200; Law of Property Act 1936 (SA) s 15; Conveyancing and Law of Property Act 1884 (Tas) s 86; Property Law Act 1958 (Vic) s 134; Property Law Act 1969 (WA) s 20.
47. See [6-515].
48. *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70; *Barbados Trust Co v Bank of Zambia* [2007] 1 Lloyd's Rep 495.
49. Policies of Assurance Act 1867 (UK); Policies of Marine Assurance Act 1860 (UK).
50. *Re Westerton; Public Trustee v Gray* [1919] 2 Ch 104 at 133 per Sargant J. See also *Marchant v Morton, Down & Co* [1901] 2 KB 829 at 832; *Torkington v Magee* [1902] 2 KB 427 at 430, 435; *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 at 121.

be said that s 25(6) established one test, applicable in all courts, for the effective assignment of all choses in action, whether legal or equitable. In *King v Victoria Insurance Co Ltd*,[51] their Lordships, while not deciding the question, did not dissent from the opinion of the Supreme Court of Queensland that 'the term "legal chose in action" includes all rights the assignment of which a Court of Law or Equity would before the Act have considered lawful'. Farwell J was of that opinion.[52] And in *Re Pain; Gustavson v Haviland*,[53] Younger J said:

> [T]he assignments in the present case [of an interest under a will] do fall within that section; for, although prior to that Act the interest of the plaintiff in this case, being properly recoverable only in a Court of Equity, was strictly 'a chose in equity', not cognisable in a Court of Law, the expression in the section 'legal choses in action' includes choses in equity within its scope.

[6-035] *'Legal chose in action' includes 'equitable chose in action': the High Court*

In Australia, 'legal chose in action' includes 'equitable chose in action'. That is, apparently, established by the following observations of Barwick CJ and Stephen, Mason and Wilson JJ in *Federal Commissioner of Taxation v Everett*:[54]

> A partner's interest in the partnership is a chose in action assignable in whole or in part.[55] The better opinion seems to be that, though the interest of a partner is an equitable interest, it may be assigned under s 12 of the Conveyancing Act 1919 (NSW) ... The interest, being a chose in action, falls within the expression 'debt or other legal chose in action' because the section, in providing that notice shall be given to a trustee 'as a person liable in respect of such debt or other legal chose in action', appears to contemplate the assignment by a beneficiary of an equitable chose in action against a trustee. There would be no point in referring to a trustee if the section made provision only for the assignment by strangers to the trust of debts owing by, and choses against, persons who happen to be trustees. The expression 'legal chose in action' may be read as 'lawfully assignable chose in action'.[56]

Federal Commissioner of Taxation v Everett concerned a voluntary assignment by a partner of part of his interest in the partnership of which he was a member. The assignment was by deed, and notice was given to the other partners. Thus, the observations just quoted were unnecessary to the decision that the assignment was effective: s 12 has no application to part of a chose in action, as their Honours recognised.[57] And in any case, the requirements of the section, even if it did apply, were satisfied. But, obiter or not, those observations must be accepted as the concluded view of the court. As shown above,[58] they are consistent with such earlier authority as there is. In Australia, at least, they must be taken to represent the law. A contrary argument has been put thus:[59]

> The 'mischief' that s [12] was intended to cure was the need to join the assignor in those cases where the assignor's presence was otiose. Yet ... it has never been necessary, on substantive grounds, to join the assignor where there is an equitable assignment of an equitable chose. There is, thus, no mischief for s [12] to cure, so far as equitable choses in action are concerned. The better view, it is therefore suggested, is that s [12] extends only to *legal* choses in action.

This argument is not available in Australian courts other than the High Court.

51. [1896] AC 250 at 254, 256.
52. *Manchester Brewery Co v Coombs* [1901] 2 Ch 608 at 619.
53. [1919] 1 Ch 38 at 44. See *Torkington v Magee* [1902] 2 KB 427 at 430–1; *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 at 117, 121; [1964] 1 All ER 216 at 228, 230–3. See also O R Marshall, *The Assignment of Choses in Action*, Pitman, London, 1950, pp 163–8 and cases there cited.
54. (1980) 143 CLR 440 at 447; 28 ALR 179 at 182–3.
55. *Hocking v Western Australian Bank* (1909) 9 CLR 738 at 743.
56. The court referred to O R Marshall, *The Assignment of Choses in Action*, Pitman, London, 1950, pp 162–8 and the cases there cited; to the 1st edition of this work [605]–[608]; and to *Re Pain; Gustavson v Haviland* [1919] 1 Ch 38 at 44.
57. (1980) 143 CLR 440 at 447; 28 ALR 179 at 183: see [6-175].
58. See [6-030].
59. M Smith and N Leslie, *The Law of Assignment*, 2nd ed, Oxford University Press, Oxford, 2013, [16.12] (emphasis in original).

[6-040] *Consequences of s 12 applying to equitable choses in action*

Accepting that s 12 applies to equitable choses in action, what follows? Not, surely, that s 12, in relation to equitable choses, is 'mandatory', in the sense that unless all the steps that it lays down are followed there can be no effective voluntary equitable assignment of an equitable chose in action. That would be a revolutionary conclusion. It is also an unnecessary conclusion. That is because it has long been well established that notice is not necessary to perfect an equitable assignment of an equitable interest.[60] In its application to legal choses in action, the section is, of course, mandatory in that sense. That is because there was previously, and is, no general means at common law of assigning legal choses in action. The section provides the only mechanism by which such an assignment may be made. However, equitable interests (including equitable choses in action) could be assigned apart from the section.[61] Therefore, to conclude that the section, if 'mandatory' in relation to the legal assignment of legal choses, is equally so in relation to the equitable assignment of equitable choses, is not a necessary conclusion. That conclusion would also have at least one very surprising consequence. The result of what appears to be the established version of the principle for which *Milroy v Lord*[62] stands is that even if notice is not given there can be a voluntary assignment of a legal chose in action which is complete in equity before it is complete at law. It would be odd if s 12 resulted in a principle more stringent in relation to equitable interests than in relation to legal interests. It would perhaps be even more strange if it were now the law that *Fortescue v Barnett*[63] had been revived by *Federal Commissioner of Taxation v Everett* in the form of *Milroy v Lord* in its application to equitable interests assignable under s 12. There is one further comment to be made. A legal chose in action may not at law, though it may in equity,[64] be assigned for consideration, except under s 12. To be consistent must it now be said that equitable choses in action may not be assigned for consideration except by complying with s 12? There is no answer to what Lord Macnaghten said in *William Brandt's Sons & Co v Dunlop Rubber Co Ltd*:[65] 'Why that which would have been a good equitable assignment before the statute should now be invalid and inoperative because it fails to come up to the requirements of the statute, I confess I do not understand. The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree'.

[6-045] *Section 12 as a non-exclusive mode of assigning equitable choses in action*

Thus s 12 provides a way in which equitable choses in action may be assigned (as it provides a way in which, at law, legal choses in action may be assigned). But it is not the only way in which this may be done. That conclusion is not inconsistent with the dicta in *Federal Commissioner of Taxation v Everett*.[66] Their Honours say that 'though the interest of a partner is an equitable interest, it *may* be assigned under s 12 …'[67] (emphasis added). And they cite, without apparent disapproval, the first edition of this work, where the same conclusion is reached.[68] If that conclusion means that s 12 in its application to equitable choses is otiose, so be it. That is a good deal less inconvenient than what follows from the contrary conclusion. That conclusion also has the merit that it renders unnecessary the classification of equitable

60. See [6-435], [8-145].
61. See [6-015].
62. (1862) 4 De G F & J 264; 45 ER 1185: see [6-080]–[6-150].
63. (1834) 3 My & K 36; 40 ER 14. See below at [6-165]–[6-170].
64. See [6-050].
65. [1905] AC 454 at 461; [1904-7] All ER Rep 345 at 350.
66. (1980) 143 CLR 440; 28 ALR 179.
67. (1980) 143 CLR 440 at 447; 28 ALR 1798 at 182.
68. See the 1st edition, [605]–[608].

interests into those, on the one hand, which are equitable choses in action, and those (if any), on the other, which are not.[69]

It is probable that 'assignment' in s 12 means 'equitable assignment', for that was the only type of assignment which existed when the precursor to s 12 was introduced into the law. The enactment presupposes an 'assignment' and the rules by which that assignment can occur. The rules are equitable rules and the assignment is an equitable assignment of a legal chose in action. Section 12 takes particular equitable assignments and attaches to them the consequences for which the enactment provides so as to overcome the constraints of procedure relating to equitable assignments.[70] Hence s 12 does not purport to make assignable that which was not assignable in equity before the predecessor to s 12 was enacted.

C Equitable Assignment of Legal Property

Equitable assignment of legal property for consideration

[6-050] *Effect of payment or execution of consideration: some cases*

A purported assignment, for value, of legal property, which fails at law, or a contract, for value, to assign legal property, effects an equitable assignment when the consideration is paid or executed. This is a case where equity regards as done that which ought to be done.[71] The Privy Council has described the principles as 'fairly fundamental'.[72] Lord O'Hagan called them 'rudimental'.[73] The effect of a valid equitable assignment of a legal interest in property after payment or execution of the consideration is to constitute the assignor a trustee of the property for the benefit of the assignee.[74] It is not relevant in that case to ask whether the contract (or the purported immediate assignment, treated as a contract) is one of a kind of which specific performance would be ordered. Whether it is or not, equity, once the assignee has done what is required of the assignee, regards that as done which ought to be done by the assignor.[75]

The position of the assignee after contract, but before the consideration is paid or executed, is rather more obscure. This has led to attacks on the relevant principles.[76] But in the end the attacks either fail or pose no substantive difficulties.[77] It is said that the assignee has, even then, an equitable interest in the property, and that the assignor holds the property as

69. For an example of a statutory enactment which, unlike s 12, prohibits all forms of assignment other than that stipulated, see *Re Fry* [1946] Ch 312; [1946] 2 All ER 106.
70. P G Turner, 'Legal Assignment of Rights of Restricted Admissibility' [2008] *LMCLQ* 306.
71. *Holroyd v Marshall* (1862) 10 HLC 191; 11 ER 999; *Tailby v Official Receiver* (1888) 13 App Cas 523; [1886-90] All ER Rep 486; *Federal Cmr of Taxation v Betro Harrison Constructions Pty Ltd* (1978) 20 ALR 647 at 650–1. And see the analysis of McPherson J in *Re Androma Pty Ltd* [1987] 2 Qd R 134 at 148–50 (see *corrigenda* at [1989] 2 Qd R v).
72. *Sookraj v Samaroo* (2004) 65 WAR 401 at [15].
73. *Shaw v Foster* (1872) LR 5 HL 321 at 349.
74. *Cator v Croydon Canal Co* (1843) 4 Y & C Ex 593 at 594; 160 ER 1149 at 1150; *Fulham v M'Carthy* (1848) 1 HLC 703 at 722; 9 ER 937 at 945; ABB *Australia Pty Ltd v Federal Cmr of Taxation* (2007) 162 FCR 189 at [59]–[60].
75. See [6-190] ff.
76. See, for example, D Waters, *The Constructive Trust*, The Athlone Press, London, 1964, pp 75–143; R Chambers, 'The Importance of Specific Performance' in S Degeling and J Edelman (eds), *Equity in Commercial Law*, Lawbook Co, Sydney, 2005, p 433; W Swadling, 'The Vendor-Purchaser Constructive Trust' in S Degeling and J Edelman (eds), *Equity in Commercial Law*, Lawbook Co, Sydney, 2005, pp 475–6, 487–8; W Swadling, 'The Fiction of the Constructive Trust' (2011) 64 *CLP* 399 at 407; J McGhee (ed), *Snell's Equity*, 32nd ed, Thomson Reuters (Legal) Ltd, London, 2010, [5-030], [24-002]–[24-004]. See also S Worthington, *Proprietary Interests in Commercial Transactions*, Clarendon Press, Oxford, 1996, pp 194–8, 207–10.
77. P G Turner, 'Understanding the Constructive Trust Between Vendor and Purchaser' (2012) 128 *LQR* 582 develops the ensuing points in much more detail.

constructive trustee for the assignee.[78] Deane J described statements of this kind as 'inaccurate and misleading'.[79] He said:[80]

> For limited purposes, the distinction between legal title and beneficial ownership may provide a useful reference point in describing the position of the ordinary unpaid vendor of land under an uncompleted contract of sale. However, and with due respect to some past statements of high authority to the contrary, it is wrong to characterize the position of such a vendor as that of a trustee. True it is that, pending payment of the purchase price, the purchaser has an equitable interest in the land which reflects the extent to which equitable remedies are available to protect his contractual rights and that the vendor is under obligations in equity which attach to the land. Nonetheless, the vendor himself retains a continuing beneficial interest in the land which transcends any 'lien'[81] for unpaid purchase money to the extent to which he may be entitled in equity after completion. Pending completion, he is beneficially entitled to possession and use. Pending completion, he is beneficially entitled to the rents and profits. If the purchaser enters upon the land without the vendor's permission and without authority under the contract, the vendor can maintain, for his own benefit, an action for trespass against the purchaser. While the practical significance of those continuing beneficial rights of the vendor may vary according to particular circumstances (eg whether completion is already overdue or is not due for some lengthy period), it is both inaccurate and misleading to speak of the unpaid vendor under an uncompleted contract as a trustee for the purchaser.[82] There is authority for the view that, after completion has actually taken place, some of the equitable rights of the purchaser, which (in their entirety) then constitute beneficial ownership, relate back to the date of the contract. But there is no relation back of beneficial ownership in the sense that the vendor is retrospectively deprived of his beneficial right, pending payment of the full purchase price, to the possession, use, rents and profits of the land. Regardless of whether his rights be viewed in the perspective of foresight (ie before completion) or hindsight (ie after completion), the ordinary unpaid vendor of land is not a trustee of the land for the purchaser. Nor is it accurate to refer to such a vendor as a 'trustee sub modo' unless the disarming mystique of the added Latin is treated as a warrant for essential misdescription.

The purchaser's equitable interest is certainly unusual. In the absence of contrary agreement, the vendor is entitled to retain possession until completion, and to keep income arising before that time.[83] The equitable interest, or trust, can arise only if the contract is one of a kind of which specific performance might be ordered. It has been said that the statement that there is a trust is 'only true if and *in so far* a Court of Equity would under all the circumstances of the case grant specific performance of the contract'.[84] It has been said that the interest of the assignee is 'an interest commensurate with the relief which equity would give by way of specific performance'.[85] It has been said that its value is commensurate only with the amount of purchase price paid.[86] The interest of the assignee is defeasible, because the contract may be avoided or rescinded. The interest of the assignee is conditional, at least upon performance by the assignee of the assignee's obligation to pay the price. It may also be conditional on

78. *Lysaght v Edwards* (1876) 2 Ch D 499 at 506.
79. *Kern Corp Ltd v Walker Reid Trading Pty Ltd* (1987) 163 CLR 164 at 192; 71 ALR 417 at 435.
80. (1987) 163 CLR 164 at 191–2; 71 ALR 417 at 435.
81. This is a reference to the possibility that where the purchase money is to be paid by instalments, some not yet due, the court may grant to the vendor a decree of specific performance and a lien in relation to the future instalments: *Nives v Nives* (1880) 15 Ch D 649.
82. See generally *Rayner v Preston* (1881) 18 Ch D 1 at 10–11 and D W M Waters, *The Constructive Trust*, The Athlone Press, London, 1964, pp 74 ff.
83. *Cuddon v Tite* (1858) 1 Giff 395; 65 ER 971.
84. *Howard v Miller* [1915] AC 318 at 326 per Lord Parker of Waddington (emphasis added). See also *Bevin v Smith* [1994] 3 NZLR 648 at 659–65; *Jerome v Kelly (Inspector of Taxes)* [2004] 2 All ER 835; [2004] 1 WLR 1409 at [29], [32].
85. *Howard v Miller* [1915] AC 318 at 326 per Lord Parker of Waddington; *Stern v McArthur* (1988) 165 CLR 489 at 537; 81 ALR 463 at 496; *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; 201 ALR 359 at [53]–[56]. More recently this has been qualified. The interest has been said to be commensurate with the purchaser's ability to obtain any equitable relief, such as an injunction: *Legione v Hateley* (1983) 152 CLR 406 at 429; 46 ALR 1 at 29; *Stern v McArthur* (1988) 165 CLR 489 at 522–3; 81 ALR 463 at 485.
86. *Chief Cmr of Stamp Duties v Paliflex Pty Ltd* (1999) 47 NSWLR 382 at 390.

consent from a government body or official.[87] The trust is unusual, in that it is difficult, if not impossible, to point to any duties of a fiduciary character which the assignor owes to the assignee.[88] It is not surprising that judges have taken refuge in phrases such as 'trustee *sub modo*' by way of an attempt (not a very productive attempt, perhaps) to describe it.[89]

[6-055] *Effect of payment or execution of consideration: analysis*

It is submitted that the position may be analysed thus.

The function of the vendor-purchaser 'trust' is to protect the interest that the vendor and the purchaser each have in the performance of the contract. Most aspects of that protection can be found in some 'equity' — some claim, right, privilege or immunity. Some of these equities have proprietary characteristics. Taken together the equities can be viewed as equitable property. From the points of view of the vendor and the purchaser respectively, the equitable property can be seen as distributed between vendor and purchaser. All the equities but the purchaser's lien for the repayment of payments of so much of the purchase price as has been paid protect the respective interests of the parties in having the contract performed. The purchaser's lien protects the purchaser's interest in the event that the contract is not performed.

In *Jerome v Kelly (Inspector of Taxes)*,[90] Lord Walker said:

> It would … be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. … The provisional assumptions may be falsified by events, such as rescission of the contract (either under a contractual term or a breach). As the contract proceeds to completion the equitable interests can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full.

This account of the position may be developed further as follows:[91]

> While the purchaser's rights 'depend on' specific performance, those rights are not a single response to a single event. They form a plural 'response', because various distinct equities arise at different stages as the contract is performed. Additional facets accrete to the purchaser's interest as the contract matures towards completion, strengthening the protection of the performance interest. Further, these equities 'respond' to plural 'events'; in particular, not only the set of facts to which equity responds by decreeing specific performance, but also to various reduced sets of facts. Many facts to which equity may respond by decreeing (or refusing) specific performance will be unknowable when equities that anticipate specific performance arise in the purchaser's favour at an early stage in the contract's performance. When defining the sets of facts to which such

87. *Re Rudge; Curtain v Rudge* [1949] NZLR 752; *McWilliam v McWilliams Wines Pty Ltd* (1964) 114 CLR 656 at 661; *Bevin v Smith* [1994] 3 NZLR 648 at 660–1.
88. *Re Puntoriero; Ex parte Nickpack Pty Ltd* (1991) 104 ALR 523 at 530–1; *Chief Cmr of Stamp Duties v ISPT Pty Ltd* (1998) 45 NSWLR 639 at 654–5 (for a detailed analysis); *Jerome v Kelly (Inspector of Taxes)* [2004] 2 All ER 835; [2004] 1 WLR 1409 at [32].
89. *Chang v Registrar of Titles* (1976) 137 CLR 177 at 184; 8 ALR 285 at 291; see generally D W M Waters, *The Constructive Trust*, The Athlone Press, London, 1964, pp 74–143; *Howard v Miller* [1915] AC 318; *McMahon v Sydney County Council* (1940) 40 SR (NSW) 427; *Oughtred v IRC* [1960] AC 206; [1959] 3 All ER 623; *Haque v Haque (No 2)* (1965) 114 CLR 98 at 124–5; [1966] ALR 553 at 567 per Kitto J (the contract had 'to an extent' transferred beneficial ownership; the vendor was 'in progress towards' trusteeship); *Brown v Heffer* (1967) 116 CLR 344; [1968] ALR 89; *Austin v Sheldon* [1974] 2 NSWLR 656; *Legione v Hateley* (1983) 152 CLR 406; 46 ALR 1; *KLDE Pty Ltd v Cmr for Stamp Duties (Qld)* (1983) 155 CLR 288 at 296–7, 300–1; 56 ALR 337 at 342–3, 346–7; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 610; 78 ALR 1 at 3; *Niord Pty Ltd v Adelaide Petroleum NL* (1990) 54 SASR 87 at 104; *Australian Agricultural Co v Oatmont Pty Ltd* (1992) 8 ACSR 255 at 260. And see [7-150]–[7-195], [20-230].
90. [2004] 2 All ER 835; [2004] 1 WLR 1409 at [32].
91. P G Turner, 'Understanding the Constructive Trust Between Vendor and Purchaser' (2012) 128 *LQR* 582 at 584 (one footnote omitted). See also D Jensen, 'Reining in the Constructive Trust' (2010) 32 *Syd L Rev* 87 at 99–102.

equities respond, courts ignore unknowable facts. The result is a range of staple tests of specific enforceability, one each for most of the equities that arise between vendor and purchaser. The stability of these tests in turn stabilises the equitable property distributed between vendor and purchaser under the vendor-purchaser trust.

There are four 'equities' or rights which form part of the purchaser's interest.

First, the purchaser has a right in relation to land, enforceable against third parties and transferable to third parties. Thus the purchaser can claim priority over holders of competing interests by enforcing the vendor's promise to convey on completion.[92] And the purchaser can assign, charge and devise the land. It will pass as land on the purchaser's intestacy.[93]

The second of the purchaser's 'equities' is an equitable right that the vendor exercise due care to preserve and maintain the land pending completion.[94]

The third of the purchaser's 'equities' is an equitable right to rents and profits received by the vendor between the agreed date for completion and the actual date of completion.[95] In contrast, the vendor is entitled to rents and profits between the date of contract and the agreed date for conveyance.[96] With this might be coupled the right of the purchaser to an account from the vendor of any moneys obtained by a wrongful sale to another purchaser.[97]

The fourth of the purchaser's 'equities' is a lien for repayment of the purchase price in the event of non-performance.[98]

In contrast, the vendor has the following rights between contract and completion: to receive rents before completion, to retain damages recoverable against others for wrongs to the vendor's land before completion, to receive the purchase money on completion, and, in default, to enforce a lien for the purchase money.[99] The vendor's lien is an equitable interest.[100]

Depending on the course of events, at earlier stages after contract but before completion the limits in the remedies available to the purchaser mean that even if the purchaser can be described as having 'beneficial ownership',[101] it is beneficial, or equitable, ownership of a relatively slight kind. The purchaser can alienate the interest, or seek to assert its priority over the interest of another purchaser. But the purchaser at that stage has no right to the beneficial enjoyment of the land itself or its income.[102] The purchaser cannot be said at that stage to have 'full beneficial ownership'.[103]

The times at which each of these equities arises may differ. The extent to which each may be enforced may differ. At a particular time some may be enforceable only by negative injunction.

92. *Jerome v Kelly (Inspector of Taxes)* [2004] 2 All ER 835; [2004] 1 WLR 1409 at [29]; *Perpetual Trustee Co Ltd v Smith* (2010) 186 FCR 566; 273 ALR 469 at [41].
93. *Cmrs of Inland Revenue v G Angus & Co* (1889) 23 QBD 579 at 595.
94. *Englewood Properties Ltd v Patel* [2005] 3 All ER 307; [2005] 1 WLR 1961 at [54], [58]. See also *Lysaght v Edwards* (1876) 2 Ch D 499 at 507; *Earl of Egmont v Smith* (1877) 6 Ch D 469 at 475–6; *Clarke v Ramuz* [1891] 2 QB 456; *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264 at 269; *Abdulla v Shah* [1959] AC 124 (duty not to create tenancies on unfavourable terms).
95. *Cuddon v Tite* (1858) 1 Giff 395; 65 ER 971.
96. *Englewood Properties Ltd v Patel* [2005] 3 All ER 307; [2005] 1 WLR 1961 at [47]. See also *Lysaght v Edwards* (1876) 2 Ch D 499 at 507–8; *Re Hamilton-Snowball's Conveyance* [1959] Ch 308; [1958] 2 All ER 319 (statutory compensation for damage caused by requisition, unless dealt with by the contract).
97. *Lake v Bayliss* [1974] 2 All ER 1114; [1974] 1 WLR 1073.
98. *Rose v Watson* (1864) 10 HLC 672 at 679, 684; 11 ER 1187 at 1190, 1192. On purchaser's and vendor's liens, see S Worthington, *Proprietary Interests in Commercial Jurisdictions*, Clarendon Press, Oxford, 1996, pp 222–42.
99. *Kern Corp Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164 at 191–2; 71 ALR 417 at 435 quoted above at [6-050]. See also *Shaw v Foster* (1872) LR 5 HL 321 at 338 ('the paramount right of the vendor and trustee to protect his own interest as vendor of the property').
100. *Perpetual Trustee Co Ltd v Smith* (2010) 186 FCR 566; 273 ALR 469 at [78] (conceded).
101. *Lysaght v Edwards* (1876) 2 Ch D 499 at 506 per Sir George Jessel MR.
102. *Jerome v Kelly* [2004] 2 All ER 835; [2004] 1 WLR 1409 at [32].
103. *Road Australia Pty Ltd v Cmr of Stamp Duties* [2001] 1 Qd R 327 at [19].

At other times they may be enforceable by a positive remedy like specific performance. Thus immediately after the contract, the purchaser may be able to restrain the completion of a contract made by the vendor with another purchaser, pending argument about, and depending on the court's view as to, such questions as whether the contract sued on was in truth made, and priorities between the two purchasers.[104] That stands in contrast with the position which arises when the purchaser, being ready, willing and able to complete by paying the purchase price, obtains a decree of specific performance. The position is a fortiori when the purchaser has already paid the purchase price, for at that stage the purchaser may be described as 'absolute beneficial owner', and the vendor as a 'bare trustee'.[105]

It is sometimes claimed that it is circular to say that the 'interest' of the purchaser is commensurate with the availability of specific performance. It is submitted that that is not so.

There is a distinction between the type of specific enforceability which a purchaser has to show in order to vindicate a right in the period between contract and conveyance, and the type of specific enforceability which a purchaser has to show in order to obtain an order that there be a conveyance, that is, a decree of specific performance. The expression 'specific enforceability' thus has two meanings for two different purposes.

Each of the four 'equities' summarised above which form part of the purchaser's interest in the land depends on demonstrating that there is a contract of sale, that it is not illegal in formation, that it will not be illegal in performance, that it is a contract for valuable consideration, and that the contract is of a type which is capable in due course of being the subject of a decree of specific performance (that is, a sale of land). But when the purchaser is seeking to vindicate one of those four 'equities', it is not necessary to show that the vendor has a good title (or that the purchaser has waived the vendor's obligation to provide it), that the purchaser is ready, willing and able to perform, that there is no defence to an application for a decree of specific performance, and that there is no discretionary factor precluding the decree. Those latter matters are not relevant at the earlier stage of considering enforcement of one of the four 'equities' and at the earlier stages of assessing what rights the purchaser acquired on entry into the contract. They are relevant only when a decree of specific performance is sought. At those earlier stages provisional assumptions will be made in the purchaser's favour that in due course the purchaser will be able to establish what is needed to obtain a decree of specific performance and negate what might prevent it. The fact that when the purchaser in due course applies for a decree of specific performance, it turns out that the application must fail for some reason, does not affect the existence of the purchaser's four 'equities' up to that point, and that fact renders the existence of the four 'equities' thereafter useless. There is sense in making provisional assumptions about uncertain future considerations like what matters can be established in a suit for specific performance. The sense in making the provisional assumptions rests in the circumstance that sometimes it will be impossible to establish those considerations at the earlier time when the purchaser may be seeking to indicate one of the 'equities'. For example, a purchaser may not be ready, willing and able to perform before the contracted date for completion even though that purchaser may be able to prove readiness, willingness and ability on that date and on the date of the suit. The 'provisional assumptions' are those to which Lord Walker of Gestingthorpe referred in the passage from *Jerome (Inspector of Taxes) v Kelly*[106] quoted above. Sir Andrew Morritt C put the point in different words. Speaking of the period between contract and conveyance, he referred to 'the theoretical judicial intervention constituted by the availability of the discretionary remedy of specific performance'. He continued: 'Without that theoretical intervention the contract would remain just that; it could not constitute a disposition of any interest in the land agreed

104. *Hadley v The London Bank of Scotland* (1865) 3 De G J & S 63; 46 ER 562.
105. *Lloyds Bank plc v Carrick* [1996] 4 All ER 630 at 637.
106. [2004] 2 All ER 835; [2004] 1 WLR 1409 at [32].

to be sold'.[107] And Deane J's statement that before completion 'the purchaser has an equitable interest in the land which reflects the extent to which equitable remedies are available to protect his contractual rights'[108] is correct in using the expression 'equitable remedies', not 'a decree of specific performance': before the time for completion and the time of a suit for specific performance, negative injunctions are available to enforce the purchaser's 'equities', even if a decree of specific performance is not yet capable of being granted.[109]

Using the language of trust to describe the relationship between vendor and purchaser in the interval that separates contract and conveyance is out of favour. But so long as the limited and specific purposes served by calling a particular aspect of the relationship a 'trust' relationship are remembered, the nomenclature is not incorrect,[110] though there are certainly disadvantages as well as advantages in its use. The disadvantages include confusion. The advantages include highlighting relevant similarities with express trusts. However, when the contract of sale is made, it can be said that a trust has been created,[111] because, subject to defences, any later purchaser will be bound by the first purchaser's interest. When the agreed time for conveyance arises, the purchaser's 'trust' becomes stronger as the vendor's rights before that day terminate. The payment of the full purchase price causes the purchaser's 'trust' to strengthen further, because it increases the likelihood that a suit for a decree of specific performance will succeed. At each of these stages the purchaser is a beneficiary under a 'constructive trust' for the purposes of exceptions created to the Statute of Frauds by such doctrines as the doctrine of part performance.

[6-060] *Consequences of the equitable rule when there is non-compliance with requirements at law*

A purported immediate assignment of a legal right or title may fail for want of compliance with the requirements of the common law, or statute, as to its effective transfer. The registered proprietor of an estate in fee simple in land under the Torrens system may, for instance, purport to convey that estate by deed. The deed will be ineffective at law to convey the estate: that may be done only in the manner prescribed by the legislation. But if valuable consideration is given, the conveyance, though ineffective at law, is effective in equity.

[6-065] *Consequences of the equitable rule where the property is incapable of assignment at law*

Similarly, a purported immediate assignment of a legal right or title may fail because at common law that right or title may not be assigned. The whole of a debt is not assignable at law; a fortiori, part is not either.[112] Part of a debt may be assigned in Western Australia, by statute.[113] A purported assignment, for consideration which is paid or executed, of part of a debt or other chose in action is, however, effective in equity. The voluntary equitable assignment of part of a debt or other chose in action is discussed below.[114] A charge on a fund operates as a partial equitable assignment — an assignment of part of the debt to the extent of the charge.[115]

107. *McLaughlin v Duffill* [2010] Ch 1 at [26].
108. *Kern Corp Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164 at 191; 71 ALR 417 at 435.
109. See *Hewett v Court* (1983) 149 CLR 639 at 665; 46 ALR 87 at 106–7.
110. For example, *Riverton City Ltd v Haddad* (1986) 40 WIR 236; *Jerome (Inspector of Taxes) v Kelly* [2004] 2 All ER 835; [2004] 1 WLR 1409 at [29]–[32].
111. *Green v Smith* (1738) 1 Atk 572 at 573; 26 ER 360.
112. *Re Steel Wing Co Ltd* [1921] 1 Ch 349; [1920] All ER Rep 292; *Williams v Atlantic Assurance Co* [1933] 1 KB 81; [1932] All ER Rep 32; *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584; [1955] 1 All ER 843; *Shepherd v Federal Cmr of Taxation* (1965) 113 CLR 385; [1966] ALR 969; *Re Ward; Ex parte Official Trustee in Bankruptcy v Dabnas Pty Ltd* (1984) 3 FCR 112 at 119–22; 55 ALR 395 at 403–6; *McIntyre v Gye* (1994) 51 FCR 472 at 479; 122 ALR 289 at 295; *Deposit Protection Board v Dalia* [1994] 2 AC 367 at 380–1; [1994] 1 All ER 539 at 548.
113. See [6-175].
114. See [6-175], [6-180].
115. *Durham Bros v Robertson* [1898] 1 QB 765 at 769; [1895-9] All ER Rep Ext 1683 at 1685–6; *Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd* [1995] 3 All ER 987 at 991–2; [1995] 1 WLR 1140 at 1144.

[6-070] *What 'consideration' is necessary?*

Generally, it can be said that the consideration necessary to support an assignment of this kind is consideration sufficient to support a simple contract. This was not always the law. The common law objected to assignments of choses in action as involving maintenance. Equity took the view that there was no maintenance if the assignor was, at the time of the assignment, indebted to the assignee. Thus it was necessary, and it was also sufficient, to prove a pre-existing debt.[116] It is no longer either necessary or sufficient. In *Glegg v Bromley*,[117] Mrs Glegg had commenced an action against Lady Bromley for slander. She was at the time indebted to her husband, Captain Glegg, to the extent of about £7000. Mrs Glegg and her husband made a deed. The deed recited the indebtedness. It recited a request by the husband for further security. It recited her agreement to furnish it. And it witnessed that in pursuance of that agreement and in consideration of the indebtedness, she assigned to him 'all that the interest sum of money or premises to which she is or may become entitled under or by virtue of the said action of *Glegg v Bromley* or under or by virtue of any verdict compromise or agreement which she may obtain or to which she may become a party in or consequent upon the said action …'. The Court of Appeal held that that was an effective assignment. The existence of the debt was not itself sufficient consideration. But there was to be inferred a forbearance to sue on the part of the husband, and that was sufficient. As Parker J put it:[118]

> I think that where a creditor asks for and obtains a security for an existing debt the inference is that, but for obtaining the security, he would have taken action which he forbears to take on the strength of the security, and I cannot think that this inference is rebutted by the fact that the reason why he asks for the further security is his desire to obtain a benefit for himself at the expense of another creditor who may shortly be in a position to take the subject-matter of the proposed security in execution.

Equitable assignment: purported assignment of legal property assignable at law but not complying with requirements at law and unsupported by consideration

[6-075] *The problem*

Equity does not assist volunteers. For that reason it would not be surprising if the rule were that a purported gift of property assignable at law, which failed at law because it did not fully comply with the legal requirements, failed equally in equity because equity would not intervene at the suit of the intended assignee (a volunteer) to compel the assignor to complete the gift. The position is, however, rather more complex.

[6-080] *Milroy v Lord*

The leading authority is the judgment of Turner LJ in the Court of Appeal in Chancery in *Milroy v Lord*.[119] Turner LJ did not deliver the only judgment in that case, and earlier authority was not lacking.[120] But later authority has consistently treated Turner LJ's judgment as the starting point. It would be profitless to take a different course here.

The facts were that Medley executed a deed whereby he purported to transfer to Lord as trustee for certain persons including the plaintiff, without consideration, 50 shares in the Louisiana Bank. The deed was not an effective transfer at law; that could be effected only by

116. See S J Bailey, 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1932) 48 *LQR* 547 at 551–3; H A Hollond, 'Further Thoughts on Equitable Assignments of Legal Choses in Action' (1943) 59 *LQR* 129 at 130; *Norman v Federal Cmr of Taxation* (1963) 109 CLR 9 at 31; [1964] ALR 131 at 150.
117. [1912] 3 KB 474; [1911-13] All ER Rep 1138.
118. [1912] 3 KB 474 at 491; [1911-13] All ER Rep 1138 at 1147. See also *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 3; [1942] 1 All ER 404 at 406–7.
119. (1862) 4 De G F & J 264; 45 ER 1185.
120. *Noonan v Martin* (1987) 10 NSWLR 402 at 409–10.

the execution of a transfer and its registration in the books of the bank. Lord held a power of attorney from Medley under which he was empowered to execute a transfer of the shares and to receive dividends paid on them. He also held the share certificates. On Medley's death the question arose whether the shares, notwithstanding those facts, were assets in Medley's estate. It was held that they were. In coming to that conclusion, Turner LJ laid down two principles:[121]

> [1] I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for [those] purposes … but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift.
> [2] The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.

[6-085] *The second Milroy v Lord principle*

The second of those principles has given rise to little difficulty.[122] There was, of course, one problem inherent in it. If what purports to be an assignment of a legal right is ineffective to assign the right at law but (within the first of the principles) effects an assignment in equity the result is often thought to be that the right is thereafter held by the assignor on trust for the assignee. Does that mean that the assignment is, after all, ineffective in equity because what is expressed as a direct assignment takes effect as a trust? The answer, given by the English Court of Appeal in *Re Rose; Rose v Inland Revenue Commissioners*,[123] is no. Sir Raymond Evershed MR referred to the two principles laid down by Turner LJ in *Milroy v Lord* and continued:[124]

> Those last few sentences form the gist of the Crown's argument and on it is founded the broad, general proposition that if a document is expressed as, and on the face of it intended to operate as, a transfer, it cannot in any respect take effect by way of trust — so far I understand the argument to go. In my judgment, that statement is too broad and involves too great a simplification of the problem; and is not warranted by authority. I agree that if a man purporting to transfer property executes documents which are not apt to effect that purpose, the court cannot then extract from those documents some quite different transaction and say that they were intended merely to operate as a declaration of trust, which ex facie they were not; but if a document is apt and proper to transfer the property — is in truth the appropriate way in which the property must be transferred — then it does not seem to me to follow from the statement of Turner LJ that, as a result, either during some limited period or otherwise, a trust may not arise, for the purpose of giving effect to the transfer. The simplest case will, perhaps, provide an illustration. If a man executes a document transferring all his equitable interest, say, in shares, that document, operating, and intended to operate, as a transfer, will give rise to and take effect as a trust; for the assignor will then be a trustee of the legal estate in the shares for the person in whose favour he has made an assignment of his beneficial interest. And, for my part, I do not think that the case of *Milroy v Lord* is an authority which compels this court to hold that in this case — where, in the terms of Turner LJ's judgment, the settlor did everything which, according to the nature of the property comprised in the settlement, was necessary to be done by him in order to transfer the property — the result necessarily negatives the conclusion that, pending registration, the settlor was a trustee of the legal interest for the transferee.

121. (1862) 4 De G F & J 264 at 274–5; 45 ER 1185 at 1189–90.
122. Its application on the facts in *T Choitram International SA v Paragani* [2000] 1 All ER 696; [2000] 1 WLR 1 was questioned by M Smith and N Leslie, *The Law of Assignment*, 2nd ed, Oxford University Press, Oxford, 2013, [11.76]–[11.77]. The seeming contradiction of it by Rix LJ in *Barbados Trust Co v Bank of Zambia* [2007] 1 Lloyd's Rep 495 at [77] is best treated as being a dictum made per incuriam: none of the authorities he cites supports it.
123. [1952] Ch 499; [1952] 1 All ER 1217.
124. [1952] Ch 499 at 510–11; [1952] 1 All ER 1217 at 1222–3. See also *Re Rose* [1949] Ch 78; [1948] 2 All ER 971.

It is not easy, it may be interpolated, to see force in the comment of Bryson J in *Noonan v Martin*[125] that the 'Court of Appeal treats the share transfers' with which the case was concerned 'as a present declaration of trust'. The court was simply explaining that an assignment, otherwise effective under the first *Milroy v Lord* principle, does not nevertheless fail, because being effective it necessarily constitutes the assignor trustee for the assignee, by operation of the second *Milroy v Lord* principle.

[6-090] *The first Milroy v Lord principle*

The first of Turner LJ's principles has given rise to greater difficulty. The problem is the meaning to be assigned to the statement that 'the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary in order to transfer the property and render the settlement binding upon him'. In *Anning v Anning*,[126] the settlor, being close to death, executed a voluntary deed poll by which he purported to transfer his personal estate to his wife and children. That estate included a Crown lease, an interest in a grazing partnership, bank accounts, jewellery, furniture, implements, book debts and securities. Each of those items, except the interest in the partnership which was an equitable interest only, could have been transferred at law; and in the case of each of the items which the deed did not effectually assign at law the question was whether the deed did effectually assign it in equity. Each member of the court (Griffith CJ, Isaacs and Higgins JJ) held that the test was that laid down by Turner LJ in *Milroy v Lord*.[127] But each ascribed to that test a different meaning.

[6-095] *The three views in Anning v Anning*

Griffith CJ held that 'necessary' means necessary to be done by the settlor: that is to say, those things which the settlor, and only the settlor, could do.[128]

Higgins J appears to have considered that, in saying that the settlor must have done everything necessary, Turner LJ meant that the settlor must have done everything which it was within the settlor's power to do.[129] That is to say, if there is something which must be done in order to complete an assignment at law and which can be done either by the settlor or by some other person, there will not be a complete assignment in equity until it has been done.

Isaacs J said:[130]

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

That is to say, where property may be assigned at law it is not, if there is no consideration, effectively assigned in equity until title passes at law.

125. (1987) 10 NSWLR 402 at 411.
126. (1907) 4 CLR 1049; 13 ALR 709.
127. (1862) 4 De G F & J 264; 45 ER 1185.
128. *Anning v Anning* (1907) 4 CLR 1049 at 1057; 13 ALR 709 at 712. See *O'Regan v Cmr of Stamp Duties* [1921] St R Qd 283; *Haythorpe v Rae* [1972] VR 633.
129. (1907) 4 CLR 1049 at 1081–2; 13 ALR 709 at 721–2.
130. (1907) 4 CLR 1049 at 1069; 13 ALR 709 at 717.

[6-100] *Illustrations of the three views in practice*

The practical effect of the distinction between those three views can be illustrated by the case of a transfer, by way of gift, of shares in a company. As a general proposition, the transfer will be complete at law when:

(*a*) the transfer, in the form prescribed by the constitution of the company, has been signed by the transferor;

(*b*) the transfer has been delivered, with the share certificates, to the transferee;

(*c*) the transfer has been signed by the transferee;

(*d*) the transfer has been delivered, with the share certificates, to the company; and

(*e*) the company has registered the transfer.

On the view taken by Griffith CJ, the gift of the shares will be complete in equity as soon as steps (*a*) and (*b*) have been taken; Higgins J would regard it as complete in equity when steps (*a*), (*b*) and (*d*) have been taken; and Isaacs J not until each of steps (*a*), (*b*), (*c*), (*d*) and (*e*) have been taken.[131]

Another illustration is the case of a voluntary absolute assignment of a debt. It will be complete at law when:

(*a*) the assignment is reduced to writing and is signed by the assignor; and

(*b*) express notice of the assignment is given to the debtor.

On the view taken by Griffith CJ, the assignment is complete in equity when step (*a*) has been taken. Neither Higgins J nor Isaacs J would, however, regard the assignment as complete in equity before step (*b*) is taken: Higgins J because step (*b*) *could* be taken by the assignor and Isaacs J because the assignment, being one which may be effected at law, is incomplete in equity until it is complete at law.

[6-105] *Ambulatory application of Milroy v Lord*

One further difficulty to which judicial attention has been directed is this. *Milroy v Lord*[132] was, of course, decided before the Judicature Act 1873 came into force. When it was decided, debts and other legal choses in action could not be assigned at law though they could, fairly readily, be assigned in equity.[133] Should the first of the principles enunciated by Turner LJ be held to apply to legal property which, when *Milroy v Lord* was decided, could not be assigned at law but may now be so assigned? Or should the principle be limited in its operation to legal property which, when *Milroy v Lord* was decided, could be assigned at law? Lord Macnaghten in his speech in *William Brandt's Sons & Co v Dunlop Rubber Co Ltd*[134] favoured the latter view.[135] But as Windeyer J pointed out in *Norman v Federal Commissioner of Taxation*,[136] Lord Macnaghten's observations were made with reference to an assignment for value, and, so far as voluntary assignments are concerned, the weight of more recent authority is to the contrary. In particular, it can now be confidently asserted that the principles in *Milroy v Lord* apply to purported voluntary absolute assignments of debts and other legal choses in action which may be assigned at law pursuant to s 12 of the Conveyancing Act 1919 (NSW) and corresponding provisions in other jurisdictions.[137]

131. See generally L Zines, 'Equitable Assignments: When will Equity Assist a Volunteer?' (1965) 38 *ALJ* 337.
132. (1862) 4 De G F & J 264; 45 ER 1185.
133. See [6-070] ff.
134. [1905] AC 454; [1904-7] All ER Rep 345, cited in [6-020].
135. *Adcock v Jolly* (1893) 19 VLR 609.
136. (1963) 109 CLR 9 at 28; [1964] ALR 131 at 148.
137. *Anning v Anning* (1907) 4 CLR 1049; 13 ALR 709; *Norman v Federal Cmr of Taxation* (1963) 109 CLR 9 at 28; [1964] ALR 131 at 148; *Olsson v Dyson* (1969) 120 CLR 365; [1969] ALR 443. The last named case has been attacked on the ground that s 12 'was intended to be facilitative rather than mandatory': M Smith and N Leslie, *The Law of Assignment*, 2nd ed, Oxford University Press, Oxford, 2013, [11.129]. But s 12 is mandatory for an assignment the validity of which depends on it: see [6-040].

[6-110] *Meaning of 'necessary'*

What Turner LJ meant by 'necessary' is a problem that has not been so easy to solve. In Australia, the question is now probably concluded, by the majority judgments in *Corin v Patton*,[138] in favour of the view taken by Griffith CJ in *Anning v Anning*.[139] That is probably true also of English law.[140] The Court of Appeal held that a gift of shares in a company was complete after steps (*a*), (*b*), (*c*) and (*d*)[141] but not (*e*), had been taken (this involves a rejection of the view taken by Isaacs J in *Anning v Anning* but, strictly, does not choose between the remaining two alternative views).[142]

The position established by *Corin v Patton* is best understood after examining the earlier Australian cases.

[6-115] *Brunker's case: the facts*

The facts of *Brunker v Perpetual Trustee Co (Ltd)*[143] were, briefly, that Sellar, the registered proprietor of a parcel of land under the provisions of the Real Property Act 1900 (NSW) executed, on the day before his death, a voluntary transfer to his housekeeper of an estate in the land in remainder expectant upon his death. The land was subject to a mortgage to a bank, but, as it was intended that the remainder interest should be transferred free of the mortgage, particulars of it were not entered in the memorandum of prior encumbrances. The mortgage was, however, not discharged and the bank remained, at all material times, in possession of the certificate of title. After signing the transfer, Sellar handed it to a law stationer, who had prepared it acting, it was held, as agent for Sellar, not the housekeeper. After Sellar's death, the transfer came into the possession of the housekeeper. She delivered it to her solicitors. The solicitors inserted particulars of the bank's mortgage in the memorandum of prior encumbrances and lodged the transfer for registration, but the certificate of title was not produced to the Registrar General. Meanwhile Sellar's executor had lodged a caveat against the registration of dealings affecting the land. He initiated proceedings in which he sought, and obtained, an order declaring the transfer to be void, restraining its registration, ordering its delivery up and extending the caveat. An appeal against that order was dismissed by the High Court (Rich, Dixon and McTiernan JJ; Latham CJ dissenting).

[6-120] *Dixon J's preliminary position*

The leading majority judgment is that of Dixon J, with which Rich J agreed. That judgment has been cited as if it were authority for the view of *Milroy v Lord*[144] taken by Griffith CJ in *Anning v Anning*.[145] But fairly clearly it is not. Dixon J held that a transferee of land under the Real Property Act 1900 obtains no estate in the land, legal or equitable, until his or her transfer is

138. (1990) 169 CLR 540; 92 ALR 1.
139. (1907) 4 CLR 1049 at 1057; 13 ALR 709 at 712. In Queensland it was already so concluded, so far as choses in action are concerned, by statute: Property Law Act 1974 s 200.
140. See *Re Rose; Rose v IRC* [1952] Ch 499; [1952] 1 All ER 1217. See also *Mascall v Mascall* (1984) 50 P & CR 119; *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd* [1996] Ch 51; *Kaye v Zeital* [2010] 2 BCLC 1; *Curtis v Pulbrook* [2011] 1 BCLC 638 at [47] (where Briggs J doubted that the 'existing rule' served 'any clearly identifiable or rational policy objective').
141. Listed in [6-100].
142. For different approaches, criticised in the 4th edition of this work at [6-110], see *Pennington v Waine* [2002] 4 All ER 215; [2002] 1 WLR 2075. The decision is criticised by M Smith and N Leslie, *The Law of Assignment*, 2nd ed, Oxford University Press, Oxford, 2013, [11.105]–[11.121]. It is defended by H Tjio and T M Yeo, 'Re Rose Revisited: The Shorn Lamb's Equity: *Pennington v Waine*' [2002] *LMCLQ* 296; J Garton, 'The Role of the Trust Mechanism in the Rule in *Re Rose*' [2003] *Conv* 364.
143. (1937) 57 CLR 555; [1937] ALR 349.
144. (1862) 4 De G F & J 264; 45 ER 1185.
145. *Norman v Federal Cmr of Taxation* (1963) 109 CLR 9 at 28–9; [1964] ALR 131 at 148; *Taylor v Deputy Federal Cmr of Taxation* (1969) 123 CLR 206; see generally L Zines, 'Equitable Assignments: When will Equity Assist a Volunteer?' (1965) 38 *ALJ* 337; N Seddon, 'Imperfect Gifts of Torrens Title Land' (1974) 48 *ALJ* 13; and [6-140], [6-145].

CHAPTER 19

Declarations

A Introduction

[19-005] The power of the court to give declaratory judgments is among the most important of all curial remedies. There was always an historical difference between general declarations made by the court in the course of litigation between private parties and declarations made by the court in litigation between the Crown and a private party. The former are declarations made in the so-called 'original' jurisdiction; the jurisdiction in which the latter are made is called the 'supervisory' jurisdiction. It is clear that at all times the Court of Chancery in England had the power to grant declaratory relief in its original jurisdiction as ancillary to the granting of some principal relief. Thus the court could in an appropriate case declare that the plaintiff was a *cestui que trust* of a fund of money and then grant an injunction against the defendant trustees to restrain them from committing a threatened breach of trust. Equally, a court could first declare that a contract existed and then order specific relief. In the supervisory jurisdiction, equity could hold the Crown, its officers and public authorities to account, subject to the historically extensive immunities enjoyed by those entities and persons. The distinction between declaratory relief in the original and supervisory jurisdictions continues to exist. To put the point at its lowest, the considerations relevant to whether declaratory relief should be granted or refused are somewhat different where the litigants are private parties and where the litigants include the Crown. In Australia, perhaps more than in England, the 'standing' requirement imposed on a plaintiff differs according to whether the original or the supervisory jurisdiction is invoked. But the original jurisdiction of equity has been widened by statute so as to become a general declaratory jurisdiction: a jurisdiction available to parties whether or not the Crown is involved. And because the original jurisdiction of equity has been widened to the extent it has, the resulting statutory jurisdiction is used daily by litigants — again, whether the Crown is involved or not.

It is possible therefore to speak of declaratory relief in terms that apply, prima facie, wherever declaratory relief is claimed. This chapter seeks to explain the origins and nature of the modern declaratory remedy; to identify any limits on the jurisdiction to make declarations; and to consider certain matters relevant to the court's discretion whether to make or refuse declaratory relief. The topic is one of the most important among remedies, since declaratory relief can be relatively quickly obtained; it may therefore be obtained at less cost; and, most importantly, it has the advantage of being available in circumstances in which no other relief would be available.

B Nature and Development

Original jurisdiction

[19-010] *Ancient equitable jurisdiction*

When discussing the ancient inherited jurisdiction of the Court of Chancery to grant merely declaratory relief, Bankes LJ said:[1]

> I cannot doubt that had the Court of Chancery of those days thought it expedient to make mere declaratory judgments they would have claimed and exercised the right to do so.

As a statement that the Court of Chancery was able to grant declaratory relief without a claim also to grant principal relief to enforce the rights so declared, his Lordship's statement is unequivocal and incorrect. Bankes LJ cited no authority in support of his statement. There are at least two aberrant examples of 'naked' declarations.[2] However, these decisions were either decided per incuriam or if correct show an extremely narrow jurisdiction; so narrow that it would appear to have been unknown by some of the leading judges of the equity courts. Before 1850 the Court of Chancery constantly proclaimed an inability to make merely declaratory decrees and it constantly declined to make them. In *Ferrand v Wilson*,[3] Sir James Wigram VC held that he had no jurisdiction to entertain the complaint of a tenant-in-tail in remainder that the life tenant in possession had wrongfully exercised his power of exchanging land for land of at least equal value. He said:[4]

> The Plaintiff's equity to relief in respect of this exchange will be found to resolve itself into that which, for the argument, I will admit to be a defect in the jurisprudence of this country, namely, a want of a jurisdiction to ascertain and declare rights before a party interested has actually sustained damage.

If the subject matter of the proceedings were any legal (as opposed to equitable) right, title or interest, no declaration would have been possible before Sir John Rolt's Act,[5] unless that right, title or interest had first been adjudicated upon at law. Even if the subject matter were equitable, the courts repeatedly refused to grant naked declaratory relief. They looked with envious eyes to Scotland where the courts had always had the power to make mere declarations, there called 'declarators'. In *Grove v Bastard*,[6] Lord Cottenham LC said that the English courts 'have not the power which the Courts in Scotland have, of settling such questions by *declarator*'.[7] In the Scottish case of *Earl of Mansfield v Steward*,[8] a case in which the appellant as purchaser of land sought a declaratory order as to the sufficiency of the title which his vendor sought to force upon him, Lord Brougham LC — 'perennially agitating for reform'[9] — said:[10]

> My Lords, I cannot close my observations in this case without once more expressing my great envy, as an English lawyer of the Scotch jurisprudence, and of those who enjoy under it the security and the various facilities and conveniences which they have from that most beneficial and most admirably-contributed form of proceeding, called a declaratory action. Here you must wait till a party chooses to bring you into Court; here you must wait till possibly your evidence is gone; here

1. *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536 at 568; [1914-15] All ER Rep 24 at 37.
2. *Duffield v Elwes* (1827) 1 Bli NS 497; 4 ER 959; *Taylor v A-G* (1837) Sim 413; 59 ER 164. For analysis of *Taylor's* case, and a view different from that advanced here, see G Donaldson, 'Discretion in Declaratory Relief', in K Dharmananda and A Papamatheos (eds), *Perspectives on Declaratory Relief*, Federation Press, Sydney, 2009, pp 128–30.
3. (1845) 4 Hare 344; 67 ER 680.
4. *Ferrand v Wilson* (1845) 4 Hare 344 at 385; 67 ER 680 at 697.
5. 25 & 26 Vict c 42 (1862).
6. (1848) 2 Ph 619; 41 ER 1082.
7. *Grove v Bastard* (1848) 2 Ph 619 at 621–2; 41 ER 1082 at 1083 (emphasis in original).
8. (1846) 5 Bell 139.
9. M Leeming, 'The Negative Declaration in Australian and United States Federal Courts' (2004) 12 *AJ Admin L* 55 at 57.
10. *Earl of Mansfield v Steward* (1846) 5 Bell 139 at 160–1. See also *Clough v Ratcliffe* (1847) 1 De G & Sm 164 at 178–9; 63 ER 1016 at 1023.

> you have no means whatever, in ninety-nine cases out of a hundred of obtaining the great benefit of this proceeding. In Scotland you have that benefit; and a more remarkable instance of its beneficial tendency does not exist in my recollection than the present litigation. How would Lord Mansfield have been situated in the case we now have, and how would the vendor of the estate have been situated if they must have waited till perhaps after two or three generations there was a new heir in possession, an heir substitute, and the question was raised? It is most comfortable, it is most gratifying to that noble person, as well as to the other contending parties, that they have had access to the decision of the Court below, and of your Lordships in the last resort, the highest judicial authority, and that he now takes a title which is just as good as if he had an Act of Parliament deciding in his favour, and as secure in the expenditure of his money, and the other parties as secure in taking it.

[19-015] *English reforms*

It was with this situation in mind that the parliament at Westminster enacted the Chancery Act 1850,[11] also known as 'the Special Case Act' and 'Sir George Turner's Act'. Section 1 provided:

> Whereas proceedings in the High Court of Chancery in England are attended with great delay and expense, which it is expedient to diminish be it therefore enacted … that it shall be lawful for Persons interested or claiming to be interested in any Question cognizable in the said Court as to the Construction of any Act of Parliament, Will, Deed, or other Instrument in Writing, or any Article, Clause, Matter or Thing therein contained, or as to the Title or Evidence of Title to any Real or Personal Estate contracted to be sold or otherwise dealt with, or as to the parties to or the Form of any Deed or Instrument for carrying any such Contract into effect, or as to any other Matter falling within the original Jurisdiction of the said Court as a Court of Equity, or made subject to the Jurisdiction or Authority of the said Court as a Court by any Statute not being one of the Statutes relating to Bankrupts, and including among such Persons all Lunatics, Married Women and Infants, in the Manner and under the Restrictions hereinafter contained, to concur in stating such Question in the Form of a Special Case for the Opinion of the said Court, and it shall also be lawful for all Executors, Administrators, and Trustees to concur in such Case.

This provision armed the court with some power to grant merely declaratory relief. However, the power was severely limited. First, the power was confined to the various matters enumerated in s 1. Secondly, the power required the concurrence of both parties to state a case to the court for the granting of declaratory relief. Thirdly, even if both parties concurred in the stating of the case, the court had discretion to refuse a declaration and to remit the case so stated to a common law court.

[19-020] Not surprisingly, the Act was not found adequate. Parliament returned to the topic of declaratory relief in the Chancery Procedure Act 1852.[12] Section 50 of that Act provided:

> No suit in the said Court shall be open to Objection on the Ground that a merely declaratory Decree or Order is sought thereby, and it shall be lawful for the Court to make binding Declarations of Right without granting consequential Relief.

The 1852 Act did not suffer any of the defects which impaired the utility of the 1850 Chancery Act. But like that enactment, the 1852 Act was also interpreted restrictively. In *Rooke v Lord Kensington*,[13] Sir William Page Wood VC held that the 1852 Act conferred no authority on the Court of Chancery to declare a plaintiff's rights unless the plaintiff claimed principal equitable relief or principal equitable relief could have been granted if claimed.[14]

[19-025] The next significant change occurred at the commencement of the Judicature Act and Judicature Rules.[15] Together these invested the Supreme Court of Judicature with plenary

11. 13 & 14 Vict c 35.
12. 15 & 16 Vict c 86.
13. (1856) 2 K & J 753; 69 ER 986.
14. *Rooke v Lord Kensington* (1856) 2 K & J 753 at 760–2; 69 ER 986 at 989–90.
15. The Legitimacy Declaration Act 1858 (21 & 22 Vict c 93) slightly extended the declaratory jurisdiction of the Court of Chancery but does not call for discussion here.

declaratory power. The provisions were worded to depart from the interpretations given to the 1850 and 1852 enactments. That wording survived into later rules of court. Order 15 r 16 of the Rules of the Supreme Court, which remained in force until 26 April 1999,[16] provided:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any consequential relief is or could be claimed.

[19-030] *Current English rules*

Later provisions have been made in yet wider terms. The current rule in England abandons any reference to declarations 'of right'. It provides: 'The court may make binding declarations whether or not any other remedy is claimed'.[17] A significant difference between English and Australian law is created by a further rule empowering courts subject to the Civil Procedure Rules 1998 (UK) to grant an 'interim declaration'.[18] It will be necessary to return to the topic of interim declarations later in this chapter.[19]

Reforms in New South Wales

[19-035] *From 1880 until 1901*

Until 1880, the equitable powers of the Supreme Court of New South Wales included no power to grant merely declaratory relief. In this respect the position was the same as the position of the Court of Chancery in England before 1850. In 1880, legislation was enacted which introduced s 50 of the Chancery Procedure Act 1852 (UK) into New South Wales with immaterial changes.[20] Under the 1880 Act and its 1901 successor,[21] it was provided:

> No suit shall be open to objection on the ground that a merely declaratory decree is sought thereby and the Court may make binding declarations of right without granting consequential relief.

Since the Court of Chancery had fixed a restrictive interpretation upon precisely similar 1852 legislation applicable in England, it was hardly surprising that the Australian courts placed a similarly restrictive interpretation on the New South Wales section. For example, in *J C Williamson Ltd v Durno Ltd*,[22] Harvey J held that the equity court was without power to make a declaration as to whether the landlord had or had not unreasonably withheld his consent to a proposed assignment of the lease by his tenant, it being impossible to pass any consequential relief on such a declaration. Similarly, in *Walsh v Alexander*[23] Isaacs J approved and applied the decision of *Rooke v Lord Kensington*,[24] subject only to the gloss that the equity court could grant merely declaratory relief if consequential relief could be obtained in another court even if not in the equity court itself.

Statutory reforms of this position occurred in three stages.

[19-040] *From 1901 until 1924*

Apart from the general declaratory power established in New South Wales in 1880, from 1901 the Supreme Court of New South Wales had jurisdiction to make declaratory orders in specific types of case.[25] An application for declaratory relief in these specific types of case was by way of originating summons and affidavit. The provision allowed declarations to be made in favour

16. The Civil Procedure Rules 1998 (UK) commenced on that day.
17. Civil Procedure Rules 1998 (UK) r 40.20.
18. Civil Procedure Rules 1998 (UK) r 25.1(1)(b).
19. See [19-140]–[19-150].
20. Equity Act 1880 (NSW) s 50.
21. Equity Act 1901 (NSW) s 10.
22. (1915) 15 SR (NSW) 442.
23. (1913) 16 CLR 293.
24. (1856) 2 K & J 753; 69 ER 986.
25. Equity Act 1901 (NSW) Sch 4.

of creditors, devisees, legatees, the next of kin of deceased persons, any *cestui que trust*, or any person deriving an interest under some such person. The declaration could be made with regard to (*a*) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, heir at law, or *cestui que trust*; (*b*) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others; (*c*) the approval of any sale, purchase, compromise, or other transaction; and in other situations. These provisions were frequently used and highly beneficial. They readily enabled disputes to be determined in form by the answering of questions, but in effect by granting declaratory relief. Relief was thus awarded in disputes over legal rights, equitable rights, and both legal and equitable rights. And the relief was awarded mainly on the basis of documents. One limitation was that the jurisdiction came to be limited to cases involving no dispute of fact. But whereas relief under the general power to make declarations was only awarded where consequential relief was claimed or could be granted, in the cases listed above that limitation did not apply.

[19-045] *From 1924 until 1965*

The general power to make declarations was amended in 1924 to read thus:[26]

> No suit shall be open to objection on the ground that a merely declaratory decree is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not.

However, this did not achieve the objective of conferring plenary declaratory power on the Supreme Court, for the court persisted in finding new limitations on its powers. In the year after the general declaratory power was amended, Harvey CJ in Eq said of the reworked section:[27]

> The subject matter of this section is 'a suit in Equity', a well-known form of procedure, viz a suit for equitable relief or relating to equitable rights and titles.

[19-050] Another reason behind this narrow construction seems to have been that to grant declaratory relief in respect of purely legal rights, titles or interests would be contrary to the essential concept of having law and equity administered by different tribunals. In New South Wales at the time, that concept was matched by the reality that the Supreme Court sat separately at common law and in equity. Regarding the amended s 10, if it were possible for the court sitting in equity to declare that a defendant was in breach of contract or wrongfully in possession of land, then the Supreme Court sitting in equity would thereby prevent a judge and jury from deciding those matters at common law, which was what the Common Law Procedure Act 1899 (NSW) required. On the view taken by Harvey CJ in Eq — which prevailed in both the Supreme Court of New South Wales and the High Court of Australia[28] — there was power in the equity side of the Supreme Court to grant merely declaratory relief in any suit relating to purely equitable rights and titles whether or not consequential relief was or could be claimed. But with regard to legal rights or titles, declaratory relief was only available if consequential relief was or could be claimed. The logical force of the underlying arguments is undeniable. However, those arguments supported a construction of the power to make declarations which undoubtedly caused major commercial inconvenience. Among other things, that construction ensured that complex commercial disputes were put before juries unlikely to be well versed in the activities of commerce.

[19-055] Surprisingly, it was not until 1965 that the New South Wales parliament took the next step in its long battle to confer plenary declaratory jurisdiction on its Supreme Court. The then existing form of s 10 of the Equity Act 1901 (NSW) was omitted and replaced[29] by a considerably more detailed provision which began:

26. Equity Act 1901 (NSW) s 10, as amended by the Administration of Justice Act 1924 (NSW) s 18.
27. *Tooth & Co Ltd v Coombes* (1925) 42 WN (NSW) 93 at 94.
28. See *David Jones Ltd v Leventhal* (1927) 40 CLR 357; *Langman v Handover* (1929) 43 CLR 334; *Harvey v Walker* (1945) 46 SR (NSW) 180.
29. By the Law Reform (Miscellaneous Provisions) Act 1965 (NSW).

> (1) In addition to the jurisdiction which is otherwise vested in it, the Court shall have jurisdiction to make binding declarations of right whether or not any consequential relief is or could be claimed, and whether or not the suit in which the declaration is sought is a suit for equitable relief or a suit which relates to equitable rights or titles.
>
> No suit shall be open to objection on the ground that a merely declaratory decree is sought thereby.

A second subsection provided that, without limiting subs (1), the court was to have jurisdiction to declare, among other things, 'the nature, quality and extent of the estates, interests, powers, rights, liability or duties of any persons in respect of any real or personal property' and 'the interests, powers, rights and liabilities or duties of any persons arising under' a list of instruments and legal relations, including any partnership agreement; any agreement relating to a trade mark; any contract of some other class; any Act, regulation or rule; and so on. By the same Act, for the first time the parliament conferred declaratory power on the common law side of the Supreme Court in commercial causes, albeit a more limited power.[30]

[19-060] *Construction of the 1965 provision*

After such a legislative history, it could scarcely be doubted that the legislature of New South Wales intended the equity court's declaratory jurisdiction to be largely unlimited. To cautious members of the judiciary things appeared otherwise. However, the language of the 1965 legislation was soon afforded its full breadth. In *Sutherland Shire Council v Leyendekkers*,[31] Street J felt no difficulty in declaring the validity of a rate, notwithstanding the availability of alternative procedures; in so doing, his Honour stressed the general utility of declaratory relief and specifically declined to follow the overly limiting reasoning of Myers J in *Salmar Holdings Pty Ltd v Hornsby Shire Council*.[32] Soon thereafter, the Court of Appeal[33] reversed the decision of Myers J in the *Salmar Holdings* case and in terms endorsed the views expressed by Street J in *Sutherland Shire Council v Leyendekkers*. Mason JA, with whom Moffitt JA agreed, held that the court's jurisdiction to grant declaratory relief was largely unlimited, the only inhibiting factor being the court's discretion in any given case for some suitable reason, not to exercise its jurisdiction. The jurisdiction of the New South Wales equity court to grant declarations after 1965 was in no material respect different from that of the English courts under their Judicature system.

Forster v Jododex Australia Pty Ltd

[19-065] *Significance of the case*

In the establishment of the declaratory jurisdiction that exists in Australia today, the final step was taken by the High Court of Australia in *Forster v Jododex Australia Pty Ltd*.[34] That was an appeal from New South Wales on the meaning of the 1965 provisions in the pre-Judicature conditions of New South Wales. Nonetheless, the decision of the High Court is of first importance for the declaratory jurisdiction throughout Australia. Mr Forster had applied under the provisions of the Mining Act 1906 (NSW) for authority to enter certain lands owned by Jododex Australia Pty Ltd. The company sued in equity for a declaration that no authority could be granted because it had in existence a valid exploration licence. If correct, that contention would have precluded the granting of authority for Mr Forster to enter the relevant land. Street J upheld the company's contention. The correctness of his Honour's declaration was affirmed by the High Court. The precautions of hesitant judges

30. Commercial Causes Act 1903 (NSW) s 7B, inserted by the Law Reform (Miscellaneous Provisions) Act 1965 (NSW). See H H Glass and R P Meagher, 'Summary Determination of Commercial Disputes in New South Wales' (1966) 40 *ALJ* 232.
31. [1970] 1 NSWR 356.
32. (1970) 91 WN (NSW) 234.
33. *Salmar Holdings Pty Ltd v Hornsby Shire Council* [1971] 1 NSWLR 192.
34. (1972) 127 CLR 421.

were effectively dismissed. All the judges sitting in the High Court held that Street J had jurisdiction to make the declaration, notwithstanding the power of the mining warden to determine the question in issue and notwithstanding the specialised nature of the dispute.

[19-070] *Width of jurisdiction*

The balance of the reasoning of the High Court on the proper construction of the New South Wales statute applies to equivalent provisions elsewhere in Australia. *Forster v Jododex Pty Ltd* has been described as 'the root authority in Australia in relation to the granting of [declaratory] relief pursuant to powers which are analogues of the original' 1875 provisions in England.[35] The High Court in *Forster's* case unanimously held that the declaratory power conferred on the Supreme Court of New South Wales by the enactment in question[36] was no more limited than the power of a court under a Judicature system to grant declarations.[37] Gibbs J, with whom the other members of the court agreed, said the jurisdiction to make a declaration is 'a very wide one'.[38] He noted[39] English authorities which said that the jurisdiction is 'almost unlimited' or words to similar effect.[40] Gibbs J held that it was 'neither possible nor desirable to fetter the broad discretion given by [the New South Wales statute] by laying down rules as to the manner of its exercise'.[41] That view has been applied to the legislation relating to other courts.[42] However, Gibbs J admitted that 'before the discretion is exercised in favour of making a declaration',[43] the following rules should in general be satisfied:[44]

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

Later, in *Ainsworth v Criminal Justice Commission*,[45] the width of the remedy was again emphasised. But the court also stated what must be the case, namely that the awarding of declarations 'is confined by the considerations which mark out the boundaries of judicial power'.[46]

[19-075] *Current Australian provisions*

The Supreme Court Act 1970, which commenced in 1972, introduced the Judicature system into New South Wales. Section 75 of that Act provides:

> No proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the Court may make binding declarations of right whether any consequential ruling is or could be claimed or not.

35. *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378 at [13]. See also *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406 at 414; *Edwards v Santos Ltd* (2011) 242 CLR 421; 275 ALR 489 at [37].
36. Equity Act 1901 (NSW) s 10.
37. *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 435, approving remarks made in *Salmar Holdings Pty Ltd v Hornsby Shire Council* [1971] 1 NSWLR 192 at 202.
38. *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 435.
39. *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 435.
40. *Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490 at 507; *Barnard v National Dock Labour Board* [1953] 2 QB 18 at 41; [1953] 1 All ER 1113 at 1119; *Ibeneweka v Egbuna* [1964] 1 WLR 219 at 225.
41. *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448, adopted by Gibbs J in *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437–8. See also *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297 at 305.
42. For example, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; 106 ALR 11.
43. *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437.
44. *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448, adopted by Gibbs J in *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437–8. See also *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297 at 305.
45. (1992) 175 CLR 564; 106 ALR 11.
46. *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582; 106 ALR 11 at 22. See also L Sarna, *The Law of Declaratory Judgments*, 3rd ed, Thomson Carswell, Toronto, 2007, pp 15–17. Cf *Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490 at 507; [1922] All ER Rep 160 at 162.

This section in effect re-enacts s 10 of the Equity Act 1901, as it stood from 1924 to 1965, with the crucial change of 'suit' to 'proceedings'. Most other Australian courts have the benefit of materially identical provisions.[47] Except for the power of English courts to grant 'interim declarations', the provisions for the making of declarations appear to be of the same width under the Civil Procedure Rules 1998 (UK) and the various Australian provisions.[48] Whether the application of those provisions differs between Australia and England is a separate point.

Supervisory jurisdiction

[19-080] *Peculiar development*

Declaratory relief in disputes between the Crown and a subject had a rather different history. Originally, a subject could either sue the Crown in any court by petition of right brought (with the Crown's fiat) against the Attorney-General or, alternatively, by bill brought (without obtaining the Crown's fiat) against the Attorney-General in the Court of Exchequer Chamber. Seemingly, in either case declaratory relief would be obtained; and merely declaratory relief at that, whether or not principal relief was or could be sought. Indeed, declaratory relief was about the only relief available to a subject against the Crown as the courts were unable to make coercive orders against the Crown. After falling into abeyance for some time, this head of declaratory jurisdiction was triumphantly resurrected in the United Kingdom by the Court of Appeal in *Dyson v Attorney-General*,[49] a decision repeatedly followed in England,[50] specifically approved by the Privy Council,[51] and enthusiastically embraced by the courts of Australia.[52]

An attempt was made in *Tito v Waddell (No 2)*[53] to limit the scope of declaratory relief against the Crown under the principles of *Dyson's* case. In *Tito's* case it was conceded by the Crown that the jurisdiction was not confined to declarations that some document or action was invalid, but extended to other cases, such as making declarations that property vested in the Crown was subject to some trust or mortgage in favour of the plaintiff; and that a declaration was properly made in, for example, *Hodge v Attorney-General*,[54] to the effect that the plaintiffs, as equitable mortgagees, were entitled to retain possession of mortgaged property until the Crown, as owner of the equity of redemption, redeemed the mortgage. However, the Crown contended that there was no jurisdiction to declare that the Crown owed a plaintiff a sum of money. The authorities directly on the point are slender: *Pool v Attorney-General*,[55] a badly reported case, tended in favour of the jurisdiction, while Rowlatt J's decision in *Bombay and Persia Steam Navigation Co Ltd v MacLay*[56] tended against it; and Sir Robert Megarry VC in *Tito's* case found it unnecessary to decide the point. But there seems no reason in principle

47. Federal Court of Australia Act 1976 (Cth) s 21; Court Procedures Rules 2006 (ACT) reg 2900; Supreme Court Act (NT) s 18; Supreme Court Act 1935 (SA) s 31; Supreme Court Rules 2000 (Tas) reg 103; Supreme Court Act 1986 (Vic) s 36; Supreme Court Act 1935 (WA) s 25(6). The High Court has no explicit power to award declarations, but has the general powers conferred by the Judiciary Act 1903 (Cth) 31; see also s 79. In Queensland, the Supreme Court 'may hear an application for a declaratory order only and may make a declaratory order without granting any relief as a result of making the order': Civil Proceedings Act 2011 (Qld) s 10.
48. See *Dickinson v Perrignon* [1973] 1 NSWLR 72 at 83; *Makin v Gallagher* [1974] 2 NSWLR 559 at 583; cf *Parramatta City Council v Sandell* [1973] 1 NSWLR 151 at 173; *Mutton v Ku-ring-gai Municipal Council* [1973] 1 NSWLR 233 at 252.
49. [1911] 1 KB 410; [1908-10] All ER Rep Ext 1097.
50. See, for example, *Simmonds v Newport Abercan Black Vein Steam Coal Co* [1921] 1 KB 616; *Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490; [1922] All ER Rep 160.
51. *Esquimalt and Nanaimo Railway Co v Wilson* [1920] AC 358 at 365–8.
52. See, for example, *A-G (Vic) v Commonwealth* (1945) 71 CLR 237; *Crouch v Commonwealth* (1948) 77 CLR 339. A precursor to *Dyson v A-G* is *A-G (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469.
53. [1977] Ch 106; [1977] 3 All ER 129.
54. (1839) 3 Y & C Ex 342; 160 ER 734.
55. (1708) Park 272; 145 ER 777.
56. [1920] 3 KB 402.

why such a limitation should be thought to exist. The basis for the suggested limitation is that to make an order against the Crown declaring the existence of a debt owing by it is to make a coercive order against the Crown. It is not. In any event, in Australia, the suggested limitation could not apply in actions against the Commonwealth, whose rights by statute have been equiparated with those of the subject.[57] 'Crown' for this purpose means the Crown in the right of the forum, so that, for example, an English court will not make a declaration as to the obligations of the Crown in the right of Canada.[58]

Illustrations of width: original jurisdiction

[19-085] *Status*

Of the utility and scope of the remedy there is no doubt. The variety of situations in which declarations may be made is numerically limitless. A brief list of examples will suffice to illustrate the width of the jurisdiction.

In matters of status, declarations can be made that the plaintiff was fathered by the defendant;[59] or that the plaintiff is still a member of a club,[60] church,[61] trade union[62] or professional organisation,[63] or is not;[64] or that resolutions purportedly passed by its executive are invalid;[65] or that a person pretending to be such a member is in fact not one.[66]

[19-090] *Property law*

In the field of property law, declaratory relief is frequently resorted to in order to determine questions of title to land[67] or, indeed, of personal property,[68] the validity of limitations,[69] the meaning of a will[70] and vendor and purchaser questions;[71] and such declarations are particularly apt to abort lengthy and expensive litigation.

[19-095] *Commerce*

In commerce, declarations can be made that a contract has or has not been concluded.[72] Declarations can be made ascertaining the rights and obligations of the parties.[73] The court can declare that a breach of contract has occurred,[74] or what are the consequences of a breach,[75]

57. Judiciary Act 1903 (Cth) s 64.
58. *R v Secretary of State for Foreign and Commonwealth Affairs; Ex rel Indian Association of Alberta* [1982] 2 All ER 118.
59. *L v L* [2013] NSWSC 916 at [14].
60. *Young v Ladies Imperial Club Ltd* [1920] 2 KB 523; [1920] All ER Rep 223.
61. *Stuart v Haughley Parochial Church* [1936] Ch 32.
62. *Bonsor v Musicians' Union* [1956] AC 104; [1955] 3 All ER 518.
63. *Law v Chartered Institute of Patent Agents* [1919] 2 Ch 276; [1918-19] All ER Rep Ext 1237.
64. *R v Jockey Club; Ex parte Aga-Khan* [1993] 2 All ER 853; [1993] 1 WLR 909.
65. *Holden v Southwark Corp* [1921] 1 Ch 550; *Makin v Gallagher* [1974] 2 NSWLR 559; *McNab v Auburn Soccer Sports Club Ltd* [1975] 1 NSWLR 54.
66. *A-G v Ulverston Urban District Council* [1944] Ch 242.
67. *Bridges v Mees* [1957] Ch 475; [1957] 2 All ER 577; *Coe v Commonwealth* (1993) 118 ALR 193; 68 ALJR 110; *Bridgewater v Leahy* (1998) 194 CLR 457; 158 ALR 66; *Durian (Holdings) Pty Ltd v Cavacourt Pty Ltd* (2000) 10 BPR 18,099; [2000] NSWCA 28; *Vanmeld Pty Ltd v Fairfield City Council* (2000) 106 LGERA 454; [2000] NSWCA 51.
68. *Health Services for Men Pty Ltd v D'Souza* (2000) 48 NSWLR 448.
69. *A-G (NSW) v Cahill* [1969] 1 NSWR 85.
70. *Le Cras v Perpetual Trustee Co Ltd* [1969] 1 AC 514; [1967] 3 All ER 915.
71. *Re Plymouth Corp and Walter* [1918] 2 Ch 354.
72. *Jager v Tolme & Runge* [1916] 1 KB 939.
73. *West v Gwynne* [1911] 2 Ch 1.
74. *Union of India v Compania Naviera Aeolus SA* [1962] 1 QB 1; [1961] 2 All ER 115.
75. *Rajbenbach v Mamon* [1955] 1 QB 283; [1955] 1 All ER 12.

or that a contract has been terminated.[76] By declaration it is possible to settle in one action independent claims arising out of one contract.[77]

[19-100] *Other instances*

Declarations are also useful in solving private international law problems arising out of parties' suing each other in different jurisdictions.[78] Declaratory relief may also issue in situations far removed from the examples so far considered. Whether a doctor can remove the support system which is keeping a plaintiff alive may be the subject of declarations.[79]

Illustrations of width: supervisory jurisdiction

[19-105] In the supervisory jurisdiction, the courts have granted supervisory declarations against the Crown, agencies of the Crown or other public bodies.[80] In Australia, declarations are used in proceedings to impugn the validity of federal[81] or state Acts;[82] and, both in Australia and elsewhere, it is used to declare the invalidity of subordinate legislation.[83] Thus, the High Court has frequently made declarations declaring legislation of the Commonwealth parliament to be invalid. Many different courts have by declarations dealt with the validity of regulations made under statute by dock companies,[84] orders made under statute by municipal authorities,[85] the by-laws of chartered societies,[86] or other companies,[87] and so on.

Source

[19-110] *Inherent power?*

The statutory widening of the old equitable power to make declarations in equity's original jurisdiction has established the declaration in that it has become common to seek declaratory relief in a very wide range of situations. The question arises whether the declaration has become established in a further sense. In *Ainsworth v Criminal Justice Commission*,[88] Mason CJ, Dawson, Toohey and Gaudron JJ observed that declarations may be available where the prerogative writs are not available for 'technical' reasons. They turned to the status of the declaratory remedy and said:[89]

76. *Schering Ltd v Stockholms Enskilda Bank* [1946] AC 219; [1946] 1 All ER 36.
77. *Nyali v A-G* [1956] 1 QB 1; [1955] 1 All ER 646; [1957] AC 253; [1956] 2 All ER 689.
78. See *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; 146 ALR 402; A S Bell, 'The Negative Declaration in Transnational Litigation' (1995) 111 *LQR* 674; Lord Collins of Mapesbury (gen ed), *Dicey, Morris and Collins on The Conflict of Laws*, 15th ed, Sweet & Maxwell, London, 2012, Vol 1, [12-048]–[12-051].
79. *Auckland Area Health Board v A-G* [1993] 1 NZLR 235; *Airedale NHS Trust v Bland* [1993] AC 789; [1993] 1 All ER 821; *Aintree University Hospital NHS Foundation Trust v James* [2014] AC 591; [2014] 1 All ER 573 at [46].
80. See generally Lord Woolf and H Woolf, *The Declaratory Judgment*, 4th ed, Sweet & Maxwell, London, 2011, [2-29]–[2-60].
81. For example, *A-G (Vic) v Commonwealth* (1945) 71 CLR 237; *Ditchburn v Australian Electoral Officer for Queensland* (1999) 165 ALR 147.
82. For example, *Hughes & Vale Pty Ltd v NSW* (1954) 93 CLR 1; [1955] AC 241; *Croome v Tasmania* (1997) 191 CLR 119; 142 ALR 397.
83. For example, *Crouch v Commonwealth* (1948) 77 CLR 339.
84. *London Assn of Shipowners and Brokers v London and India Docks Joint Committee* [1892] 3 Ch 242; [1891-4] All ER Rep 462.
85. *Brownsea Haven Properties Ltd v Poole Corp* [1958] Ch 574; [1958] 1 All ER 205.
86. *Knowles v Zoological Society of London* [1959] 2 All ER 595; [1959] 1 WLR 823.
87. *Australasian Memory Pty Ltd v Brien* (1998) 45 NSWLR 111; *Hudson Securities Pty Ltd v Australian Stock Exchange* (2000) 49 NSWLR 353.
88. (1992) 175 CLR 564; 106 ALR 11.
89. *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582; 106 ALR 11 at 22, citing as the source of the last quotation in the passage *Gardner v Dairy Industry Authority (NSW)* (1977) 18 ALR 55 at 69; 52 ALJR 180 at 188; see also at 189; 71.

> It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which '[i]t is neither possible nor desirable to fetter … by laying down rules as to the manner of its exercise'.[90] However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions.[91] The person seeking relief must have 'a real interest'[92] and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen'[93] or if 'the Court's declaration will produce no foreseeable consequences for the parties'.

The first sentence in that paragraph,[94] if true, would mean that special legislation or rules of court are not needed to empower superior courts to make declaratory orders. As there was special legislation empowering the court from which *Ainsworth's* case reached the High Court to make declarations,[95] and as the High Court itself enjoyed the same power,[96] this suggestion was unnecessary to the High Court's decision. Other observations may also be made. First, in saying that '[i]t is now accepted' that superior courts have inherent power to grant declaratory relief, their Honours evidently accepted that proposition themselves. However, it is unclear whether they meant to include others in the group said to accept the point in question. In the decisions cited by their Honours, both in the quoted passage and elsewhere in their reasons, no other court accepted that superior courts have inherent power to make declarations. Secondly, it may be that their Honours would have been willing to change the law by accepting that superior courts ought to be considered to have inherent power to make declarations, even though that had not been the previously accepted view.[97] On one view, a corresponding change to the law occurred in *Cardile v LED Builders Pty Ltd*,[98] where the High Court of Australia held that power to make Mareva orders stems from the inherent jurisdiction of courts of equity (including in a judicature system) to protect the efficacy of the court's own procedures. In particular, it was said that Mareva orders serve to protect the efficacy of the courts' procedures for executing their own judgments. The reasoning given in support of that decision in the *Cardile* case has (with respect, correctly) been treated by Australian courts as convincing. Correspondingly detailed reasoning was not offered in the *Ainsworth* case. It is therefore unclear whether the first sentence in the passage quoted from *Ainsworth's* case expressed a willingness to change the law. Whatever the intended meaning of the first sentence in the passage above, it is arguable that it does not meet the conditions of a seriously considered dictum which courts below the High Court ought to follow.

None of this is to say that it would not be permissible for the High Court of Australia to change the law so as to make a power to award declarations an inherent power of superior courts.[99] However, at present it is doubtful that it is the law of Australia. The merits of making

90. *Forster v Jododex Pty Ltd* (1972) 127 CLR 421 at 437.
91. See *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.
92. *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448; *Forster v Jododex Pty Ltd* (1972) 127 CLR 421 at 437.
93. *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 10; 6 ALR 193 at 198.
94. The sentence has often been quoted or paraphrased with approval or without criticism: for example, *Rozenes v Beljajev* [1995] 1 VR 533 at 569; *Australian Competition and Consumer Commission v Oceana Commercial Ltd* [2004] FCAFC 174 at [148]; *Taylor v O'Beirne* [2010] QCA 188 at [25]; *Momcilovic v R* (2011) 245 CLR 1; 280 ALR 221 at [179]; *QBE Insurance (Aust) Ltd v Lois Nominees Pty Ltd* [2012] WASCA 186 at [90]; *Centrebet Pty Ltd v Baasland* [2013] NTSC 59 at [112]; *Plenty v A-G* [2013] SASC 35 at [13].
95. Rules of the Supreme Court Rules (Qld) O 4 r 11. These rules ceased to have effect upon the commencement of the Uniform Civil Procedure Rules 1999 (Qld).
96. Judiciary Act 1903 (Cth) s 79.
97. See M Aronson and M Groves, *Judicial Review of Administrative Action*, 5th ed, Lawbook Co, Sydney, 2013, [15.20]; *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378 at [9].
98. (1999) 198 CLR 380; 162 ALR 294 at [26]–[44].
99. See R French, 'Declarations: Homer Simpson's Remedy — Is There Anything They Cannot Do?', in K Dharmananda and A Papamatheos (eds), *Perspectives on Declaratory Relief*, Federation Press, Sydney, 2009, pp 41–4.

or declining to make that change in the law would need to be considered fully on an appropriate occasion before the first sentence of the quoted passage could be considered accurate.

C Jurisdiction

Jurisdiction or discretion?

[19-115] *Gibbs J's 'rules'*

The judgment of Gibbs J in *Forster v Jododex Pty Ltd* does not decide whether the several 'rules' to which his Honour referred strictly go to whether a superior court has jurisdiction to make declaratory orders, or instead to whether the court in its discretion ought to grant or refuse declaratory orders. The judgment also leaves open whether the 'rules' listed by Gibbs J might go both to jurisdiction and to discretion. The most literal reading suggests that Gibbs J saw the rules as going to discretion alone. But as the distinction did not need to be strictly drawn in the case, and was not strictly drawn, the view that these rules go to discretion alone cannot be attributed to him. Different courts have expressed different opinions as to whether the rules or matters to which Gibbs J referred go to discretion or jurisdiction or both. The statements are probably irreconcilable. As will be seen, opinions on whether the 'rules' or considerations to which Gibbs J referred go to discretion or jurisdiction or both have simply changed.

[19-120] *Inevitability of limits?*

Approaching the matter first as a question of principle it is submitted that, while the jurisdiction or power to make declarations is undoubtedly and helpfully wide, it would be undesirable to abandon all jurisdictional limits even if that could be done by judicial decision. To abandon all jurisdictional limits would leave very little opportunity to throw out unmeritorious claims without first conducting a full hearing. Admittedly, the courts might consider that in some cases or some categories of cases the refusal of a declaration is a foregone conclusion so as to warrant early dismissal of proceedings.[100] However, that would be artificial. It would be more natural to admit that the grounds of refusal in those circumstances are jurisdictional, not discretionary. In Australia the abandonment of all limits on the jurisdiction to make declarations could not be done as far as federal law is concerned. For example, the requirement that a plaintiff have a real or substantial interest in obtaining the declaration could not be abandoned because the concern of the federal judicial power is with justiciable controversies and matters within the meaning of Ch III of the Commonwealth Constitution.

[19-125] *Recent decisions*

Recent decisions appear to settle the uncertainty by treating Gibbs J's 'rules' as going both to jurisdiction and, where jurisdiction is found, also to discretion. *Edwards v Santos Ltd*[101] is one illustration. The circumstances of the case were said to raise several questions:[102]

> … which cannot be wholly disentangled. Does the [court] have jurisdiction to grant declaratory relief? Do the plaintiffs have standing, or a 'sufficient interest' or a 'real interest'? Is the question which the plaintiffs are raising merely hypothetical? Are the plaintiffs seeking an advisory opinion?

That was a case in which federal jurisdiction was attracted.[103] However, it was not suggested that these questions went to jurisdiction, and not merely discretion, only because the case involved a federal matter. Indeed, whether the case involved a federal matter was treated as '[a]nother, more distinct, question'.[104] In the result, it was held that the primary judge in the

100. See *C E Heath Casualty & General Insurance Ltd v Pyramid Building Society (in liq)* [1997] 2 VR 256 at 284–5.
101. (2011) 242 CLR 421; 275 ALR 489.
102. *Edwards v Santos Ltd* (2011) 242 CLR 421; 275 ALR 489 at [36].
103. *Edwards v Santos Ltd* (2011) 242 CLR 421; 275 ALR 489 at [40]–[45].
104. *Edwards v Santos Ltd* (2011) 242 CLR 421; 275 ALR 489 at [36].

Federal Court had incorrectly concluded that there was no matter; that the plaintiffs had no standing; that their application for relief was merely for an advisory opinion; and that the court accordingly had no jurisdiction to make declaratory orders. That being a jurisdictional error, a writ of certiorari issued to the Federal Court. Another example is *Bass v Permanent Trustee Co Ltd*.[105] The plurality in that case said that a dispute which is 'hypothetical or academic' in being divorced from the facts of a case 'is … not suitable for judicial resolution by way of declaration or otherwise'.[106] If the presence or absence of a real or substantial question went merely to discretion, a case could remain suitable for judicial resolution by declaration if it concerned a dispute divorced from the facts. *Bass v Permanent Trustee Co Ltd* therefore tells against the view that Gibbs J's 'rules' go to discretion rather than jurisdiction. Gaudron J's opinion that the unavailability of declaratory relief where the declaration would produce no foreseeable consequences for the parties is 'not simply a matter of discretion'[107] accords with these authorities.[108]

[19-130] *England: the same or a different position?*

How these principles would be viewed in England is difficult to assess. There can appear to be large differences in the way that Australian and English courts respectively view the role of jurisdiction and discretion in connection with declaratory relief. It is beyond the scope of this work to measure those differences. However, brief mention can be made of one area in which the difference may seem greater than it is. Like the courts of Australia, the courts of England have had to address whether declaratory relief may be ordered where the declaration would be as to the future rights and liabilities of the plaintiff and defendant, rather than as to their existing liabilities and rights. Whereas the Australian courts have had the language of justiciable controversy and judicial power[109] at their disposal to explain why the futurity of the relevant rights does not necessarily deprive the court of jurisdiction, those terms and concepts are less prominent in English law. Instead the English courts have reached often similar results by explaining that a concession to the normal ban on giving advisory opinions in declarations allows declarations of as yet future rights to be made.[110] That is not a concession to advisory opinions of the type eschewed by *Re Judiciary and Navigation Acts*.[111] Rather, the concession is to what Lord Steyn in *R (Rusbridger) v Attorney-General*[112] called '[a] genuine dispute about the subject matter'.[113] His Lordship considered that such a dispute was necessary to support declaratory orders. In deciding whether there was jurisdiction to make declarations in respect of allegedly criminal conduct, Lord Steyn said there would have been if the Attorney-General had threatened to prosecute but the absence of such a threat did not necessarily mean there was no jurisdiction. Other criteria were relevant also. The upshot is that Lord Steyn's search for a 'real dispute' and the so-called concession (discussed in other cases) to the normal ban on advisory opinions is less different from the search an Australian court might make for a justiciable controversy (in state or federal law) sufficient to establish jurisdiction to grant declaratory orders than a superficial assessment suggests.[114]

105. (1999) 198 CLR 334; 161 ALR 399.
106. *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; 161 ALR 399 at [48]. Cf *R (Pretty) v DPP* [2002] 1 AC 800; [2002] 1 All ER 1 at [116] ('the court would have a *discretion* which it would normally exercise to refuse to rule upon hypothetical facts') (emphasis added).
107. *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591; 169 ALR 616 at [52].
108. See also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582; 106 ALR 11 at 22 (a case not concerned with federal law).
109. And, in federal jurisdiction, 'matter'.
110. For example, *Re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1 at 18; [1995] 3 All ER 290 at 301.
111. (1921) 29 CLR 257. For criticism of the doctrine in that case, including with respect to declarations, see L Zines, 'Advisory Opinions and Declaratory Judgments at the Suit of Governments' (2011) 22 *Bond LR* 156.
112. [2004] 1 AC 357; [2003] 3 All ER 784.
113. *R (Rusbridger) v A-G* [2004] 1 AC 357; [2003] 3 All ER 784 at [22].
114. See also L Sarna, *The Law of Declaratory Judgments*, 3rd ed, Thomson Carswell, Toronto, 2007, pp 15–17.

Non-justiciability

[19-135] *Relevance to jurisdiction*

The non-justiciability of a dispute deprives a court of jurisdiction to make declaratory relief about the non-justiciable subject matter. In *Mutasa v Attorney-General*,[115] the plaintiff, a citizen of Southern Rhodesia and a British subject, had been arrested when he resigned from the Southern Rhodesian civil service upon the colony's unilateral declaration of its independence. He was refused a declaration that the Crown had failed to protect him, since the Crown's duty to protect its citizens is a purely political and moral one. It is not a legal duty since it cannot be enforced in a court of law. Breach of the duty cannot give rise to any known cause of action. It followed that the claim for a declaration failed in limine. The court had 'no power to make the declaration' claimed by the plaintiff.[116] By way of contrast, in *Shergill v Kaira*[117] disputes between two factions of a sect of a Sikh community regarding who as the spiritual successor of the First Holy Saint of that sect had power to appoint and remove trustees were held to be justiciable disputes. They were made no less justiciable, and no less suitable a subject of declaratory relief, by the fact that questions of religious doctrine would have to be answered. They would be answered by reference to objective criteria.[118]

Although non-justiciability would seem to deprive a court of jurisdiction to make declaratory orders, as in *Mutasa v Attorney-General*, in some decisions non-justiciability has been treated as going to discretion only. In *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation*,[119] the plaintiff sought a declaration that its land was affected by an unsigned policy statement apparently issued without statutory authority by a ministerial officer. Relief was declined because the policy statement was so lacking in either intention or capacity to affect legal rights that its true construction was an irrelevance. The court exercised its discretion to refuse relief although, by majority, it considered itself to have jurisdiction to grant it. The perception that non-justiciability goes only to discretion, not jurisdiction, may need revision in light of more recent authorities.

Interim declarations?

[19-140] *Principles*

It follows from the very nature of declaratory relief that it is final relief, and that there can be no such thing as an interlocutory declaration. As Upjohn LJ said in *International General Electric Co of New York Ltd v Commissioner of Customs and Excise*,[120] 'an order declaring the rights of the parties must in its nature be a final order after a hearing when the court is in a position to declare what the rights of the parties are, and such an order must necessarily then be res judicata and bind the parties for ever, subject only, of course, to a right of appeal'.[121] This

115. [1980] QB 114; [1979] 3 All ER 257.
116. *Mutasa v A-G* [1980] QB 114 at 123; [1979] 3 All ER 257 at 265.
117. [2014] 3 All ER 243; [2014] 3 WLR 1.
118. See also *Egan v Willis* (1998) 195 CLR 424; 158 ALR 527 at [5]: 'Questions respecting the existence of the powers and privileges of a legislative chamber may present justiciable issues when they are elements in a controversy arising in the courts under the general law but they should not be entertained in the abstract and apart from a justiciable controversy'. The latter is true '*at least* as a matter of discretion' (emphasis added).
119. [1977] 1 NSWLR 43.
120. [1962] Ch 784; [1962] 2 All ER 398.
121. *International General Electric Co of New York Ltd v Cmr of Customs and Excise* [1962] Ch 784 at 789; [1962] 2 All ER 398 at 400.

has been stated as doctrine by primary judges,[122] the Full Federal Court[123] and in the judgments of several judges in the High Court of Australia.[124] As was explained in *Kinsella v Gold Coast City Council*,[125] the impediment is not to the grant of a declaration prior to the conclusion of the entire proceeding, but to declarations of a provisional nature made before a court is in a position finally to determine the matters contained in the declaration.[126] Thus, a declaration that a representative litigant is entitled to recover against certain defendants in negligence but only on behalf of those group members who prove they have suffered damage is not a final order as to the group members; it is in effect an interim declaration.[127]

[19-145] *Illustrations*

On these principles, the decision in *Macleod v Minister Administering Lands Resumption Act 1957*[128] appears to be wrong. Section 69(2)(b) of the Supreme Court Civil Procedure Act 1932 (Tas) relevantly provided that in any action against any officer or agent of the government of Tasmania, the Supreme Court may give judgment or make an order declaring that any officer or agent of the government of Tasmania should abstain from doing or performing any act. The court held that this empowered the Supreme Court to make an interim declaration that an officer of the Tasmanian government should abstain from doing some act until the determination of an action. The judge reasoned that:[129]

> Such a declaration would amount to no more than an expression of judicial opinion that the *status quo* ought not to be interfered with until the rights of the parties have been determined. It amounts to a declaration that the relevant officer should abstain from doing an act whilst the action, in which the lawfulness of such act is sought to be determined, remains undecided.
>
> Opinions of that type are at odds with the principles collected and analysed in *Kinsella v Gold Coast City Council*.[130]

A different procedure from that in *Macleod's* case was followed in *Australian Competition and Consumer Commission v Cement Australia Pty Ltd*.[131] There the court made orders under the heading 'interim declarations' and invited the parties to make submissions as to the precise terms of the final orders. The further submissions prompted the court to clarify that the 'interim' declarations:[132]

> ... sought to communicate some explanatory context to the outcome of the proceedings ... without attempting to comprehensively frame the ultimate declarations to be made in the precise terms in which they ought to be made after thoughtful and careful analysis of the lengthy reasons [of the court] by the parties.

122. *Bond v Sulan* (1990) 26 FCR 580 at 591; 98 ALR 121 at 132; *NSW Group Pty Ltd v Mokas* [2006] NSWSC 976 at [14]–[16]; *Telstra Corp Ltd v Queensland* (2013) 217 FCR 181; 306 ALR 470 at [30]–[34]; *Kinsella v Gold Coast City Council* [2014] QSC 65 at [61]–[78] (the fullest analysis to date).
123. *Magman International Pty Ltd v Westpac Banking Corp* (1991) 32 FCR 1 at 15; 104 ALR 575 at 588; *Ho v Grigor* (2006) 151 FCR 236; 231 ALR 639 at [54]. The more tentative remarks in *AED Oil Ltd v Puffin FPSO Ltd* (2010) 27 VR 22 at [22]–[24] are to be read subject to the other authorities cited here.
124. *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; 194 ALR 337 at [128]; *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317; 201 ALR 139 at [143]–[144]. The contrary statement of doctrine in I C F Spry, *The Principles of Equitable Remedies*, 9th ed, Lawbook Co, Sydney, 2014, p 469 is unaccompanied by citations of the Australian authorities.
125. [2014] QSC 65.
126. *Kinsella v Gold Coast City Council* [2014] QSC 65 at [66].
127. *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; 194 ALR 337 at [128].
128. [1991] Tas R 106.
129. *Macleod v Minister Administering Lands Resumption Act 1957* [1991] Tas R 106 at 113.
130. [2014] QSC 65.
131. [2013] FCA 909; [2014] FCA 148.
132. *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2014] FCA 148 at [5] (emphasis in original).

The court further explained that the 'interim' declarations:[133]

> … were made … pending the submission of proposed final declarations by the parties for the consideration of the Court. They are 'interim declarations' in the *sense* that they are designed to operate pending only the resolution of any question about the *final formulation* of the declarations (and orders) …
>
> However, the declarations are not 'interim' in any sense in which lawyers or the Court would understand them to have an 'interlocutory' function *pending trial*. They were short-form declarations made after a trial of the principal controversy … The law simply does not recognise, unlike an injunction, an interim or interlocutory declaration as to a *state of affairs* pending the trial of the very matter to be determined at trial and the subject of the particular controversy.

If the 'interim declarations' were in fact final in nature, but executory in that they needed to be more fully worked out, then the orders were not affected with the problem seen in the relief granted in *Macleod v Minister Administering Lands Resumption Act 1957*. However, if the 'interim declarations' in the *Cement Australia* decision were final, then the court would seem to have made and withdrawn its final orders, and then to have substituted new final orders in a more detailed form. That raises procedural questions — not, with respect, addressed in the judgment accompanying the 'interim' declarations or the judgment on the terms of the 'final' declarations — as to the power of the Federal Court to withdraw its final orders and enter replacements.

[19-150] *Two unanswered questions*

In England, the Civil Procedure Rules empower a court to grant interim declarations.[134] There appear to be many more cases in which such relief has been sought and refused than there are cases in which such relief has been given.[135] Two fundamental questions about interim declarations remain unanswered in Australia.

The first concerns whether the unavailability of interim declarations depends on lack of jurisdiction or an adverse exercise of discretion. On one view, the conclusion that there is no such thing as an interim declaration is a logical consequence of (*a*) requiring the plaintiff to have a real or substantial interest and (*b*) requiring there to be a real, not hypothetical, question. Since those are two requirements currently treated by the High Court as going to jurisdiction, not merely discretion, the same logic suggests that the interim declarations are unavailable as a matter of jurisdiction.[136]

The second unresolved question is whether a power similar to that conferred by the English Civil Procedure Rules could be conferred upon courts exercising federal jurisdiction in Australia. In *Bass v Permanent Trustee Co Ltd*,[137] the High Court said the crucial difference between an advisory opinion and a declaratory judgment is the fact that the former 'is not based on a concrete situation and does not amount to a binding decision raising a res judicata between the parties'.[138] The declaration in *Macleod v Minister Administering Lands Resumption Act 1957*, for example, would not have raised a res judicata. An argument could be made that federal courts can grant interim injunctions compatibly with the doctrine prohibiting federal courts[139] from granting advisory opinions and that interim declarations could be supported in the same way. On the other hand, a bare declaration differs from an injunction in being a statement rather than coercive relief. Further analysis would be needed to plumb the question.

133. *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2014] FCA 148 at [10]–[11] (emphasis in original).
134. Civil Procedure Rules 1998 (UK) r 25.1(1)(b).
135. See Lord Woolf and J Woolf, *The Declaratory Judgment*, 4th ed, Sweet & Maxwell, London, 2011, [3-107]–[3-115].
136. Cf *Bond v Sulan* (1990) 26 FCR 580 at 591; 98 ALR 121 at 132.
137. (1999) 198 CLR 334; 161 ALR 399.
138. *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; 161 ALR 399 at [48].
139. *Patrick Stevedores Operations No 2 v Maritime Union of Australia (No 3)* (1998) 195 CLR 1; 153 ALR 643 at [35].

But the analysis may be unnecessary given the present antipathy towards interim declarations in Australia, and their apparent inutility to date in England.

D Real, not Hypothetical, Question

Real questions

[19-155] *When present*

A real question for answer by a declaration is present if there is a particular degree of connection between the law and the facts. A legal dispute is a dispute over the legal significance of certain facts. A difference of opinion between two persons over whether a contract between them has this meaning or that meaning will be a hypothetical, not a real, question if in the circumstances the meaning of their contract has no practical significance for them, and if circumstances in which the meaning would have practical significance are unforeseeable.

[19-160] *Futurity*

Often the futurity of a situation is what makes questions about the legal significance of that situation hypothetical questions, not real ones. One way of testing whether there is a real, not merely hypothetical, question is to ask whether it is foreseeable that the declaration will produce consequences for the parties. This test, which is favoured in Australia,[140] may be contrasted with the original equitable jurisdiction to award declaratory relief. Before the statutory reforms in England described earlier,[141] declarations were only available where a plaintiff had an existing equity to relief in the Court of Chancery. Bare negative declarations, and bare positive declarations as to future states of affairs, were not available. The power to make declarations as to future states of affairs has thus expanded under the statutory powers modelled on the powers conferred by the Judicature Act and Rules. Can the existence of a real question where a plaintiff seeks a declaration as to a future state of affairs be tested in the same manner as a court tests whether a plaintiff has a right to a *quia timet* injunction? That has been done in at least one case.[142] While on a general level there are similarities between the questions relevant to the grant and refusal of both types of relief, the tests for each type of relief are different. A declaration may be made in respect of events all of which occurred in the past; a *quia timet* injunction relates entirely to conduct that the plaintiff apprehends will occur in the future. Further, where a declaration is claimed as to the future, the concern is whether the declaration if granted will produce foreseeable consequences for the parties; in the case of *quia timet* injunctions, the fact that the plaintiff seeks the injunction entitles the court to assume that the injunction if granted will have such foreseeable consequences. The differences in the tests for the award of the two remedies reflect the different purposes of each. Where a declaration is claimed as to the future, it relates to a future state of affairs, not to the defendant's apprehended *conduct* as such. A *quia timet* injunction is emphatically to do with the defendant's apprehended conduct, rather than a *state of affairs* as such.

Related points

[19-165] *Real answers*

Assuming a real question exists for adjudication, a declaration to resolve the dispute must also be real. Answers in a declaration which are not based on agreed or found facts are purely

140. For example, *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 188, 189; 18 ALR 55 at 69, 71; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591; 169 ALR 616 at [52].
141. See above [19-015]–[19-025].
142. See *CIP Property (AIPT) Ltd v Transport for London* [2012] EWHC 259 (Ch) at [23] ('the principles regarding the grant of a declaration and the principles relating to the grant of *quia timet* injunctions … are, as might be expected, broadly similar').

hypothetical and thus bad. 'At best, [such] answers do no more than declare that the law dictates a particular result when certain facts in the material or pleadings are established.'[143] The deficiency here is not that there is no real question between the parties; it is a deficiency of form. Aspects of the form of declaratory relief are discussed later in this chapter.[144]

[19-170] *Federal judicial power*

In the exercise of federal jurisdiction, the requirement that there be a real, not hypothetical, question is replaced by the requirement that there be a matter and a justiciable controversy. The considerations in federal and non-federal cases have influenced one another in Australian decisions.

E Sufficient Interest

Sources of rules

[19-175] *General*

Since the one power is exercised to make declarations where the parties are private parties and where one of the parties is the Crown or a public authority, the requirement that the plaintiff have a 'sufficient interest' to seek the declaration does work in both public and private law. However, the requirement applies differently to different sorts of controversies. For example, a plaintiff who has standing to enforce or challenge the validity of a public Act thereby has a sufficient interest for the purpose of obtaining declaratory relief. In controversies between private parties, attention is primarily but not exclusively on the plaintiff's rights, widely defined to include rights, privileges, immunities and so on. Statute may confer on a plaintiff a right to complain about the conduct of another where the defendant's conduct neither infringes an individual right of the plaintiff's, nor confers standing in the usual sense on the plaintiff. In Australia, federal jurisdiction and its bearing on standing must also be taken into account. In general terms, therefore, it is appropriate to speak of a requirement that the plaintiff who seeks a declaration must show a sufficient interest in the controversy, and then to examine the controversy in order to answer that question.

[19-180] *Federal jurisdiction*

A prayer for declaratory relief in federal jurisdiction attracts the principles to do with matters within the meaning of Ch III of the Commonwealth Constitution. The correct frame of reference here is not found in the notions sufficient interest or real interest linked with the general jurisdiction to grant declaratory relief. Those notions are very wide. Subject to that caveat, in a general sense the requirement of a matter can be said to be narrower than a requirement of a sufficient or a real interest. The narrowing comes from the confining of matter to the resolution of controversies subject to the other properties of federal judicial power as envisaged by Ch III. For example, that power may not be exercised by simply any superior court which possesses the general power to make declaratory orders. In contrast, the jurisdiction or power to make declaratory orders may be possessed and properly exercised by courts that do not fit the description of Chapter III courts. When considering certain statements in the cases it is appropriate to bear in mind that the notions of sufficient and real interests are not co-extensive with the notion of a matter. In several decisions of the High Court, it has been said that in federal matters standing — which here includes the ordinary requirement that a plaintiff seeking a declaration show a sufficient or real interest

143. *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; 161 ALR 399 at [49]. See also *Elliott v Seymour* (2001) 116 FCR 100 at [20], [37], [43].
144. See [19-240]–[19-285].

— 'are subsumed within the constitutional requirement of a "matter"'.[145] The subsuming metaphor, it is submitted, is not intended to mean that the notion of 'matter' is larger than the notions of sufficient or real interest in the sense that, where the plaintiff lacks a sufficient or real interest, there may nevertheless be a matter. Rather, the subsuming seems intended to mean that instead of asking whether the plaintiff has a sufficient or real interest, the correct question is whether there is a matter between the parties. There can be a matter without there being correlative rights and liabilities between a plaintiff and the defendant.[146] Since a sufficient or real interest will amount to a matter where the other requirements of Ch III are fulfilled, and since those other requirements of constitutional law are outside the province of this book, it is not proposed to say anything further about them.

[19-185] *Standing at general law*

Standing at general law is a fallacy if it is thought to involve (*i*) a notion and a requirement derived wholly from the judge-made law (*ii*) which applies uniformly to all sorts of disputes.[147] To take standing to enforce public Acts alone, it is doubtful that the judge-made law in point, even in Australia alone, conforms to a unitary test. Broadening the focus, whether any of the judicial formulations of standing to enforce public Acts in fact applies depends on questions of statutory construction.[148] A public Act may confer 'private' rights on individuals, in which case formulations of the standing requirement for the enforcement of public Acts which do not confer such rights will not be in point. For present purposes, that class of case may be assimilated to the cases of private rights considered below.[149] Alternatively, a public Act may confer on a person or a class of persons a right to enforce the Act divorced from any right the enforcement of which has the purpose of benefiting the plaintiff. For present purposes, these situations fall within a different group of cases considered below.[150]

Public laws

[19-190] *Extension of the rule in Boyce's case*

The most difficult area of the law of standing, including standing in relation to declaratory relief, concerns public laws and public rights. In this area the requirement that the plaintiff have a sufficient connection with the subject matter of the dispute crystallised into the rule that a plaintiff's *locus standi* to obtain declaratory relief without joining the Attorney-General as a plaintiff is governed by the same rule as governs proceedings for injunctive relief. That is the rule in *Boyce v Paddington Borough Council*:[151] a plaintiff must show either that (*a*) some private right of the plaintiff's is interfered with in addition to interference with the public right, or alternatively that (*b*) in respect of the plaintiff's public right, the plaintiff suffers special damage from the defendant's interference.[152] Points of principle immediately arise. It is submitted that there is no logically compelling reason to fetter the law of declarations with the rule in *Boyce v Paddington Borough Council*. Why cannot the courts proceed on the principle

145. *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; 155 ALR 614 at [37]. See also *Croome v Tasmania* (1997) 191 CLR 119 at 132–3; 142 ALR 397 at 406; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591; 169 ALR 616 at [42]–[50], [101]–[109], [177]–[179]; *Pape v Cmr of Taxation* (2009) 238 CLR 1; 257 ALR 1 at [50]–[51], [152].
146. *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591; 169 ALR 616 at [16]–[17], [20], [44]–[45], [76]–[77], [120], [122], [124], [159], [183]–[185], [211], [214].
147. *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; 155 ALR 614 at [33]–[41]. See M Aronson and M Groves, *Judicial Review of Administrative Action*, 5th ed, Lawbook Co, Sydney, 2013, [11.40].
148. *Allan v Transurban City Link* (2001) 208 CLR 167; 183 ALR 380 at [16]; *Brown v Executors of the Estate of HM Queen Elizabeth the Queen Mother* [2008] 1 WLR 2327 at [35]–[38].
149. See [19-200]–[19-215].
150. See [19-220].
151. [1903] 1 Ch 109; [1900-3] All ER Rep Ext 1240.
152. See [21-175].

that any person may successfully obtain a declaration without joining the Attorney-General if that person has a real and substantial interest in the subject matter of the dispute? A related question of principle, fully discussed elsewhere, is whether the rule in *Boyce's* case ought to apply at all in cases where relief is sought against an officer of the Commonwealth.[153]

Nor is there any binding decision which strictly requires an Australian court to apply *Boyce's* case to determine whether a plaintiff has standing to seek a declaration in respect of public laws. Indeed, it is notorious that the test has been applied in a haphazard manner by the courts. '"Special damage" is of course the kind of ambiguous phrase which one judge will interpret broadly and another narrowly, and this may account for the untidy appearance of the decisions.'[154] Some judicial decisions appear to give the widest possible meaning to 'private right' and 'special damage', in fact a meaning so wide that one must question the utility of retaining the rule. Other cases exist in which the rule seems wholly to have been abandoned. In yet other cases, judges have effectively supported the application of *Boyce's* case to declaratory relief generally, by following the relatively strict views on standing enunciated by the House of Lords in *Gouriet v Attorney-General*.[155] Statutory reform of the standing rules in England has rendered the topic unimportant to judicial review proceedings in that country. In English judicial review proceedings, it suffices that a claimant has a 'sufficient interest in the matter to which the application relates'.[156] That avoids the precise difficulties created by applying the rule in *Boyce's* case to declarations in respect of public rights so far as those are subject to proceedings for judicial review.[157] Until the general application of the rule in *Boyce's* case to declaratory relief is directly challenged in the High Court, it can be expected to linger in Australia.[158]

[19-195] *Standing by concession*

In *Croome v Tasmania*,[159] Brennan CJ, Dawson and Toohey JJ held that a concession by the state that the plaintiffs had standing to bring an action for declarations of the invalidity of certain provisions of the Criminal Code (Tas) was effective to establish the plaintiffs' standing to seek those declarations. However, not every concession by the Crown that a plaintiff has standing to seek a declaration in respect of public laws or public rights will establish the plaintiff's standing. In *Croome v Tasmania*, Brennan CJ, Dawson and Toohey JJ said the concession by Tasmania would establish the plaintiff's sufficient interest 'if [the concession was] rightly made', which they held on the facts it was.[160] A concession wrongly made by a defendant will not establish that a plaintiff who seeks a declaration has a sufficient interest to claim that relief.

153. See M Leeming, 'Standing to Seek Injunctions against Officers of the Commonwealth' (2006) 1 *J Eq* 3; M Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, Federation Press, Sydney, 2012, pp 48–52.
154. J D Heydon, 'Injunctions and Declarations', in L A Stein (ed), *Locus Standi*, Law Book Co, Sydney, 1979, p 39.
155. [1978] AC 435; [1977] 3 All ER 70. See *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 126–7; 22 ALR 291 at 295.
156. Senior Courts Act 1981 (UK) s 31(3). On this provision, see *R v Inland Revenue Cmrs; Ex parte National Federation of Self-Employed and Small Businesses* [1982] AC 617; [1981] 2 All ER 93.
157. That is not to say that the 'sufficient interest' test has been found unproblematic: see Lord Woolf, J Jowell, A Le Sueur, C Donnelly and I Hare, *De Smith's Judicial Review*, 7th ed, Sweet & Maxwell, London, 2013, Ch 2; R Moules, *Environmental Judicial Review*, Hart Publishing, Oxford, 2011, pp 99–107.
158. See [21-185]–[21-190] and the survey in N J Young, 'Declarations and Other Remedies in Administrative Law' (2004) 12 *AJ Admin L* 35 at 38–43.
159. (1997) 191 CLR 119; 142 ALR 397.
160. *Croome v Tasmania* (1997) 191 CLR 119 at 127; 142 ALR 397 at 402.

Private rights

[19-200] *Relationship with standing*

In *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*,[161] Gaudron, Gummow and Kirby JJ said that '[i]n private law there is, in general, no separation of standing from the elements in a cause of action'.[162] That accommodates the fact that, other things being equal, a plaintiff who seeks declaratory relief will satisfy the requirement of a sufficient or real interest by showing that the plaintiff has a cause of action against the defendant. It is unclear to what extent, if at all, standing to seek a declaration of existing or potential private rights is separate from the elements of a cause of action. Standing and the elements of a cause of action are clearly separate in particular ways. If a plaintiff is party to a contract with the defendant the plaintiff has no cause of action for breach of contract until the defendant commits a breach. However, the fact that the defendant has committed no breach does not as such mean that the plaintiff has no standing to obtain a declaration that the defendant will breach the contract if the defendant performs certain acts. Circularity of reasoning can easily occur, for in the latter case it can be said that the plaintiff succeeds because the plaintiff has a good cause of action *for a declaration*. Strictly, the question regarding standing to seek a declaration of private rights, actual or potential, and the elements of a cause of action in respect of private rights is: to what extent, if at all, is standing to seek a declaration in respect of actual or potential private rights separate from the elements of any actual or potential causes of action to enforce those actual or potential rights?

[19-205] *Strangers to contracts*

To that question there is no clear answer. In the law of contracts, the question arises where A seeks a declaration as to the rights and liabilities arising under a contract between B and C. In exceptional cases where A by statute or under the general law has a right to enforce the contract between B and C, A will have standing to seek — or a sufficient or real interest to seek — a declaration as to the actual and potential rights and liabilities that the contract creates. In *Meadows Indemnity Co Ltd v Insurance Corporation of Ireland plc*,[163] May LJ said a plaintiff who claimed a declaration in respect of a contract to which it was not a party had interests that were not 'vitally affected' so as to give standing as the authorities were said to require. His Lordship said:[164]

> I accept the general submission that was made to us that a person who is not a party to a contract has no locus, save perhaps in exceptional circumstances, to obtain a declaration in respect of the rights of other parties to that particular contract.

In an obiter dictum in *Feetum v Levy*,[165] Jonathan Parker LJ said that English law had 'moved on'[166] from the view on which May LJ's observations were based. This news has been enthusiastically received by writers in the field.[167] It evidently led the Court of Appeal in *Office of Fair Trading v Foxtons Ltd*[168] to treat the following as an exhaustive statement of the preconditions to a grant of declaratory relief:[169]

161. (1998) 194 CLR 247; 155 ALR 614.
162. *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; 155 ALR 614 at [43]. See also *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591; 169 ALR 616 at [92].
163. [1989] 2 Lloyd's Rep 289.
164. *Meadows Indemnity Co Ltd v Insurance Corp of Ireland plc* [1989] 2 Lloyd's Rep 289 at 309.
165. [2006] Ch 585.
166. *Feetum v Levy* [2006] Ch 585 at [82].
167. Lord Woolf and J Woolf, *The Declaratory Judgment*, 4th ed, Sweet & Maxwell, London, 2011, esp [3-26]–[3-27].
168. [2009] 3 All ER 697; [2010] 1 WLR 663.
169. *Financial Services Authority v Rourke* [2002] CP Rep 14 at 18; [2001] EWHC 704 (Ch), quoted and applied in *Office of Fair Trading v Foxtons Ltd* [2009] 3 All ER 697; [2010] 1 WLR 663 at [57]–[61].