THE MECHANICS OF ASSIGNMENTS:

FUNCTIONS AND FORM

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Abstract

Choses in action are valuable assets. This has compelled (and been facilitated by) the development of legal devices such as equitable assignment to allow holders of choses to deal with them, *inter vivos*.

This thesis makes two claims.

First, equitable assignments are best conceived as a composite of a bare trust and an atypical agency where the assignee is authorised to invoke the assignor's entitlements against the obligor to the chose assigned, as the assignee pleases.

On this conception, equitable assignments merely entail generation of a new set of jural relations as between assignor and assignee. Though these affect how the jural relations between assignor and obligor are to be discharged, those jural relations are left intact and unchanged, unless the requirements for 'statutory' assignments have been satisfied.

Second, 'statutory' assignments are regulatory in effect. Where a debt or other chose in action has been validly equitably assigned and the requirements in s 136(1) Law of Property Act 1925 are satisfied, the specific entitlements set out in sections 136(1)(a), (b) and (c) will be passed from the assignor and transferred to the assignee. But that is only true with regards entitlements falling within those provisions, and the set of entitlements listed therein is not exhaustive.

The composite model of equitable assignment, and the clarification of the nature of 'statutory' assignment, reduces confusion over their operation and effects. Accordingly, this thesis tempers the urge towards legislative reform of the law of assignment: reform may not be needed since the law is not incoherent, though it is certainly complex. And if targeted law reform to simplify the law on assignment be thought desirable, it is as well to know what one is reforming.

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

Ames (1887)	JB Ames, 'Purchase for Value Without Notice' (1887) 1 Harv L Rev 1
Ames (1890)	JB Ames, 'The Disseisin of Chattels - Part III' (1890) 3 Harv L Rev 337
Ames (1909)	JB Ames, 'Disseisin of Chattels' in *Select Essays in Anglo-American Legal History*, vol III (Cambridge University Press 1909)
Ames (1913)	JB Ames, *Lectures on legal history and miscellaneous legal essays* (Harvard University Press 1913)
Ashburner (1933)	Walter Ashburner, *Ashburner's Principles of Equity* (Denis Browne ed, 2nd edn, Butterworth & Co 1933)
Bailey (1932)	SJ Bailey, 'Assignments of debts in England from the twelfth to the twentieth century - Part III' (1932) 48 LQR 547
Beale, Gullifer and Paterson (2016)	H Beale, L Gullifer and S Paterson, 'A case for interfering with freedom of contract? An empirically-informed study of bans on assignment' [2016] JBL 203
Bridge (2013)	MG Bridge and others, *The Law of Personal Property* (1st edn, Sweet & Maxwell 2013)
Bridge (2016)	MG Bridge, 'The Nature of Assignment and Non-Assignment Clauses' (2016) 132 LQR 47
C3PA	Contracts (Rights of Third Parties) Act 1999
Calvert (1847)	Frederic Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* (2nd edn, William Benning & Co 1847)
Chitty (2015)	Joseph Chitty, *Chitty on contracts* (HG Beale (Gen ed), 32nd edn, Sweet & Maxwell 2015)
Clerk and Lindsell (2014)	JF Clerk and WHB Lindsell, *Clerk & Lindsell on Torts* (MA Jones ed, 21st edn, Sweet & Maxwell 2014)
CLPA1854	Common Law Procedure Act 1854

Corbin (1926)	AL Corbin, 'Assignment of Contract Rights' (1926) 74 University of Pennsylvania Law Review 207
Davies (2015)	Paul S Davies, *Accessory Liability* (Hart Publishing 2015)
Edelman and Elliott (2015)	James Edelman and Steven Elliott, 'Two Conceptions of Equitable Assignment' (2015) 131 LQR 228
Elphinstone (1871)	HW Elphinstone, *A Practical Introduction to Conveyancing* (1st edn, William Maxwell 1871)
Goode (1976)	Roy Goode, 'The Right to Trace and its Impact in Commercial Transactions--II' (1976) 92 LQR 528
Goode (1979)	'Inalienable Rights?' (1979) 42 MLR 553
Goode (2003)	RM Goode, 'Are intangible assets fungible?' [2003] LMCLQ 379
Goode (2013)	Sir Roy Goode, *Goode on legal problems of credit and security* (Louise Gullifer ed, 5th edn, Sweet & Maxwell 2013)
Green (1984)	Brian Green, 'Grey, Oughtred and Vandervell - A contextual reappraisal' (1984) 47 MLR 385
Guest and Liew (2015)	AG Guest and YK Liew, *Guest on the law of assignment* (2nd edn, Sweet & Maxwell 2015)
Handley (2009)	KR Handley, *Spencer Bower and Handley: res judicata* (4th edn, LexisNexis 2009)
Harris (1975)	JW Harris, *Variation of Trusts* (Sweet & Maxwell 1975)
Hayton and Mitchell (2015)	Ben McFarlane and Charles Mitchell, *Hayton and Mitchell: text, cases and materials on the law of trusts and equitable remedies* (14th edn, Sweet & Maxwell 2015)
Holdsworth (1920)	WS Holdsworth, 'History of the treatment of choses in action by the common law' (1920)
Holdsworth (1925)	WS Holdsworth, *A History of English Law*, vol VII (1st edn, Methuen & Co 1925)
Hohfeld (1923)	WN Hohfeld, *Fundamental legal conceptions as applied in judicial reasoning and other legal essays* (WW Cook ed, Yale University Press 1923)

Holmes (1968)	OW Holmes, *The common law* (Mark DeWolfe Howe ed, Macmillan 1968)
Judicature Act 1873	Supreme Court of Judicature Act 1873
Judicature Acts	Supreme Court of Judicature Act 1873 and Supreme Court of Judicature Act 1875
LPA1925	Law of Property Act 1925
Lewin (2015)	Lynton Tucker and others, *Lewin on Trusts* (19th edn, Sweet & Maxwell/Thomson Reuters 2015)
Lord Cairns' Act	Chancery Amendment Act 1858
McFarlane and Stevens (2010)	Ben McFarlane and Robert Stevens, 'Interests in Securities: Practical Problems and Conceptual Solutions' in Louise Gullifer and Jennifer Payne (eds), *Intermediated securities: legal problems and practical issues* (Hart Publishing 2010)
McLauchlan (1980)	DW McLauchlan, 'Priorities--Equitable Tracing Rights and Assignments of Book Debts' (1980) 96 LQR 90
Marshall (1950)	OR Marshall, *The Assignment of Choses in Action* (Pitman 1950)
Matthews (2012)	Paul Matthews, '*Burgess v Wheate* (1759)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012)
Meagher, Gummow & Lehane (2015)	JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2015)
Megarry & Wade (2012)	Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade - The law of real property* (8th edn, Sweet & Maxwell 2012)
Oditah (1989)	Fidelis Oditah, 'Priorities: equitable versus legal assignments of book debts' (1989) 9 Oxford Journal of Legal Studies 513
Oditah (1991)	Fidelis Oditah, *Legal Aspects of Receivables Financing* (Sweet & Maxwell, 1991)

Oditah (2009)	Fidelis Oditah, 'Recurrent Issues in Receivables Financing' in John Armour and Jennifer Payne (eds), *Rationality in Company Law: Essays in Honour of DD Prentice* (Hart 2009)
Peel (2015)	Edwin Peel, *The law of contract* (14th edn, Sweet & Maxwell 2015)
Pollock (1910)	Frederick Pollock, 'Contract' in *Encyclopædia Britannica* (11th edn, 1910) Vol 7
Salinger (2006)	Noel Ruddy, Simon Mills and Nigel Davidson, *Salinger on Factoring* (4th edn, Sweet & Maxwell 2006)
Smith and Leslie (2013)	Marcus Smith and Nico Leslie, *The Law of Assignment* (2nd edn, OUP 2013)
Snell (2015)	John McGhee and others, *Snell's Equity* (33rd edn, Sweet & Maxwell 2015)
Spence (1850)	George Spence, *The equitable jurisdiction of the Court of Chancery*, Vol II (Lea and Blanchard 1850)
Stevens (2007)	Robert Stevens, *Torts and Rights* (OUP 2007)
Story (1882)	Joseph Story, *Commentaries on the law of agency: as a branch of commercial and maritime jurisprudence, with occasional illustrations from the civil and foreign law* (CP Greenough ed, 9th edn, Little, Brown, and Company 1882)
Story (1884)	Joseph Story and WE Grigsby, *Commentaries on equity* jurisprudence (1st English edn, Stevens and Haynes 1884)
Sugden (1846)	Sir Edward Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates* (11th edn, S Sweet 1846)
Tolhurst (2016)	GJ Tolhurst, *The Assignment of Contractual Rights* (2nd, edn, Hart Publishing 2016)
Tolhurst and Carter (2014)	GJ Tolhurst and JW Carter, 'Prohibitions on Assignment: A Choice to be Made' (2014) 73 Cambridge Law Journal 405.
Trukhtanov (2010)	A Trukhtanov, 'In defence of the "No discharge after notice" rule' [2010] LMCLQ 551

Tudsbery (1912)	FC Tudsbery, *The nature, requisites and operation of equitable assignments* (Sweet and Maxwell 1912)
Watts and Reynolds (2014)	Peter Watts and FMB Reynolds, *Bowstead and Reynolds on Agency* (20th edn, Sweet & Maxwell 2014)
Zakrzewski (2005)	Rafal Zakrzewski, *Remedies reclassified* (OUP 2005)

TABLE OF CASES

- A -

- B -

- C -

- D -

- E -

- F -

- G -

- H -

- I -

- J -

- K -

- L -

- M -

- N -

- O -

- P -

- Q -

- R -

- S -

- T -

- U -

- V -

- W -

- Z -

***

TABLE OF LEGISLATION

UNITED KINGDOM

Statutes

Subsidiary Legislation

Hansard

AUSTRALIA

INDIA

NEW ZEALAND

***

TABLE OF EXAMPLES

TABLE OF TABLES

PART I:

INTRODUCTION

I. A CONCEPTUAL ACCOUNT OF EQUITABLE AND STATUTORY ASSIGNMENTS

1. The argument, in miniature

Equitable assignments of choses in action (as opposed to choses in possession)[1] arising from voluntarily assumed private law obligations[2] are effective, regardless of obligor assent, whether such assent be given at the time of such assignment, or in advance (eg, where the obligor agreed from the outset to be obligated 'to' the obligee 'or his/her assigns').

An obligee may equitably assign the benefit of *primary* obligations[3] arising from voluntarily assumed obligations arising at common law (such as contract or covenant, but not tort) and in equity (such as the obligations of a trustee under an express trust, or those of an executor to a will), without the obligor's assent. Equitable assignments may also be effected of choses in action which may not be novated (for example, the chose in action arising when secondary obligations are imposed by law following the breach of primary contractual, tortious or equitable

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1 '[I]n modern times, lawyers have accurately or inaccurately used the phrase "choses in action" as including all personal chattels that are not in possession': *Colonial Bank v Whinney* (1886) 11 App Cas 426 (HL) 480. In this thesis, unless indicated otherwise, 'chose' and 'choses' shall refer to 'chose in action' or 'choses in action', respectively.

2 Though obligations also arise as a matter of public and administrative law, in this thesis, unless indicated otherwise, 'obligations' will be used to refer only to obligations arising as a matter of private law.

3 The language of 'primary' and 'secondary' obligations is drawn from John Austin, *Lectures on jurisprudence, or, The philosophy of positive law* (Robert Campbell ed, 5th edn, John Murray), Lecture XLV. Though applied most prominently to contractual obligations (see, eg, *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 826 (HL) 848–49; *Moschi v Lep Air Services Ltd* [1973] AC 331 (HL)), Austin's analysis applies to obligations generally: Peter Birks, 'Equity in the Modern law: an Exercise in Taxonomy' (1996) 26 UWALR 1, 10.

obligations: ie, an assignment of a *cause* of action).[4] These phenomena show that the subject-matter 'transferred' by an equitable assignment is not the same as that which is 'transferred' by a novation, though the end-results bear some similarities.

First, the subjects of a novation may only be choses in action arising from voluntarily undertaken obligations: most often, contractual obligations.[5]

When a contract is novated, the obligor becomes obligated to a new and different obligee under a new and different contract.[6] Since no person may ordinarily

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4 Formerly, it was believed that it was impossible to assign a cause of action (ie, a 'bare' right of action), whether it be a cause of action at law for breach of contract, or for breach of a duty arising in tort. It is now clear, however, that there is no absolute conceptual bar, but rather, such assignments may be rendered ineffective by reason of the policy against encouraging maintenance and champerty. So long as those concerns do not arise, there is nothing to bar the assignment of a cause of action. For discussion of the effect of maintenance and champerty, see Guest and Liew (2015) para 1-20, 1-2 and 4-23 to 4-36. Over and beyond the policy to discourage maintenance and champerty, statute has rendered the assignment of certain types of chose void or unenforceable. Some of these are discussed in Guest and Liew (2015) para 4-19 to 4-22.

5 There appears to be no conceptual reason why the voluntarily assumed obligations of a covenantor arising under a deed may not be novated. If B has covenanted by deed that he will pay £10,000 to A, A can promise to release B from his duty under that covenant in exchange for his executing a deed by which he covenants to pay £10,000 to C. For that matter, A can promise to release B from his duty under that covenant in exchange for his promise that he will pay £10,000 to C. Either of these would operate by way of novation to 'transfer' from A to C the benefit of B's promise of payment.

6 'As might be expected, there was no dispute as to the relevant legal principles. They can be summarized as follows:– (a) Novation involves the creation of a new contract where an existing party is replaced by a new party. (b) Thus, novation requires the consent of all parties, including in particular the party which is thereby accepting a new person as his debtor or as his counterpart under an executory contract (c) the consent may be apparent from express words or inferred from conduct …': *The 'Tychy' (No 2)* [2001] 1 Lloyd's Rep 10 (Admlty), [65]; affd in *The 'Tychy' (No 2)* [2001] EWCA Civ 1198, [2001] 2 Lloyd's Rep 403. And it is also for this reason that the *burdens* owed by an obligee to her obligor may be 'transferred' to

become contractually bound without their assent,[7] novation entails obtaining the obligor's consent to being subjected to a *new* obligation with a new obligee.[8]

In contrast, an equitable assignment of the benefit of a contractual chose in action is effective as between the assignor and the assignee regardless of the obligor's assent thereto. Thus, it is possible to equitably assign the benefit of a contractual chose even where the obligor has not, expressly or implicitly, agreed that he would be obligated to the obligee or her assigns. Consequently, as mentioned above, it is also possible to equitably assign the benefit of an accrued cause of action in tort, without the tortfeasor's consent, and equitable assignments are generally effective, unless:

(i) such assignment is prohibited by statute or the public policy against encouraging maintenance and/or champerty; or

(ii) such assignment is ineffective because the obligation underlying the chose assigned is 'too personal', for example, where they involve an exercise of judgment, discretion, or some element of skill personal to the particular obligee.[9]

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a third party via novation, such that it is that third party who is to be responsible for the due performance of such burdens.

7 For authorities, see references cited in *Halsbury's Laws* (5th edn, 2012) vol 22, para 604.

8 *Scarf v Jardine* (1882) 7 App Cas 345 (HL), 351.

9 This is a matter of construction: *Davies v Collins* [1945] 1 All ER 247 (CA) 249E. For further discussion of contracts too 'personal' to permit assignment, see Guest and Liew (2015) para 4-38. The chose in action accruing to an employer as to an employee's services under an employment contract was, at common law, too personal to be assigned without the employee's assent: *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 (HL) 1020, 1026. But now, see also Transfer of Undertakings (Protection of Employment) Regulations 2006, and Guest and Liew (2015) para 4-37.

Care should, however, be taken over the 'too personal' objection.

A contract may be said to be 'too personal' in two senses. Where A contracts for B, a well-known artist, for B to Φ, where 'Φ' means 'paint A's portrait', B's services as an artist are 'personal' in that it is B, and only B, whose services have been engaged; they are non-delegable by B. The obligation to Φ undertaken to A by B is non-delegable. And yet, the benefit to A of such 'personal' contract may still be equitably assigned to C. As will be explained below, by such assignment, A will have bound herself to C in equity to invoke her contractual entitlements against B for C's benefit, and will also have authorised C in equity to invoke those contractual entitlements as if he were her. Consequently, C may require A to release B from his duty to Φ, or C may release B from that duty in his capacity as A's 'agent'. But what B is duty-bound to do remains unaffected by such assignment. There is, accordingly, no reason why the benefit of 'personal' contracts of this nature may not be equitably assigned, where 'benefit' refers not to *what* it is that the obligor is duty-bound to do, but to *whom* it is that the obligor is duty-bound.[10]

For a contract to be 'too personal' as to preclude an assignment without obligor consent, the obligor and obligee must have agreed, expressly or implicitly, that the obligor is to be duty-bound to the obligee *and only* to that particular obligee – as, for example, when there is an anti-assignment clause.[11] Consequently, the cases tell us that the obligor's assent is irrelevant with regards the efficacy of the assignment unless the contract had provided expressly (or implicitly) otherwise.

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[10] This was recognised in Corbin (1926) 218. The distinction between 'what the obligor is duty-bound to do' and 'to whom the obligor is duty-bound' will be expanded on in Chapter II.

[11] Goode (1979) 555, fn 6.

Subject to these qualifications, since an assignment is effective regardless of the obligor's assent, an assignment of a contractual chose in action cannot change the voluntarily assumed obligations of a contractual obligor in the manner of a novation.

The above rests on an uncontroversial premise: contractual obligations once undertaken by an obligor should not be unilaterally changed by the obligee without the obligor's assent.[12] To freely allow this would insufficiently protect the obligor's liberty.[13]

For example, the obligee to a contractual obligation may not unilaterally insist on the obligor performing anything that the obligor is not already duty-bound to do. Such obligor commits no breach by refusing to do anything which he was not contractually obligated to do. Neither damages at law, nor any injunction in equity, would issue in respect of such a non-breach.

But the rule of invariability also extends to voluntarily undertaken equitable obligations, like those undertaken by trustees to express trusts. So, although:[14]

> [i]t is established by all the cases, that if the cestui que trust *joins* with the trustee in that which is a breach of trust, knowing the circumstances, such a cestui que trust can never complain of such a breach of trust[;]

the trust beneficiaries have no entitlement that their trustee so join with them.

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12 *Cowey v Liberian Operations Ltd* [1966] 2 Lloyd's Rep 45 (Mayor's and City of London Court) 50 (Block J).

13 See John Stuart Mill, 'On Liberty' in John Gray and GW Smith (eds), *JS Mill, On liberty, in focus* (Routledge 1991) esp pp 30–31 and 116. See also Isaiah Berlin, 'John Stuart Mill and the Ends of Life' in John Gray and G. W. Smith (eds), *JS Mill, On liberty, in focus* (London: Routledge, 1991) 135.

14 *Walker v Symonds* (1818) 3 Swan 1, 64; 36 ER 751, 774 (emphasis added).

Unless some power of appointment be vested in the beneficiaries to require the trustee to act as they demand, the beneficiaries of an express trust may not ordinarily require their trustee to perform in a manner not sanctioned by the terms of his trust. As Lord Simonds LC said in *Chapman v Chapman*:[15]

> [I]t is the function of the court to execute a trust, to see that the trustees do their duty and to protect them if they do it, to direct them if they are in doubt, and if they do wrong, to penalise them. It is not the function of the court to alter a trust because alteration is thought to be advantageous to an infant beneficiary.[16]

Consequently, equity, too, recognises that it is impermissible to alter the voluntarily undertaken obligations as are recognised within equity without the obligor's assent.

Given the above, let us consider the following Example.

Example 1.1

A lends B £10,000, and it is expressly agreed that B will repay £10,000 in cash notes to A on January 1st, 2016.

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15 [1954] AC 429 (HL) 446.

16 This is now qualified by the Variation of Trusts Act 1958 (as to the effect of which, see Harris (1975) Chs 3 and 4). See also ss 53 and 57, Trustee Act 1925; s 64, Settled Land Act 1925: see Harris (1975) 9–14 and 19–25. Outside these areas, the court also has a power to approve schemes varying administration of charitable trusts under the *cy-près* doctrine now regulated by s 62, Charities Act 2011; and a further jurisdiction to order resettlements of matrimonial property by way of matrimonial relief pursuant to s 24, Matrimonial Causes Act 1973 (as amended).

On the facts in Example 1.1, were A to equitably assign the benefit of her contract with B to C:

(i) If B paid C £10,000 on January 1st, 2016, after having received notice of the equitable assignment to C, B would not be liable to be ordered to pay C anything more, nor would B be liable to be ordered to pay A anything, either;[17]

(ii) If B paid *no one* on January 1st, 2016, not even A, C would be entitled to bring proceedings at law against B in respect of B's breach, without, it seems, needing to join A as a party to such proceedings;[18] and

(iii) If B paid A £10,000 on January 1st, 2016, notwithstanding that B had previously received notice of the equitable assignment to C, B would have done so 'at his peril' (though it is unclear why such payment would not discharge the debt at law), in that B would still be liable to be ordered to pay C the £10,000 should C bring proceedings against B.[19]

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17 *Quaere* whether this is because of a change in B's duty, or if it arises because of some other reason. This is explored in Chapter V, Section 4.

18 *Quaere* whether such proceedings might not be equitable, given that joinder of obligees like A may be dispensed with in equitable proceedings. This possibility is examined in Chapter VIII.

19 *Quaere* whether the basis of B's 'peril' of being made liable to C in these circumstances arises at law (because such payment to A does not discharge the obligation at law), or in equity (because although such payment to A discharges the obligation at law, doing so given knowledge of the assignment to C is unconscionable). This question is examined in Chapters IX and X.

There are many other implications once an equitable assignment is effected, beyond the three mentioned above, but these three suggest that equitable assignment somehow *substitutes* C in place of A in the obligation that had arisen between A and B in Example 1.1, even though B had not previously agreed to such a possibility. But this entails treating C *as if* C was the one who had contracted with B and so was B's obligee, even though that is plainly not so.

Conceiving equitable assignment to operate by allowing A to substitute C in her place as the party who had contracted with B, and so permitting C to be treated as if he had always been the obligee to whom B was duty-bound is, in essence, to deem that to be fact when it is not.[20] It cannot be otherwise, since it is impossible for A to alter history. Thus, such a conception of assignment would be a manifestation of the legal fictions so abhorred by Bentham.[21]

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20 'But there is no possession possible of a contract. The fact that a consideration was yesterday given by A to B, and a promise received in return cannot be laid hold of by [C], and transferred from A to himself. The only thing which can be transferred is the benefit or burden of the promise, and how can they be separated from the facts which gave rise to them? How, in short, can a man sue or be sued on a promise in which he had no part?': OW Holmes, *The common law* (Mark DeWolfe Howe ed, Macmillan 1968) 265.

21 Jeremy Bentham, *The works of Jeremy Bentham*, vol IX (William Tait 1838) 77. For a summary of the legislative changes prompted by Bentham's scepticism, see M Lobban, 'Legal Fictions before the Age of Reform' in Maksymilian Del Mar and William Twining (eds), *Legal fictions in theory and practice* (Springer 2015). That said, as will be explained in Chapter XI, such fiction is precisely what Parliament enacted pursuant to s 25(6), Judicature Act 1873, and s 136(1), Law of Property Act 1925. Bentham would have found such Parliamentary fictions less objectionable, his ire being focused on the creation of such confusions by unelected officials (ie judges).

This thesis suggests that such legal fictions are unnecessary by setting out a different conceptual[22] account of equitable assignment. It proposes that an equitable assignment of a chose in action is better conceived as a composite device comprising: (I) a bare trust constituted by the assignor in favour of the assignee over that chose in action; coupled with (II) a form of agency by which the assignee is authorised to invoke the assignor's entitlements, as the assignee pleases, this agency being irrevocable owing to the assignee's beneficial interest in that chose arising from the accompanying trust.

2. Scope

This thesis aims to uncover the operation (ie, the mechanics) of assignments of choses in action arising under English law.[23] Given the limits of a thesis, it will concern itself with exposing the mechanisms underpinning two forms of assignment which are of general application: equitable assignment of choses in action, and 'statutory' assignment of choses in action pursuant to s 136(1) of the Law of Property Act 1925 (hereafter 'LPA1925').[24] This thesis will also examine and rationalise the role which notice plays in the operation of equitable assignments.

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22 See Roger Cotterrell, *The politics of jurisprudence: a critical introduction to legal philosophy* (2nd edn, LexisNexis), 81–83.

23 Given the export of the common law across the Commonwealth, similar conceptions of assignment of choses in action are to be found in Australia, Hong Kong, and Singapore (to name a few examples). That said, some Commonwealth jurisdictions (for example, New Zealand and India) have very different conceptions of assignment. To keep this thesis within reasonable bounds, it will concentrate on the law of England and Wales, being, in a sense, the 'source' material from which the common law of assignment may be drawn.

24 The analysis of statutory assignments will be found in in Chapter XI.

Concentrating on the general case, this thesis will leave aside analysis of the many other types of assignment which only apply in certain defined contexts. It will leave aside assignments by and to the Crown,[25] transfers pursuant to statute in respect of policies of marine[26] or life[27] insurance, intellectual property rights,[28] shares and securities,[29] and transfers of the legal estate in leasehold property.[30] This thesis will also leave aside analysis of instruments (or 'documentary intangibles')[31] which were recognized to be transferable under the law merchant.[32] Nor will it embark on analysis

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25 See *Halsbury's Laws* (5th edn, 2009) vol 13, para 16. See also *Breverton's Case* (1536) 1 Dyer 30, 73 ER 67.

26 Marine Insurance Act 1906.

27 Policies of Assurance Act 1867.

28 Copyright, unregistered design rights and performer's property rights are assignable under the Copyright, Designs and Patents Act 1988. Registered trade marks and an application for the registration of a trade mark are assignable under the Trade Marks Act 1994. Patents and applications for a patent are legislatively defined *not* to be choses in action, (s 30(1), Patents Act 1977) but even so, patents, patent applications and rights in patents and patent applications may be assigned under the 1977 Act. See *Halsbury's Laws* (5th edn, 2009) vol 1, para 21.

29 For an abbreviated list of the relevant statutory provisions, see *Halsbury's Laws* (5th edn, 2009) vol 13, para 18. However, the transfer of legal title in company shares is not merely an 'assignment'; rather, it is more appropriately understood to be a novation: RR Pennington, *Company law* (8th edn, Butterworths 2001) 399; MS Ooi, *Shares and other securities in the conflict of laws* (OUP 2003) para 3.12.

30 See s 52(1), LPA1925.

31 RM Goode, *Goode on commercial law* (Ewan McKendrick ed, 4th edn, Penguin, 2010) 52.

32 Eg, bills of lading and negotiable instruments such as bills of exchange and cheques. The negotiability of bills of exchange, cheques, as well as promissory notes is now regulated by the Bills of Exchange Act 1882. 'Assignment' of a bill of lading is regulated by the Carriage of Goods by Sea Act 1992. It may be noted that the conception of 'negotiation' as applied to negotiable instruments is conceptually distinct from assignment: Guest and Liew (2015) paras 1-62 to 1-63.

of transfers of choses in action arising by operation of law by reason of subrogation,[33] bankruptcy,[34] or death.[35]

Given the aim of this thesis, it will not address the adjacent question concerning the circumstances under which dealings in choses in action may be rendered ineffective as being contrary to public policy, for example, where the dealing amounts to maintenance and/or champerty, and is thus rendered null, void and of no effect.[36]

In addition, this thesis will not delve too deeply into the question as to what amounts to a chose in action. That is a difficult and distinct inquiry in itself which, logically, should be answered in advance of the question to be addressed in this thesis.[37] But it is enough for present purposes to simply accept choses in action to be

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33 See Charles Mitchell and others, *Subrogation: law and practice* (OUP 2007).

34 See Muir Hunter and RL Vaughan Williams, *Muir Hunter on personal insolvency* (Stevens & Sons 1988).

35 See JR Martyn and Nicholas Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Sweet & Maxwell 2013).

36 See Smith and Leslie (2013) Chs 23 (maintenance and champerty) and 22 (other policy grounds). Alternatively, see Guest and Liew (2015) Ch 4.

37 See Holdsworth (1920). For a compendium of the various definitions that have been attempted, see HW Elphinstone, 'What is a Chose in Action?' (1893) 9 LQR 311, 311–12. See also Marshall (1950) 5–33.

whatever English law recognizes to be such.[38] Accordingly, subject to one clarification, this thesis adopts Channell J's working definition:[39]

> 'Chose in action' is a known legal expression to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession.

The point of clarification is this. Although Channell J's definition suggests that a chose in action may *only* be claimed or enforced by action, he does not assert that a chose in action may only be *realized* by claim or action, since it goes without saying that enforcement by claim or action is necessary only where the obligation to which the chose in action pertains has not been precisely performed. Where the underlying obligation has been discharged by precise performance, no claim or action is needful since the chose in action would have been realized by performance. Therefore, reading in what Channell J must implicitly have taken to be the case:

> 'Chose in action' is a known legal expression to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession**[, *so far as such claim or action be needful.*]**

And although a *cause* of action may arise when the primary obligations arising from a *chose* in action are breached, the two are distinct.[40]

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38 For a list, see *Halsbury's Laws* (5th edn, 2009) vol 1, paras 5–11. For a list of entitlements which have been held *not* to be 'choses' or 'things' in action, see para 12.

39 *Torkington v Magee* [1902] 2 KB 427 (KB) 427. In similar vein, see *Colonial Bank v Whinney* (n 1) 440 (Lord Blackburn): '[I]n modern times, lawyers have accurately or inaccurately used the phrase "choses in action" as including all personal chattels that are not in possession.'

40 Meaning, 'every fact which is material to be proved to entitle the plaintiff to succeed,–every fact which the defendant would have a right to traverse': *Cooke v Gill* (1873) LR 8 CP 107 (Common Pleas) 116; cited with approval in *Read v Brown* (1888) 22 QBD 128 (CA) 131; and again in *Coburn v Colledge* [1897] 1 QB 702 (CA) 706.

3. The structure of the thesis

The normative proposition of the impermissibility of unilateral variations of obligations voluntarily undertaken by an obligor without the obligor's assent, and how the conceptual model of equitable assignment that is proposed in this thesis best conforms with that proposition is explained in Part II ('The Model').

In Part III ('Joinder'), this thesis will examine when and why proceedings in the court's common law or equitable jurisdiction will, or will not, require joinder of the assignor of a chose to proceedings at common law or in equity against the obligor to such chose.

Part IV of this thesis ('Notice'), examines the role and operation of notice within equitable assignment. It will demonstrate that, when an obligor to a chose that has been equitably assigned receives notice of such assignment, such notice creates the conditions in which the obligor is made duty-bound in equity to the assignee to refrain from acting in such manner as dishonestly assists the assignor-obligee in committing a breach of her equitable duties (as assignor) to her assignee.

In Part V ('The Statute'), this thesis examines the operation of s 136(1), LPA1925. The proposition in Part V is that when a debt or chose in action is 'statutorily assigned' pursuant to s 136(1) LPA1925, the debt or chose in action is *not* assigned by reason of the statute, as the statute does not provide for an independent mode of assignment distinct from such modes of assignment as are recognized at law or in equity. Rather, s 136(1) 'regulates' the operation of such assignments as are

otherwise recognized at law or in equity,[41] on satisfaction of its requirements that such assignment be 'absolute', in a signed writing, and that written notice be given to the obligor.

Hence, where a chose in action has been equitably assigned, and where the requirements in s 136(1) are satisfied, the entitlements specified in s 136(1)(a), (b) and (c) will be statutorily transferred from the assignor to the assignee, thereby extinguishing the assignor's ability to assert or invoke those entitlements. Consequently, such 'statutory' assignee becomes *exclusively* enabled to assert or invoke them, and the trust and agency effects which would otherwise apply to those entitlements would be overridden.

However, this 'transfer' only arises with regard to the entitlements specified in s 136(1), and not any others.[42] The entitlements listed in s 136(1) do not exhaust the universe of entitlements as may arise in respect of every conceivable chose in action.[43] Any extraneous entitlements falling beyond those specified by 136(1) would *not* be 'transferred' by s 136(1), and the trust and agency effects which arose when the chose in action was equitably assigned would still apply with regard to such extraneous entitlements.

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41 *Hockin v The Royal Bank of Scotland* [2016] EWHC 925 (Ch) [44] (Asplin J): '[S]ection 136 Law of Property Act 1925 does not create a statutory right of assignment in itself as much as regulates the effects of assignments which have taken place.' See also *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295 (CA) 299H.

42 Examples of such other entitlements as may be present in connection with a particular chose in action include the entitlements arising from: a contractual option; a contractual power of termination; a choice of jurisdiction clause; or an arbitration clause.

43 The implications of this will be explored in Chapter IX, Section 3; and also in Chapter XII, Section 4(b).

Finally, in Part VI, some of the more obvious implications of the model of assignment set out in this thesis will be set out. Not only are there gains in conceptual clarity, there are practical consequences, as well, and certain assumptions as to the operation of limitation, discharge of obligations, and priorities, to name just a few, may require re-thinking.

4. Terminology

Thus far, this Chapter has used the language of 'obligation' and 'entitlement' to describe what it is that the obligor is obligated to do, and what the obligee is entitled that the obligor do. These words, like the layperson's usage of 'duty' and 'right', may be distilled into narrower and more precise conceptions of the legal and equitable relations between legal persons.

To describe more accurately the effects of an equitable assignment of a chose in action, this thesis will use, as far as is helpful, the vocabulary developed by Professor Hohfeld in two seminal articles[44] published in 1913 and 1917.

Hohfeld identified a number of linguistic confusions in the law which impeded understanding what the law was doing, and how it did it. One of the most

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[44] 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16; WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning II' (1917) 26 Yale Law Journal 710. Both essays were reprinted in WN Hohfeld, *Fundamental legal conceptions as applied in judicial reasoning and other legal essays* (WW Cook ed, Yale University Press 1923) 23–64 and 65–114, respectively. In this thesis, unless otherwise indicated, references will be made to the essays reproduced in the collection of Hohfeld's essays edited by Cook.

egregious of such confusions lay in the indiscriminate use of the terms 'right' and 'duty' in legal discourse. Thus:[45]

> One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties,' and that these latter categories are therefore adequate for the purpose of analysing even the most complex legal interests, such as trusts, options, escrows, 'future' interests, corporate interests, etc.

To overcome these limitations, Hohfeld proposed a set of prescriptive conceptual constructions which he termed 'jural relations', drawn largely from extant legal and judicial usage. Hohfeld conceived these jural relations to be 'fundamental' in the sense that they might be termed the, 'lowest common denominators of the law' or, the, 'lowest generic conceptions to which any and all "legal quantities" may be reduced.'[46]

Hohfeld identified eight fundamental jural relations, namely:

(I) 'Claim-right',[47] which is correlative to 'Duty';

(II) 'Privilege', which is correlative to 'No-Right';

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45 Hohfeld (1923) 35.

46 ibid 63–64.

47 Hohfeld himself did not use the term 'claim-right', preferring, instead, to use 'right' or 'claim' interchangeably to denote the correlative jural relation to 'duty'. Given the confusion engendered by the common, non-Hohfeldian usages of the word, 'right', it has been thought advisable to avoid its use when the Hohfeldian usage is intended. Similarly, given the common, non-Hohfeldian usage of the word 'claim' in connection with the phrase, 'legal claim' denoting an entitlement to commence judicial proceedings, it has also been thought advisable to avoid using 'claim' to denote the correlative jural relation to a Hohfeldian duty. As a compromise, in this thesis, the term 'claim-right' will be used to denote the correlative jural relation to a Hohfeldian 'duty'.

(III) ‘Power’, which is correlative to ‘Liability’; and

(IV) ‘Immunity’ which is correlative to ‘Disability’.

These eight jural relations might further be opposed with each other as follows:

(V) ‘Claim-right’, is opposed to ‘No-Right’;

(VI) ‘Privilege’, is opposed to ‘Duty’;

(VII) ‘Power’, is opposed to ‘Disability’; and

(VIII) ‘Immunity’, is opposed to ‘Liability.’

The sense in which these jural relations may be said to be ‘correlative’ or ‘opposed’ is not straightforward and requires careful reading of the source texts.[48] But Hohfeld’s distillation of the broad conceptions of ‘right’ and ‘duty’ into more discrete senses allows for a more sensitive portrayal of what occurs to the jural relations between legal persons when, say, legal title to realty or personalty is conveyed from a disponor to a disponee, when a trust is constituted over realty or personalty for the benefit of another, and when an agency relationship is created between a principal and her agent. Using these conceptions, we can more clearly see how control over

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48 In particular, WN Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning I’ (1913) 23 Yale Law Journal 16; Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning II’; and WN Hohfeld, ‘The Relations Between Equity and Law’ (1913) 11 Michigan Law Review 537. All three are reproduced in Hohfeld (1923). For useful explanatory accounts, see Smith and Leslie (2013) paras 2.17 to 2.30; Julius Stone, *Legal system and lawyers' reasonings* (Stanford University Press 1964) 139–61. See also Leif Wenar, ‘The Nature of Rights’ (2005) 33 Philosophy & Public Affairs 223.

property may be ceded in multiple ways. In other words, we can see how 'transfer' of property may be effected in more ways than one.

What follows is an attempt to sketch out the bare bones of Hohfeld's vocabulary and grammar of jural relations which will be employed in this thesis.

Hohfeld's eight jural relations may be divided into two categories: first-order jural relations (comprising of classes (I) and (II), above), and second-order jural relations (comprising of classes (III) and (IV), above). The distinction between the two orders is that the second-order jural relations set out the parameters within which a legal person's first-order jural relations may be changed (power/liability) or not (disability/immunity) by another legal person.

The first-order jural relations may be understood to arise in connection with, 'two fundamental forms of rights assertions: "A has a right to phi" and "A has a right that B phi," where "phi" is an active verb.'[49] In the discussion below, 'phi' will be represented by its Greek symbol, 'Φ'.

When we say that 'A has a right that B Φ', we are saying that A has a *claim-right* that B Φ; or correlatively, that B has a *duty* to A to Φ. This means that B is not *privileged* as against A not to Φ. So far as A is concerned, B *must* Φ whether it pleases him to Φ, or not, and B has no entitlement to insist otherwise.

When we say, however, that 'A has a right against B to Φ', we are saying that A is *privileged* as against B to Φ. This means that A is under no *duty* to B to Φ: so far as B is concerned, A *may* Φ if it pleases her to do so, but B has no entitlement to

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[49] Wenar (n 48) 225.

insist that A Φ. Therefore, correlatively, we could say, instead, that B has *no-right* against A that A Φ.[50]

But, '[w]e have not only privileges and claims, but rights to alter our privileges and claims, and rights that our privileges and claims not be altered.'[51] Hence, we have second-order jural relations by which we have the *power* to alter privileges and claim-rights, as well as *immunities* against our privileges and claim-rights being altered.

Hohfeld explains the power/liability jural relation as follows:[52]

> Many examples of legal powers may be readily given. Thus, X, the owner of ordinary personal property 'in a tangible object' has the power to extinguish his own legal interest ([claim-]rights, powers, immunities, etc) through that totality of operative facts known as abandonment; and–simultaneously and correlatively–to create in other persons privileges and powers relating to the abandoned object – eg, the power to acquire title to the latter by appropriating it.

And as to the immunity/disability jural relation:[53]

> A [claim-]right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative 'control' over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or 'control' of another as regards some legal relation.

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50 See Hohfeld (1923) 39: 'Thus, the correlative of X's [claim-]]right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter.' (In this passage, X holds the legal title to the land in question, and Y is a legal person who does not hold the legal title to the said land).

51 Wenar (n 48) 230.

52 Hohfeld (1923) 51.

53 ibid 60.

> A few examples may serve to make this clear. X, a landowner, has, as we have seen, power to alienate to Y or to any other ordinary party... On the other hand, X has also various immunities as against Y, and all other ordinary parties. For Y is under a disability (ie, has no power) so far as shifting the legal interest either to himself or to a third party is concerned; and what is true of Y applies similarly to every one else who has not by virtue of special operative facts acquired a power to alienate X's property.

Thus, when we say that 'A has a *power* against B', we are saying that A is able to change B's jural relations with some legal entity or entities in some respect.

There are situations, though, where A has the opposite of a power against B, ie, where A is under a disability as regards B's jural relations with, say, A. For example, in some circumstances, we may speak of A being under a disability as regards B to change B's duty to A to Φ. Correlatively, we may speak of B being immune to A changing B's duty to A to Φ.

On the facts in Example 1.1, this disability/immunity jural relation would have arisen in the following way. Once the contract of loan had been formed, though B would be duty-bound to A to Φ (where 'Φ' means 'pay A £10,000 in cash on January 1st, 2017'), A would be under a disability to B to change B's duty to Φ; or correlatively, B is immune to A changing B's duty to Φ.

In plain language, A has no ability to unilaterally change any aspect of Φ, be it the amount to be paid ('£10,000'), the currency and mode in which it was to be paid ('English pounds in cash notes'), the time when it was to be tendered ('on January 1st, 2017'), or the party to whom the money was to be tendered ('A'). Though A might authorise another entity to accept a conforming tender on her behalf, and so, in a sense allow for tender to be made to someone in addition to herself, A may not unilaterally change the identity of the party to whom tender was to be made to the

extent that tender *to A* would no longer be good tender *at all*, such that *only* tender to her 'duly authorised agent' would be good tender.

Much of the difficulty in understanding how equitable assignments operate rests in the inadequacy of the language of 'rights' and 'duties'. Undifferentiated use of these words obscures the limited effect of equitable assignments in that it merely affects the privilege/no-right and immunity/disability jural relations between obligee-assignor and *assignee*, while leaving the claim-right/duty; power/liability; privilege/no-right and immunity/disability jural relations between obligee-assignor and *obligor* to the chose assigned intact. Accordingly, equitable assignment is able to achieve the effects we observe in the cases without any need to obtain the obligor's assent to such assignment, there being no change to the jural relations between the obligor and the obligee-assignor as would otherwise require his assent to be effective.

That said, in the following Chapters, for convenience's sake, the term 'obligation' will be used as a catch-all for the duty, no-right, liability, and/or disability which an obligor owes an obligee, when the context does not require a more precise identification of the nature of the obligation; and correlatively, the term 'entitlement' will be used as a catch-all for the claim-right, privilege, power, and/or immunity which an obligee is owed by an obligor, when the context does not require greater precision.

PART II:

THE MODEL

II. INVARIABILITY

This chapter will explain the major premises in this thesis. They are:

1. Choses in action arise from private law obligations.

2. Private law obligations comprise two parts: (I) what the obligor is duty-bound to do; and (II) whom the obligor is duty-bound to.

3. A change to either (I) or (II) means making a new obligation. That is, a substitution of a 'new' obligee to the existing obligation is, in essence, the substitution of a new obligation with a new obligee.

4. It is impermissible at common law and in equity for one party to a voluntarily undertaken obligation to unilaterally substitute it for another obligation without the counter-party's assent.

5. That said, an obligation may be framed so that the obligee to whom the obligation is owed is specified in an 'impersonal' manner. A good example would be the tort of trespass to land, where the primary obligation is owed by an obligor, being such legal person as does not own the legal title to the parcel of land in question, to an obligee, being such legal person as *does* own the legal title to the land, not to trespass on the land.

6. Such 'impersonally' drawn obligations are easily mistaken as instances where the obligee has been changed without the obligor's assent. But, properly characterised, we may recognise that there is no change in the identity of the obligee, at all, so far as the obligee

in such impersonally drawn obligations is framed by reference to the contingent association between any legal person at any particular time to some*thing*.

7. The above is true of voluntarily assumed obligations at common law and in equity. As their rules on invariability of voluntarily assumed obligations without obligor assent are the same, the proposition 'equity prevails over the common law' has no application.

8. Given the above, the *sui generis* institution of equitable assignment cannot operate as an equitable form of novation which dispenses with such assent. It operates in a distinct manner, entailing the constitution of a bare trust over the chose assigned *plus* an atypical agency in which the assignee is authorised to act as if he were the assignor, and who is also granted the authority to invoke such delegated powers as he pleases.

1. 'Equity prevails over the common law'

As mentioned in Chapter I, the operation of equitable assignments remains obscure.

On one view, equitable assignment changes the identity of the obligee to the chose in action as had been assigned, like a novation, but without needing the obligor's assent. This will be referred to in this thesis as the 'substitutive transfer' model of equitable assignment.

This thesis suggests that conceiving equitable assignment as a 'substitutive transfer' is misguided. Instead:[1]

> 'The wisdom and policy of the sages and founders of the law,' says Lord Coke …, 'have provided that no possibility, right, title nor thing in action, shall be granted or assigned to transfers, for that would be the occasion of multiplying contentions and suits'[2]. But, in regard to *choses in action*, as the same doctrine has been adopted in every other state in Europe, it may be doubted whether the reason, which has been the foundation of the rule everywhere else, was not also the reason for its introduction in this country; namely, that the credit being a personal right of the creditor, the debtor being obliged towards that person could not by a transfer of the credit, which was not an act of his, become obliged towards another; and the more especially as the mode of effecting a virtual transfer which was invented by the Roman jurisconsults, namely, by constituting the assignee the mandatory of the creditor … to sue for and recover the debt in the name of the creditor … , has also been adopted in our system of our jurisprudence.

The identity of the obligee to whom an obligation is owed is part and parcel of the specification of that obligation. One does not owe an obligation; one owes an obligation *to* someone (as Section 2, below, will explain). Recognising this, the common law rule is that voluntarily assumed obligations (eg, contractual obligations) are invariable without the obligor's assent. Consequently, it should *not* be possible to vary such obligation by an *equitable* doctrine such as equitable assignment unless the rules of equity and common law diverge on the point; though *if* they diverged, 'equity prevails over the common law.'

Section 25(11), Judicature Act 1873, statutorily enshrined the position that had held ever since the decree of James I following *The Earl of Oxford's Case* by which

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1 Spence (1850) 849–50; cited with approval: Ames (1887) 6, fn 2; Ames (1913) 211, fn 6 (reproducing the argument in Ames (1890) 339, fn 2); Holdsworth (1920) 1003; Frederick Pollock, *Pollock's principles of contract* (Sir PH Winfield ed, 13th edn, Stevens & Sons 1950) 174.

2 *Lampet's Case* (1612) 10 Co Rep 46b, 77 ER 994.

precedence was given to the rules of equity over those of the common law, so far as they differed.[3] Where matters had not *otherwise* been provided for in sub-sections (1) to (10) of s 25, and so far as the rules developed by the Chancery courts over particular subject-matter contradicted the rules developed by the common law courts over the same subject-matter, then (and only then) would the rules of equity prevail.

First, as a matter of statutory interpretation, since the question of assignment of choses in action *is* a matter 'particularly mentioned' in sub-sections (1) to (10), given s 25(6) which provides for additional statutory effects to override the effects that would otherwise arise on an assignment, the proviso to s 25(11) which reads, 'in all matters not hereinbefore particularly mentioned', precludes the rules of equity from 'prevailing' over the rules of common law.

And since s 49 of the Senior Courts Act 1981 merely replaced s 25(11) without making any substantive changes to the law,[4] the same must be true today, given the preservation of s 25(6) of the Judicature Act 1873 within s 136(1), LPA1925.

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3 *The Earl of Oxford's Case* (1615) 1 Chan Rep 1, 48; 21 ER 485, 588.

4 Now, see s 49(1), Senior Courts Act 1981, which 'embodies, in a concentrated form, the fundamental objectives of the Judicature Acts 1873–1875':*Civil Procedure 2015* (Lord Justice RM Jackson, Barbara Janet Fontaine and IR Scott eds, Sweet & Maxwell, Thomson Reuters 2015 2015), Vol II, para [9A.170] .Section 49(1) of the 1981 Act re-enacts s 44 of the Supreme Court of Judicature (Consolidation) Act 1925 which, in turn, re-enacted s 25(11) of the 1873 Act.

Secondly, there is no conflict between the *rules*[5] of equity and the common law[6] regarding unilateral variation of voluntarily assumed obligations without the obligor's assent. Both agreed that this was impermissible, as will be shown in the following Sections.

2. Obligations, and associated Hohfeldian jural relationships

Choses in action arise from obligations.[7]

'Legal' or 'common law' obligations are those recognised at common law (ie, 'common law' or 'legal' obligations), breaches of which may be remedied by common law remedies such as an action in debt or an order of compensatory damages, depending on whether the obligation breached is one to pay a fixed sum of money. Correspondingly, 'equitable' obligations are those recognised *exclusively* in equity,[8] breaches of which are remedied by equitable remedies such as orders of specific performance, injunction or equitable compensation.

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5 And not merely the remedy as might be granted: Meagher, Gummow & Lehane (2015) paras 2-155, 2-175 and 2-185.

6 As to what a 'conflict' between the rules of equity and common law might entail, before s 25(11) of the 1873 Act be resorted to, see FW Maitland, *Equity: a course of lectures* (John Brunyate ed, 2nd edn, The University Press 1936) 16–17.

7 As mentioned in Chapter I, although obligations may also arise as a matter of public or administrative law, in this thesis, 'obligations' will be used to refer to obligations arising under private law.

8 Other commonly encountered examples include obligations arising under a trust or a will, the obligation owed to creditors in a bankruptcy, and the obligations arising under vendors' and purchasers' liens. Some other examples are listed in Guest and Liew (2015) para 1-09.

All obligations, whether legal[9] or equitable,[10] primary or secondary, voluntarily undertaken or imposed by operation of law, entail two aspects:

(I) what the obligor is duty-bound to do; and

(II) to whom the obligor is duty-bound.

Ordinarily, one cannot be obliged in the abstract. One must be obliged to some*one*.[11] So the specification of the identity of the obligee in (II) is as much a part of the specification of that obligation as the specification in (I) as to what the obligor is obligated to do.

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9 The tort of public nuisance may be an exception. As to this tort, see Clerk and Lindsell (2014) paras 20-03, 20-04 and 20-69 .

10 Save for obligations arising in respect of trusts for charitable purposes, and also certain narrowly defined non-charitable purpose trusts. See: *Bowman v Secular Society, Limited* [1917] AC 406 (HL), 441 (Lord Parker). Some non-charitable purpose trusts are also valid, notwithstanding their lack of any beneficiaries. See *Re Endacott* [1960] Ch 232 (CA), 246 (Lord Evershed MR), 250–51 (Harman LJ). For a view that English law does not ordinarily recognize the validity of non-charitable purpose trusts, see Paul Matthews, 'From Obligation to Property, And Back Again?' in DJ Hayton (ed), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law International 2002), refuting the contrary view in Paul Baxendale-Walker, *Purpose trusts* (Butterworths 1999).

11 Hence, in respect of trusts, 'an use is a trust or confidence … annexed in privitie to the estate of the land … scilicet, that *cesty que use* shall take the profit.': Co Litt 272b. And in respect of contractual promises, 'The obligation of contract is an obligation created and determined *by the will of the parties*. Herein is the characteristic difference of contract from all other branches of law. The business of the law, therefore, is to give effect so far as possible to the intention of the parties … But even where the law has to fill up gaps by judicial conjecture, the guiding principle still is, or ought to be, the consideration of what either party has given the other reasonable cause to expect *of him*.': Pollock (1910) 38 (emphasis added). See also SM Waddams, *Principle and policy in contract law: competing or complementary concepts?* (Cambridge University Press 2011) 53.

An obligation is, in turn, made up of multiple jural relations. To show this, it is helpful to consider the following.

Example 2.1:

A lends B £10,000.

By such act on *A's* part in lending B £10,000, B is duty-bound to A to Φ where 'Φ' means, 'repay the loan to A'. Hence, A has a claim-right against B that B Φ.

A's claim-right/duty jural relation that B so perform will ordinarily be associated with various power/liability jural relations. Ordinarily, A will have the power against B to bring judicial proceedings against B should there be a dispute over the discharge of B's duty to A;[12] and A will also have the power against B to release B from his duty to A. But there other powers, eg:

(a) A will have the power against B to effect a discharge by accepting payment; and

(b) A will have the power against B to 'insist on payment to herself or such person as she thinks fit.'[13]

These two powers of A's will be examined, below.

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12 Or, as Diplock LJ put it, where B had breached his duty to A, 'A has a cause of action against B for any infringement by B of a right of A which is recognized by law.': *Letang v Cooper* [1965] 1 QB 232 (CA) 246.

13 This appears to entail a unilateral power in A (as creditor) to change B's obligation. But as will be shown below, this is not the case.

(a) Power to effect a discharge by accepting payment

In Example 2.1, 'payment' is not an action that B may completely perform without A's co-operation.[14] As Gloster J observed:[15]

> Payment is a consensual act and thus requires the accord of both creditor and debtor. Even if a tender by a debtor to his creditor complies fully with the terms of the contract, and the creditor's refusal to accept the payment thus constitutes a breach of contract, the tender does not discharge the debtor's obligation, although the creditor may be prevented thereafter from claiming any interest or damages for late payment or for claiming damages for breach of the payment obligation.

Therefore, until A co-operates by accepting what B has tendered, 'either by expressly declaring its unconditional assent to the payment, or by acceptance or by treating the money as its own',[16] B's duty to A to Φ is not discharged.

(b) Power to 'insist on payment to the creditor or such person as the creditor thinks fit'

Apart from the above, the common law appears to have developed a rule that, unless otherwise provided for, a creditor would also have the power to nominate an *additional* payee.

Such a power was recognised in *Hodgson v Anderson* where Bayley J held: '[t]here can be no doubt that a creditor has a right to insist on payment to himself, *or* to such person as he thinks fit.'[17]

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14 *Startup v MacDonald* (1843) 6 M & G 593, 610; 134 ER 1029, 1036.

15 *Canmer Investment Inc v UK Mutual Steamship Assurance Association Ltd* [2005] EWHC 1694 (Comm) [53].

16 ibid, adopting the analysis of Hobhouse J in *TSB Bank of Scotland Plc v Welwyn Hatfield District Council* [1993] 2 Bank LR 267 (Comm) 272–73.

In relation to this case, Bailey noted that:[18]

> [T]he common law recognized that 'every creditor has the right to insist on payment … to such person as he thinks fit' … but this rule gave no independent right of action to the assignee—it merely enabled the creditor to choose whom the debtor was to pay.

The last clause in this statement may be read to suggest that by invoking such power of choice, the creditor could *preclude* tender of payment to herself such that *only* tender of payment to her chosen payee would be an effective tender. But that goes too far.

Bayley J merely held that the creditor had a 'right' (ie, a Hohfeldian power) to insist on payment 'to himself *or* to such person as he thinks fit'. Bayley J did not hold that having named an alternate payee, the debtor would have to tender payment to that alternate payee. Had Bayley J done that, it would follow that the debtor would be duty-bound to tender payment *only* to that alternate payee. Tender to the creditor following invocation of such power of *substitution* would then, indeed, be a nullity.

It seems inconceivable that Bayley J intended that the power of the creditor to nominate an additional person to whom payment might be tendered meant that such nominee became an entity to whom the debtor *had become obligated.* As Bailey's comment above recognised, when a creditor names an additional person to whom payment might be tendered (ie, her 'assignee'), the debtor *remains* obligated (ie indebted) *to* the creditor, and not the alternate payee. So if a creditor names an alternate payee, and the debtor pays neither the creditor nor the alternate payee, the

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17 *Hodgson v Anderson* (1825) 3 B & C 842, 853–54; 107 ER 945, 949 (emphasis added).

18 Bailey (1932) 549–50.

debtor would have breached his obligation to the creditor; he breaches no obligation to the alternate payee. Thus, it is for the creditor to bring judicial proceedings against the debtor in respect of such breach: the *cause of action* is still the creditor's, and not the alternate payee's.

Given the above, the creditor's 'power to insist' is merely the creditor's power to make an offer to her debtor where, in consideration for the debtor either tendering payment to the creditor's nominee or promising to do so, the creditor promises to release the debtor from his duty to tender payment to the creditor.[19] The debtor may reject such offer by choosing to tender payment to the original creditor;[20] or accept it by tendering payment to the creditor's nominee (in which case the creditor would be bound to release the debtor from his duty to tender payment to her). Or the debtor might accept by promising to do so (which would lead to the offer becoming irrevocable).[21]

Hence, in Example 2.1, B is duty-bound *to A*, to tender payment of £1,000 to A. And on closer reading of Bayley J's judgment in *Hodgson v Anderson*, though A may certainly offer to release B from his duty if he were to tender payment to, say, C, B is *privileged* to accept, or to reject, such offer. Accordingly, the *Hodgson v Anderson* 'right' (really a power to make an offer of variation) does not denote any power to effect a unilateral change in the obligee to whom B is duty-bound.

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19 *Cf* Trukhtanov (2010) 555.

20 If she could be found, it being the debtor's duty to find his creditor and to tender payment to her, wherever she might be so long as she was within the jurisdiction: see Co Litt 210b. This rule is suspended when the creditor is outside the jurisdiction: *Fessard v Mugnier* (1865) 18 CB (NS) 286, 141 ER 453.

21 *Hodgson v Anderson* (n 17) at 3 B & C 855; 107 ER 950.

3. The derivation of Hohfeldian jural relations

(a) A's claim-right against B that B Φ

Each of A's powers as against B mentioned in the preceding Section is invested exclusively in A because it is A who has the claim-right against B that B Φ. And A has such claim-right against B because A was both party to the contract with B and provider of the consideration in exchange for B's promises within that contract. Hence A has the claim-right ('is entitled') to B's performance of Φ: it is *right* ('justified') so far as A is concerned that B perform Φ.

(b) A's powers against B

A's claim-right against B dictates the content of the four above-mentioned power/liability jural relations between A and B in Example 2.1, and why they have arisen between *A* and B, and not as between, C, D, or anyone else who is 'not-A' and B. That is, *but for* A holding the claim-right against B that B do Φ, A would *not* have these powers against B.[22]

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[22] This is not to say that power/liability jural relations may *only* arise in connection with an associated claim-right/duty jural relation. It is entirely possible for a particular power/liability jural relation to arise independently of any particular claim-right/duty jural relation. For example, where A and B have no prior dealings with each other, A has the *power* to make B an offer where she promises to pay him £10,000, if, in exchange, he promises to paint her house. Prior to receiving such an offer, B would have been under a disability (ie, have had no power) as against A to subject her to a duty to him to pay him £10,000. But by reason of A's offer, A will have invested B with a power to subject A to such a duty, if he were to *accept* A's offer. So here, we have a case where A had a power/liability jural relation with regards A's power to make an offer to B to enter into a legally binding contract with B that does not pertain to any pre-existing claim-right/duty. The claim in the main text is merely that the four power/liability jural relations identified in the main text are tied to the claim-right/duty jural relation.

(c) A's privileges against B, C, D or any 'non-A'

As to A's powers against B which have arisen because of A's claim-right against B that B Φ, A is *privileged* against B to invoke each of these powers, or not, as she pleases. B has *no-right* to insist that A invoke them, nor does he have any right to insist that A *not* invoke them.

These twin privilege/no-right jural relations also exist in respect of other legal persons. Besides B, A is similarly privileged against C, D, or anyone else who is 'not-A'. We might therefore generalise: 'A is privileged against any "non-A" to invoke her powers against B, or not, as she pleases,' keeping in mind that this is only a convenient mode of expression. The underlying reality is that A is *individually* privileged as against C, and also as against D, so on and so forth.

(d) A's immunity against B, C, D or any 'non-A'

These powers of A's against B are also A's to invoke. No one else has *such* powers to change A's jural relations with B arising from the contract of loan in Example 2.1.

It would be futile for B, C, D or anyone else who is 'not-A' to execute a deed purporting to release B from his duty to Φ. Hence A has an immunity to B, C, D or anyone else who is 'not-A' changing A's jural relations with B by invoking A's power to grant a release by execution of a deed of release.

Similarly, it is not open to B, C, D or anyone else who is 'not-A' to bring legal proceedings against B, should B breach his duty to repay the loan. Only A may invoke such power, since none of B, C, D or anyone else who is 'not-A' can be said to have been privy to and provided the consideration to B in contract arising in

Example 2.1: only A has standing to bring such proceedings at law against B should a dispute arise over B's performance of Φ.

So we may say that A has an immunity to B, C, D or anyone who is 'not-A' changing A's jural relations with B by invoking A's power to commence judicial proceedings against B. And again, purely for convenience's sake, we may say: A is immune against any 'non-A' invoking A's powers against B as would change her jural relations with B in this manner.

The point made above, as to the relationship between A's claim-right/duty jural relation with B, and the associated power/liability, privilege/no-right and immunity/disability jural relations, is underscored in the Example that follows.

4. Modifying the identity of an obligee to a voluntarily assumed obligation

None of the above jural relations are immutable as they depend entirely on party agreement.

Example 2.2

A lends B £10,000.

They also agree that B is to tender payment, not to A, but to C because A wishes to make a gift to C.

A and B also agree that C is not to have any statutory entitlements arising under the Contracts (Rights of Third Parties) Act 1999.[23]

In Example 2.2, B is duty-bound to A to Ω where 'Ω' means, 'tender payment of £10,000 to C'.

Unlike her position in Example 2.1, A now has no power to accept a conforming tender of payment because the formulation of B's duty in Example 2.2 precludes there being such a power. Since payment is now to be made *to C*, it is C who has to accept the tender of payment by B for payment to be completely and precisely performed. Thus the power to accept a conforming tender of payment to allow B to discharge his duty to Ω by performance in Example 2.2 would be vested in C, and not A (although if B tendered payment to C, C might *refuse* to accept such payment so far as he was under no duty to anyone to accept such payment but was a mere donee.[24] In such cases, since the law recognises that donees may reject gifts, C may refuse such a *gift* if C be so inclined).[25]

We see, therefore, that the nature of the power/liability jural relations as to acceptance of tenders of payment to permit B's duty to Ω to be discharged will have changed because A's claim-right against B in Example 2.2 is differently framed.

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23 Contracts (Rights of Third Parties) Act 1999 (hereafter, the 'C3PA'). The effect of such an exclusion is that the statutory duties which B might owe C if the 1999 Act applied in C's favour do not arise: see s 1(2).

24 Though C would be presumed to assent to such a gift unless he clearly manifested his intention to disclaim it so long as that power of disclaimer had yet to be lost: see references in Chapter III, n 9.

25 If this occurs, the contract between A and B would probably be discharged by frustration.

Unlike in Example 2.1, B is duty-bound to Ω, and not Φ. So the power/liability to discharge/be discharged by acceptance will have changed, in tandem.

But although B is duty-bound to Ω, B owes this duty to A, and not C. Again, this is because A (and not anyone else) had lent B the money as B had requested, and it was A's loan (and not anyone else's) which B was content to accept. Accordingly, even though what B is duty-bound to do in Example 2.2 is different from Example 2.1, in both, B remains duty-bound *to A*. This is the case, because B voluntarily assumed a contractual duty to A, and not to anyone else, that he would do so.[26]

Consequently, it is A who has the power to release B from his duty to Ω, A who has the power to bring judicial proceedings against B if there should be a dispute over his performance of Ω, and A who has the power to make an offer to B, promising to release B from his duty to Ω, in exchange for some alternative act or promise to perform some alternative act.

Yet further embellishments are possible.

Example 2.3

In addition to the facts in Example 2.2, A and B further agree that B would be liable to become duty-bound ***to such person as A might name as her assign*** by a certain deadline, but if no one was named, then B would be duty-bound to A.

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[26] SA Smith, 'Contracts for the benefit of third parties: in defence of the third-party rule' 17 Oxford Journal of Legal Studies 643, 645.

In Example 2.3, B is also duty-bound to A to tender payment to C: B is still under a duty to Ω. But the identity of the party to whom B is duty-bound is contingent on what A does, B having assented to A having the ability to *change* the identity of the party to whom B is duty-bound.

From a duty to Ω which was owed to A, once A 'named' C as her 'assign' by executing a document 'assigning' the benefit of her contract with B to C (assuming such acts would be construed to be a valid invocation of the contractually stipulated power vested in A to 'name an assign'), if B failed to do Ω, B would have breached his duty *to C* to Ω. Conversely, if A did not make a nomination within the stipulated period, B would then remain duty-bound to Ω to A, *and only to A*.[27]

A's invocation of the *contractual* power to substitute another in her place by 'naming' them as her 'assign' would have effected a substitution of the obligee to the contractual voluntarily obligation undertaken by B. But such substitution has been effected with B's consent *in advance*. And such substitution arises *because* of B's assent as part of that same contract. Accordingly, although the equitable assignment to C may entail its own effects, the *substitution* of C in place of A given the agreement in Example 2.3 would have occurred as a matter of common law.

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[27] The construction that, until A nominated someone or her power to nominate lapsed unused, B was duty-bound to no-one is, it is suggested, untenable. Similarly, a construction that B would be duty-bound in an inchoate manner to either A or such person A might nominate within the time specified (if any) is, for similar reasons, unlikely. Neither construction is convincing since either construction would lead to a conclusion that *no* contract had been formed by reason of uncertainty of the terms and/or a lack of intention to create legal relations.

5. The different ways of specifying the obligee to an obligation

The Hohfeldian conception of the jural relations between obligors and obligees requires that there *be* such obligors and obligees, that such obligors and obligees be identifiable at the relevant point in time, and that such obligors and obligees when identified have legal personality.[28] However, Hohfeld's theory of jural relations does not dictate how such obligors and obligees are to be specified. That is a matter for the substantive law pertaining to the obligation in question.

In perhaps the simplest case, an obligee may be specified to be such by reason of his or her identity as such, without more; as when under the terms of a trust, T is vested with the legal title in the fee simple of Blackacre for the benefit of A. A is the obligee under such trust because A is the entity named as beneficiary in the will.

But an obligation may specify the obligee thereto in a more open-ended way. Borrowing the language used in the C3PA, an obligee may be expressly identified by name, as a member of a class, or as answering a particular description.[29]

Example 2.4

Suppose T holds the legal fee simple in Blackacre on a testamentary trust for the life of such children of S's as who have reached their majority at the date of S's death ***or their nominees or assigns.***

The obligees (ie beneficiaries) to whom T is obligated as trustee of S's will in Example 2.4 are specified or defined in a more impersonal manner: they are identified

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28 Hohfeld (1923) 74–75.

29 C3PA, s 1(3), in respect of identifying third parties to whom the statute might be applied.

by reference to their characteristics, namely, they must either be: (i) children of S's; (ii) who have reached the age of majority; (iii) at the time of S's death; *or* (iv) the 'nominees or assigns' of such persons as satisfy requirements (i) to (iii). Only persons who meet the description by satisfying criteria (i) to (iii), *or* (iv), are 'beneficiaries' to whom T owes trust duties under S's will.

Suppose that S died, survived by his children, A1 (aged 25), A2 (aged 20), and A3 (aged 17). Under the terms of S's testamentary trust, T would be trustee for A1 and A2 (because they each satisfy requirements (i) to (iii)), but not A3 (since A3 does not). Nor does A3 satisfy (iv).

But suppose A2 executes a deed of assignment, assigning his interest as beneficiary under S's testamentary trust to A3. A3 would then become a beneficiary of that trust because she now satisfies requirement (iv) (assuming A2's execution of the 'deed of assignment' was such as to make A3 an 'assign' of A2 as a matter of construction of the terms of the testamentary trust), and T would be trustee for A3 because, when T assent d to be S's testamentary trustee, T had agreed *in advance* to be obligor to <u>such</u> person(s) as satisfied requirements (i) to (iii), or <u>such</u> person(s) as satisfied requirement (iv). And T would be so duty-bound under the terms of S's testamentary trust, even in advance of his being notified of the 'assignment' to A3.[30]

A3's entitlement as beneficiary under the terms of S's testamentary trust arises because she conforms with the description of the beneficiaries therein, independently

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[30] *Ward v Duncombe* [1893] AC 369 (HL) 392 (Lord Macnaghten): 'The trustee of the fund is trustee for the persons entitled to the fund, whether he knows their names or not. … [B]efore notice given he is just as much a trustee for the persons rightfully entitled as he is after he receives the notice …'.

of any other substantive effects generated by A2's equitable assignment. A3's position in Example 2.4, therefore, is somewhat analogous to the position of C in Example 2.3. In both, the respective obligors (T and B) are directly duty-bound to A3 and to C *independently* of the operation of the law on equitable assignment.

Turning away from voluntarily assumed obligations, many obligations imposed by law specify obligees in a broadly similar way by setting out an 'impersonal' description. For example, the obligees to the primary obligations arising from the tort of trespass to land, or the tort of conversion of personal chattels are specified by reference to their association with a 'thing', namely, their association with the legal title to an estate in land, or the legal title in a particular item of tangible personalty, respectively.

Thus, the primary obligation 'not to trespass on Blackacre' is owed by such person(s) as do not own the legal title to Blackacre *to* such person(s) as do/does own the legal title to Blackacre.' And similarly, the primary obligation 'not to convert a particular tangible chattel to one's own use' is owed by such person(s) as do not own the legal title to that tangible chattel *to* such person(s) as own(s) the legal title to that tangible chattel.'

A subsidiary question will arise, of course, as to what 'ownership of legal title' means in this context, but that need not concern us here. What is important in the present context is that the identity of the obligee is ascertained in these circumstances by reference to how the obligation *describes* the obligee, and seeing whether the obligee answers the description.

Though primary obligations which describe their obligees in this 'impersonal' manner would appear to entail the possibility of the obligee being changed without any assent on the part of the obligor, that is an illusion, for the obligee is actually the same, throughout. In these cases, there is *no* change in the obligee to whom the obligor's obligation is owed since the obligor is obligated in these cases to such person as answers the description specified in the obligation. As Holmes observed:[31]

> If A, being the possessor of a horse or a field, gives up the possession to [C], the rights which [C] acquires stand on the same ground as A's did before. The facts from which A's rights sprang have ceased to be true of A, and are now true of [C]. The consequences attached by the law to those facts now exist for [C], as they did for A before. The situation of fact from which the rights spring is a continuing one, and any one who occupies it, no matter how, has the right attached to it.

When dealing with the issue of the invariability of obligations arising at law and in equity, we should ignore instances where there has been a seeming substitution of obligees to the obligation but where, on closer inspection, we see that the obligees to that obligation have been defined by way of description, such that both the 'original' obligee, and the 'replacement' obligee may both answer that description, albeit at different points in time.

6. Invariability of voluntarily assumed obligations arising at common law

The proposition in this Chapter is that so far as obligations comprises two dimensions: (I) *what* it is that the obligor is obligated to do, and also, (II) *to whom* the obligation is owed, neither may be unilaterally changed without the obligor's assent.

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[31] Holmes (1968) 265.

Consequently, all Hohfeldian jural relationship pairings between obligor and obligee as derived from (I) and (II) may not be changed without the obligor's assent, either.

This is embedded in the common law since, in general, legal obligations may only be varied in respect of (I) and/or (II) with the obligor's assent.[32] This principle is reflected at common law by the requirement that changes to the identity of the obligee to a contractual obligation entails a wholesale substitution of a *new* contractual obligation with the new obligee, in place of the original one, by means of a novation. This denotes that each of the jural relations as between the obligor and obligee may not be unilaterally changed by the obligee without the obligor's assent, whether such assent be obtained at the time of the change, or in advance.

Given the facts in Example 2.1, if A wished to cause B to become duty-bound to C to tender payment of £1,000 to C[33] such that C would then be empowered to

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32 'I do not think it is necessary to say more than this, that it is not competent for a party to a contract to vary the terms of that existing contract by passing a notice.': *Cowey v Liberian Operations Ltd* [1966] 2 Lloyd's Rep 45 (Mayor's and City of London Court) 50 (Block J); 'From the conception of a promise being valid only when given in return for something accepted in consideration of the promise, it follows that the giving of the promise and of the consideration must be simultaneous. Words of promise uttered before there is a consideration for them can be no more than an offer; and, on the other hand, the obligation declared in words, or inferred from acts and conduct, on the acceptance of a consideration, *is fixed at that time, and cannot be varied by subsequent declaration*, though such declarations may be material as admissions.': Pollock (1910) 37 (emphasis added).

33 If A only intended for C to be in a position to receive the money from B without needing to account to A for such receipt, a different mechanism could be invoked by A. A might simply: (i) authorize C to accept a conforming tender of payment from B on her A behalf; and (ii) release C from the fiduciary duty that would usually arise in such agent-principal relations to account to A for such receipt. In such a case, though C would be empowered to accept tender of payment from B, and such tender to A's duly authorized agent would certainly be a good tender, which if accepted, would discharge B's duty to A, C would *not* have the power to bring proceedings against B for breach of that duty.

compel B at law to do so, A could offer to release B from his duty to tender payment to A[34] in exchange for B covenanting by deed to tender payment to C.[35]

If B accepted A's offer and executed the deed with such covenant as stipulated in A's offer, the debt obligation between A and B would be discharged by mutual agreement. In its place would be a fresh obligation arising between B and C in which B was duty-bound to C (by reason of the covenant) to give C £1,000.

C could disclaim such gift of money from B when tendered.[36] But failing such disclaimer, should B fail to perform his duty, C would then have the power to bring proceedings at law against B in respect of B's breach by reason of the deed that B had

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34 If the consideration for the new agreement between A and B wherein A promised to release B from his obligations under the original agreement if B were to execute a deed in the form stipulated, covenanting to pay C, and B did so, the new contract would be validly formed. If C declined to accept payment by B under the covenant, as C would be entitled to do, so far as he was a mere done, that obligation arising by way of covenant would not then be capable of being discharged by performance. But this would not lead to the frustration of the new agreement between A and B, since all that B was duty-bound to A to do under this new agreement, was to execute the deed in favour of C, which B had performed in full. The position here, therefore, is distinct from the position in n 25, above.

35 It is possible, for there to be a variation of the original agreement whereby B agrees to become duty-bound to a new promisee, C, in exchange for consideration furnished by C or under seal, but where A merely promises B not to invoke her power to bring proceedings at law against B for non-performance of his duties to her under the original agreement between them: see, eg, *Morris v Baron & Co* [1918] AC 1 (HL), *British and Beningtons, Limited v North Western Cachar Tea Company, Limited* [1923] AC 48 (HL), 68–69 (Lord Sumner). But even such variation without discharge of the original agreement would still require the assent of the obligor to be duty-bound on the terms of the new contract.

36 And as noted above (n 25), such disclaimer of the gift would discharge the new contract as arose when B accepted A's offer by reason of frustration. That said, the law presumes that C would assent to such a gift unless he clearly manifested his intention to disclaim it.

executed. Through this chain of acts by A, B and C, A would have novated her contract with B to C.[37]

The effect of a novation, therefore, is to extinguish one of the jural relations between A and B (ie the claim-right/duty jural relation), leading to attendant changes to the other associated jural relations (ie the power/liability, privilege/no-right and the immunity/disability jural relations).

To illustrate: prior to the novation, some salient jural relations between A, B and C would be as follows:[38]

<1> B would be duty-bound to A (by reason of the loan of money given by A, which, when accepted by B, gave rise to the debt between them) to tender payment of £1,000 to A; and

<2> Given **<1>**, B would usually[39] be liable to A commencing proceedings at law before a court of competent jurisdiction to adjudicate any disputes as might arise between them over B's discharge of his duty in **<1>**.

<3> B would, however, be privileged against C to tender payment of £1,000 to A *because* B is under no duty to C to do so;

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37 For an account of what novation entails, see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1992) 30 Con LR 1 (CA) 13 (Staughton LJ).

38 There are other jural relations in play, but it suffices for the moment to just concentrate on how changes to a claim-right/duty jural relation affects one of the power/liability jural relations between the parties.

39 Subject to any concerns as to limitation and/or formalities as would render breaches of the duty to be unenforceable.

<4> Given **<3>**, B would be immune to C commencing proceedings at law before a court of competent jurisdiction to adjudicate any disputes as might arise between B and C over B's carrying out of his duty *to A* to tender payment of £1,000 to A *because* B is under no duty to C to do so.

After the novation to C, however, the jural relations are different:

<5> B is now duty-bound *to C* (by reason of the covenant by which B bound himself to C) to tender payment of £1,000 to C;

<6> Given **<5>**, B would now be liable *to C* commencing proceedings at law before a court of competent jurisdiction to adjudicate any disputes as might arise between them over B's discharge of his duty to C in **<5>**.

<7> However, B would now be privileged against *A* to tender payment of £1,000 to C *because* B is no longer under any duty to A to do so;

<8> Given **< 7>**, B would now be immune to A commencing proceedings at law before a court of competent jurisdiction to adjudicate any disputes as might arise between B and A over B's carrying out of his duty *to C* to tender payment of £1,000 to C *because* B is no longer under any duty to A to do so.

It would seem, therefore, as if A's place as obligee to the obligation between A and B arising under the *contract* between them had been taken by C. But C is obligee to B with regards B's duty to tender payment to C under a new and distinct obligation (arising in covenant), and not the original contractual obligation as between

A and B. There is, therefore, no 'substitution' of C in place of A in respect of the *original* contract obligation. Instead, there has been an extinction of the original obligation, and its replacement with a new one. So if novation effects a transfer, it effects such transfer by substituting a new obligation (with a new obligee) in place of the old.

Crucially, we observe that such substitutive transfer of one obligation for another could not occur without the obligor's assent: not only must he assent to being released from the original obligation, he must also assent to becoming obligated under the *new* obligation which is to take the place of the original one, though of course, assent may be given in advance (as was the case in Example 2.3).[40]

7. Invariability of voluntarily assumed obligations arising in equity

Close inspection of the underlying principles reveal that, as a rule, equitable obligations are also not open to unilateral variation. This may be demonstrated by examining the central case of trust obligations, and considering how trust beneficiaries are sometimes said to have powers to vary them.

(a) 'Varying' a bare trust by bringing it to an end

Example 2.5

T holds the legal title in 10,000 Black Co Ltd ('BCL') shares. He constitutes himself bare trustee of his legal title in these shares for A's benefit. A, who is *sui juris*, accordingly acquires an equitable chose in action against T.

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[40] See also *Habibsons Bank Ltd v Standard Chartered Bank (HK) Ltd* [2010] EWCA Civ 1335; [2011] QB 943, [22].

The obligations of a bare trustee were defined in *Christie v Ovington* as follows:[41]

> Who is a bare trustee is a question of general practical importance. Where there is a trustee whose trust is to convey, and the time has arrived for a conveyance by him, he is, I think, a bare trustee, whether considered in reference to the *Vendor and Purchaser Act*, 1874, s. 5, or in reference to the *Land Transfer Act* [1875], s. 48.

Consequently, one is a 'bare trustee' when one is compellable in equity to convey the trust property as one's beneficiaries may direct – although it is imperative to remember that a court in its equitable jurisdiction will only make such an order on terms that the trust beneficiary indemnify the trustee for any costs incurred by reason of such execution.[42]

In Hohfeldian terms, one is a bare trustee of trust property when one is duty-bound to the trust beneficiaries to fully execute the bare trust by conveying such title to the trust property is held on trust when the beneficiaries so direct. Like the secondary duty to pay damages following a breach of a primary duty at common law, this duty is in present existence, and yet may not be performed in advance of such direction by the beneficiaries: it may only be performed *when* the demand is made.[43]

This duty to fully execute the bare trust on demand also entails an associated duty: it would be impossible for the bare trustee to fulfil its duty to fully execute the trust on demand unless she was simultaneously duty-bound to preserve the trust property *until* such a direction was given. A bare trustee, therefore, is always subject

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41 (1875) 1 Ch D 279 (Ch) 281.

42 Eg, *Re Brockbank* [1948] Ch 206 (Ch) 209.

43 See discussion in Chapter XI, Section 4(b).

to a Hohfeldian *duty* to her beneficiaries to preserve the trust property,[44] until her beneficiaries invoke their Hohfeldian *power* to require her to fully execute her trust by conveying such title as she may have in the trust property to their order.[45] And such hybrid duty-liability is part of the 'package deal' whenever one assents to take up the office of bare trustee.

It is also important to note what obligations a bare trustee is not subject to. As *Christie v Ovington* explains, a bare trustee is *only* obligated in the manner described above: he is *not* obligated to his beneficiaries to do anything else. So, if, in our example above, A had directed T to *continue to act as bare trustee but for X instead of A*, such that X, but not A, would thereafter have the power to require T to fully execute the bare trust, T would be privileged to comply, or not, with such request. In Example 2.5, A has no power to require T to continue to hold his legal title on such terms. A may request T to do so, but T has no duty to A to comply. So in Example 2.5, in agreeing *only* to be a bare trustee for A's benefit, T would *not* have assented to A (or anyone else) being vested with any power of appointment – unlike T's position in Example 2.4.

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44 *Joseph Hayim Hayim v Citibank NA* [1987] 1 AC 730 (PC), 748; cited with approval in *Parker-Tweedale v Dunbar Bank Plc* [1991] Ch 12 (CA), 19.

45 For discussion of the power/liability jural relations arising between trustees and their beneficiaries, see Tatiana Cutts, 'The nature of 'equitable property': A functional analysis' (2012) 6 Journal of Equity 44. The proposition in this thesis is that a trust relationship *also* entails a claim-right/duty pertaining to preservation of the trust property in the interim, pending invocation by the beneficiaries of their power to require execution of the trust. The analysis herein, therefore, bears some resemblance to that put forward in JE Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest Under a Trust' (2014) 27 Canadian Journal of Law and Jurisprudence 473. For further discussion of bare trusts, see Paul Matthews, 'All About Bare Trusts: Part I' [2005] Private Client Business 266 and Paul Matthews, 'All About Bare Trusts: Part II' [2005] Private Client Business 336.

Consequently, in Example 2.5, if A, as beneficiary of the bare trust therein, directed T to fully execute the bare trust by conveying his legal title in the shares to X, and T refused to do so, T would be in breach of his duty as bare trustee which he owed *to A*. There is nothing in A's status as beneficiary of this bare trust that allows A to unilaterally change the obligee (ie the beneficiary) to whom T is duty-bound.

(b) 'Varying' a special trust by invoking the doctrine in Saunders v Vautier *to convert it to a bare trust*

Nor would the analysis be much different if T held on the terms of a *special* and not a bare trust.[46]

Under English law, *sui juris* beneficiaries of a special trust who hold between them the entirety of the beneficial interest in the trust property have the power under the doctrine of *Saunders v Vautier*[47] to collapse that special trust into a bare trust in favour of the beneficiaries identified by the terms of the special trust. Accordingly, this *liability* to become a bare trustee when the doctrine of *Saunders v Vautier* is validly invoked is part of the 'package deal' whenever one assents to be a trustee under a special trust, and as bare trustee, one is liable to come under a duty to fully execute such bare trust should the beneficiaries thereto direct. But even under the

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[46] Traditionally, 'a bare trustee … is a mere passive repository for the beneficial owner, having no duties other than a duty to transfer the property to the beneficial owner or as [s]he directs. By contrast a trustee holding property on special trusts has active duties to perform, for example, in executing the trusts of a will or settlement, with administrative (and perhaps also dispositive) powers accompanying his active duties': Lewin (2015) para 1-028; '[T]here is the *special* trust, where the active duties of the trustee go beyond the basic *Saunders v Vautier* duty, but as a result of the trust terms themselves.': Matthews (2005) 268.

[47] (1841) 4 Beav 115, 49 ER 282.

doctrine of *Saunders v Vautier*, the beneficiaries of a special trust have no power to require their trustees to do anything more.

Example 2.6

Suppose T holds the legal title in 10,000 BCL shares for A_L for her life, and A_R as remainderman. T is therefore trustee for A_L and A_R under a special trust. Both A_L and A_R are *sui juris*, and they, together, hold the entirety of the beneficial interest in the legal title in the shares held on trust for their benefit by T.

Given the above, A_L and A_R may jointly invoke the doctrine of *Saunders v Vautier to* collapse the special trust into a bare trust.[48] A_L and A_R may then jointly direct T to convey his legal title in the 10,000 BCL shares to X to hold as trustee for the benefit of Y's life, and thereafter, for the benefit of Z. But the doctrine of *Saunders v Vautier* invests no power in A_L and A_R to require T to *continue* to hold on the terms of the special trust, but for Y for his life, and for Z as remainderman. Thus, T's duties as special trustee are not liable to be changed in such manner without his assent.

Though the *Saunders v Vautier* doctrine and the nature of the obligations of a bare trustee appear to suggest that equity is more amenable to the idea that the obligees to such trust obligations may be unilaterally changed without the need for assent by the trustees who owe those obligations, the better analysis is that these are cases where the said trustees had assented in advance to being liable in these ways,

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[48] Indeed, if A_L were to equitably assign the benefit of her life interest to A_R, it would open to A_R, alone, to collapse the special trust to a bare trust, and thereafter, require its full execution to A_R's sole order: *Anson v Potter* (1879) 13 Ch D 141 (Ch).

but no more. There is no *general* power in the beneficiaries of a trust to require their trustees to do anything more than to bring a bare or special trust to an end. These powers are, therefore, analogous with A's power against B in Example 2.1 to effect a discharge by accepting payment from B. Just as A in that Example had the power to bring the contract to an end, A in Example 2.5, and A_L and A_R in Example 2.6, have analogous powers to bring their respective bare and special trusts to an end.

Furthermore, we may note that T's position in Example 2.6, is distinct from T's position in Example 2.4. In Example 2.6, T did *not* agree to become trustee of a trust in which anyone had a power of appointment analogous to that which was set out in Example 2.4. Consequently, the only power which A_L and A_R are allowed as a matter of the general law is the *Saunders v Vautier* power. But that is not the same kind of power as the expressly stipulated one in Example 2.4.

In Example 2.6, if A_L and A_R jointly invoked the *Saunders v Vautier* power and required T to collapse the special trust over the BCL shares to a bare trust for their benefit, and then, as beneficiaries of that bare trust, directed T to fully execute it by conveying his legal title in the shares to X, if T refused to do so, T would have breached his duties *to* A_L *and* A_R: T would *not* be in breach of any duty to X for failing to comply with A_L's and A_R's direction. All that the *Saunders v Vautier* doctrine allows, is for a special trust to be folded into a bare trust for the *same* beneficiaries, who may then require that bare trust to be fully executed. So there is nothing within the *Saunders v Vautier* doctrine that would allow A_L and A_R to unilaterally cause T to become duty-bound to anyone other than themselves.

(c) 'Varying' a trust by acquiescing to a breach of trust

The beneficiaries of a trust have a further power: they may waive breaches of trust by their trustee. As Harris pointed out:[49]

> The beneficiaries, if all *sui juris*, can dissolve a trust-settlement. They cannot, however, direct the trustees how to administer the trust so long as they allow the settlement to continue: (*In Re Brockbank*[50] …). But, since no beneficiary can complain of a breach of trust to which he has expressly consented, they can collectively authorise the trustees to administer the trusts in a way not permitted by the trust instrument[51] …

But the beneficiaries' power to 'vary' the trusts by acquiescing in a breach of trust arises only in a manner of speaking.

Absent an express grant of a suitably worded power of appointment in the trust beneficiaries, unless there be some other basis on which to rest a power in the trust beneficiaries to vary the terms of the trust (for example, by way of statute), it is impossible for trust beneficiaries to unilaterally require their trustees to hold the trust property and act for the benefit of persons not specified as beneficiaries under the terms of the trust. For the trustees to so act would be a *breach* of that trust, and they cannot be duty-bound or liable to do so unless the trust permits it, in which case, it would be no breach at all.

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49 Harris (1975) 2–3.

50 [1948] Ch 206 (Ch).

51 As authority, Harris cites *Re Kolb's Will Trusts* [1962] Ch 531 (Ch) 540 (Cross J, from which there was an appeal, but the appeal was compromised: (1962) 106 SJ 669); and *Re Druce's Settlement Trusts* [1962] 1 WLR 363 (Ch) 369 (Russell J).

Absent such provision in the trust for the trustees to so act, it is necessary for the trustees to *assent* to so acting since it would be an oxymoron to claim that they were duty-bound to act in *breach* of their trust duties.[52]

Vaisey J held in *Re Brockbank* that the beneficiaries of a trust are empowered to, 'put an end to the trust if they like; nobody doubts that; but they are not entitled … to arrogate to themselves a power which the court itself disclaims possession …'.[53] Therefore, equity does not encroach on the autonomy of equitable obligors such as T who have assented to the office of trustee and thus, have assented to the obligations arising by taking such office: there is no general rule in equity vesting a power in anyone enabling them to impose a new trust on the trustee without his assent.

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52 *Morley v Moore* [1936] 2 KB 359 (CA) 366 (Sir Boyd Merriman P, with whom Scott LJ agreed; emphasis in bold italics added). *Morley* was a case of subrogation, but it has been recognized that subrogation and equitable assignment are closely affiliated concepts: *Hobbs v Marlowe* [1978] AC 16 (HL) 39 (Lord Diplock). *Morley* was also cited with approval and applied by Cairns LJ in *Hobbs v Marlowe* [1978] AC 16 (CA) 24; affd on appeal to the House of Lords, which also held that *Morley v Moore* was correctly decided: ibid 28–39 (Lord Diplock, with whom Lord Elwyn-Jones LC, Viscount Dilhorne, Lord Simon of Glaisdale and Lord Salmon agreed).

53 *Re Brockbank* (n 42) 210. The specific holding in that case was legislatively overruled with effect from January 1st, 1997 when s 19, Trusts of Land and Appointment of Trustees Act 1996 came into force. See also *Stephenson (Inspector of Taxes) v Barclays Bank Trust Co Ltd* [1975] 1 WLR 882 (Ch) 889; *Re Higginbottom* [1892] 3 Ch 132 (Ch); and Lord Eldon LC's observations in *Goodson v Ellison* (1826) 3 Russ 583, 38 ER 694, at 3 Russ 593–594, 38 ER 698. However, it has been suggested, *obiter*, that trustees holding company shares on trust are duty-bound to vote at General Meetings of the company as their beneficiaries wish, and that if the beneficiaries could not come to an agreement as to how the trustees were to vote, the court could compel the trustee to vote as it thought proper: *Butt v Kelson* [1952] Ch 197 (CA) 207. That proposition was doubted and not followed by Upjohn J in *Re George Whichelow Ltd* [1954] 1 WLR 5 (Ch) 8, Further, the observations in *Butt v Kelson* appear to be inconsistent with Lord Templeman's observations in *Joseph Hayim Hayim v Citibank NA* (n 44) 748.

Certainly, if the trustees complied with such request, and if such request amounted to acquiescence by the trust beneficiaries to the resultant breach of trust, the trustees would have a prima facie defence should the acquiescing beneficiaries subsequently bring judicial proceedings against them.[54]

But the law recognises that a trustee is privileged to decline to comply with such requests to commit breaches of trust. No trustee is duty-bound to so act, though he may promise to so act (and such promise may well be binding in equity on him, if supported by consideration). And if so, the parallel with novation in the preceding Section becomes rather striking. Consequently, if, given the facts in Example 2.5, A proposed to T that he should convert the shares into money, and acquire other shares in substitution to be held on trust for A and X, though A would be acquiescing in a breach of T's duties as bare trustee, since such trust gave T no powers of investment, if T refused to comply with A's proposal, T would breach no duty owed to A. And *a fortiori*, T would breach no duty to X, either.

8. The rules at law and in equity

The rules at law and in equity with regards the variability of legal and equitable obligations are essentially the same. Unless otherwise agreed, the obligor to voluntarily assumed obligations arising from contract or trust must assent to any subsequent agreement to extinguish their existing obligations, and to substitute them with new ones. Since every attempt to substitute new obligees in substitution for the existing obligees entails a substitution of new obligations in place of the old, it

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54 *Walker v Symonds* (1818) 3 Swan 1, 64; 36 ER 751, 775 (Lord Eldon LC); cited with approval in *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 (HC) 107, affd *Re Pauling's Settlement Trusts* [1964] 1 Ch 303 (CA).

follows that there is no general rule, at law or in equity, which permits substitution of obligees without the obligor's assent.

The need for assent is essential because no one may be made duty-bound to do any*thing* and/or be rendered duty-bound to any*one* without their assent to the same so far as one is concerned with voluntarily assumed obligations. To allow such unilateral imposition of duties would be an act of sovereignty over another, and would, in essence, change the basis or reason by which the duties arising from such obligation are given judicial recognition.

So far as one is concerned with voluntarily assumed obligations (as arise at common law from debt, covenant, or contract, and in equity, the trust, to give some examples) the reason why the obligors to such obligations are held to them is *because* they were voluntarily undertaken by such obligors. It is no imposition on their personal autonomy to hold them to that which they had voluntarily undertaken.

If equitable assignment of a chose in action operated to extinguish the original obligation which an obligor had voluntarily undertaken, only to subject that obligor to a *new* obligation which he had *not* voluntarily undertaken, recognition of the latter obligation could no longer be justified on grounds of the obligor's voluntary undertaking in respect of the original obligation. This is not to say that no other justification would be possible – just that a fresh one would be required. And the normative challenge which proponents of the view that equitable assignments cause the obligor to be subjected to a new obligation in place of the old *without* his assent is, accordingly, to identify what such alternative justification might be.

The proposition in this thesis is that such further justification is unnecessary because an equitable assignment does *not* operate by changing the obligor's original obligation.

Though the courts of Chancery could have created an equitable doctrine that achieved *precisely* the same effects as a novation would have done, only without requiring the assent of the obligor, it did not do so. Instead, it applied the conception of the trust, and coupled it with an extended conception of agency, thereby changing some of the jural relations between the obligee-assignor and her assignee, whilst leaving the suite of jural relations between obligor and obligee *entirely* intact. The genius of equity, therefore, was its realisation that one could *simulate* a transfer of control over the claim-rights and powers of an obligee with regard her obligor *without* requiring their extinction and substitution with new claim-rights and powers between the obligor and the obligee's 'replacement'. And hence:[55]

> The informing idea behind equitable assignment … is not that we do this at common law, and that in equity. It is rather that we *don't* do this at common law, and we *pretend* to do it in equity.

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55 Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 279 (emphasis in original).

III. DIFFERENT MODELS OF EQUITABLE ASSIGNMENT

The goals in this Chapter are as follows:

1. Having set out the basic premise that obligations, once undertaken, are invariable without the obligor's assent in Chapter II, this Chapter will outline the two prevailing models of equitable assignment.

2. It will then note the deficiencies in each of the prevailing models.

3. Lastly, it will set out a composite model of equitable assignment which avoids those deficiencies.

1. Two prevailing models

There are currently two schools of thought on equitable assignments:[1] a 'substitutive transfer' model; and a 'partial' trust model.[2]

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[1] There are others. Holmes took equitable assignment to operate by analogy with the law of succession: Holmes (1968) Chs 11 and 12; whereas Dean Ames argued that equitable assignment was an extension of the 'power of attorney' reasoning used by the common law: Ames (1887) 6; Ames (1890), a later, revised version of which may be found in Ames (1909): the relevant pages are at pp 582–84. Ames' views appears to have been anticipated by Professor Holland who noted the similarity between the operation of equitable assignment with the Roman conception of 'cessio actionum': TE Holland, *The elements of jurisprudence* (13th edn, Clarendon Press 1924), 314–15, repeating a point first made in 1880 in the first edition of this work, at pp 205–06. Professor Bridge has also recently suggested that equitable assignment rests on the implication of an appropriate contractual term in the chose assigned: Bridge (2016). The difficulty with that view is that it does not explain how equitable assignments of equitable choses, or of tortious causes of action, operate. None of these views appears to have attracted much of a following in England, though this thesis is in sympathy with Professor Holland's and Dean Ames' analysis, at least in part, so far as it recognizes, as they do, that agency conceptions play an essential role within equitable assignment.

(a) Substitutive transfer model

There is a view that equitable assignment extinguishes the claim-right/duty jural relation between the assignor and the obligor, and replaces it with an 'equivalent' claim-right/duty jural relation between the assignee and the obligor. In Professor Corbin's words, the effect of an equitable assignment is as follows:[3]

> Let us determine first what is meant by the assignment of a right. … Let us suppose that A has a right that B shall pay him $100. It is established law that A has power to assign this right to C. It is also established law that the assignment is operative without the consent of B. After the assignment B is under the same[4] duty as before; that is, he must still pay $100 at the same time and place specified. The correlative *right*, however, is no longer in A; it is in C. …
>
> If the foregoing is correct, an assignment of an existing right is an act of the possessor of that right which operates to extinguish the right of the assignor and to create an exactly similar right in the assignee. This definition is in terms of legal operation—of the effect of the assignor's act upon the action of organized society.

Similar views eschewing Hohfeldian language may be found in other secondary literature.[5] For example, in Professor Bridge's account of what happens when a debt (ie, a legal chose) is equitably assigned:[6]

> In this example, [B] is the debtor, [A] the assignor and C the assignee. Assignment means that [A] may *transfer* the debt, owed by [B], to C without obtaining the prior permission of [B]; C may then call upon [B] to pay him instead of [A]; and C may then give [B] a good

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2 'Partial', because it appears to apply only to equitable assignments of *legal* choses in action.

3 Corbin (1926) 208–09 (emphasis in original).

4 The mis-step in Corbin's reasoning occurs here. As explained in Chapter II, a change in the identity of the obligee to an duty is a change in that duty: it is *not* the 'same' duty, at all.

5 See also: JG Starke, *Assignments of Choses in Action in Australia* (Butterworths, 1972) 10; Tudsbery (1912) 1.

6 MG Bridge, *Personal property law* (4th edn, OUP 2015) 231 (emphasis added).

> discharge for payment of the debt initially owed to [A]. The effect of assignment is to *transfer* [A's] payment entitlement to C. In consequence, a relationship of debtor and creditor between [B] and C is *substituted* for the earlier debt relationship between [B] and [A]. The debt owed previously by [B] to [A] has been transferred by [A] to C in the same way as [A] might have sold to C an antique clock or a second-hand car earlier acquired from [B].

These statements posit that an equitable assignment of a chose in action entails extinction of the assignor's entitlements against the obligor coupled with a regrant by operation of law to the assignee of the assignor's entitlements.

Though attractive, Bridge's analogy between the effects of an equitable assignment of a chose in action, and the effects of a conveyance of legal title to tangible property is not a good one. This may be shown as follows.

Example 3.1

B owns a copy of Bridge's *Personal Property Law* (the 'Book'). B hands it over to A, making it clear that he is giving and not lending it to A by saying, 'Here, take this. This Book is yours.' This transaction is witnessed by X who happens to be in the room.

As explained in Chapter II,[7] the obligation arising from the tort of conversion as applied to the use and enjoyment of this Book may most appropriately be set out in the following form:

- All persons who do not hold the legal title to the Book
- are duty-bound to such person who holds the legal title to the Book

[7] Chapter II, Section 5.

- to Φ, where 'Φ' means 'not convert the Book to his or her own use'.

Before the Book was gifted to A, X (being a person who did not hold the legal title to the Book at that point in time) was duty-bound to B (being such person who held the legal title to the Book at that time) to Φ. It would also be accurate to say that A (being a person who did not hold the legal title to the Book at that point in time) was also duty-bound to B (being such person who held the legal title to the Book at that point in time) to Φ. Conversely, it would also be accurate (if odd) to say that B (as holder of the legal title to the Book at that point in time), was *not* duty-bound to either A or X, to Φ.

But following the gift to A, X (still being a person who did not hold the legal title to the Book at that later point in time) would continue to be duty-bound to Φ, though X would then be so duty-bound *to A*, as A had become owner of the legal title to the Book in place of B at that later point in time.

B's gift of the Book to A seems to have unilaterally varied X's claim-right/duty jural relation arising in connection with the tort of conversion. But as explained in Chapter II, this is illusory. The obligee to whom X is duty-bound is unchanged because X had always been (and remains) only contingently duty-bound to whomsoever holds the legal title to the Book. Consequently, B's action in divesting himself of his legal title in the Book has not changed X's duty: X is *still* duty-bound to such person as holds the legal title to the Book.

What, then, of A?

Following the gift to A, A would no longer be duty-bound to B to Φ. What is more, X, and B, as non-holders of the legal title to the Book, are now duty-bound *to A*

as holder of the legal title to the Book, to Φ. So it seems that A's jural relations have been changed by B's actions. But these changes to A's jural relations with B and X are not achieved without regard to the need for assent by A.

English law recognises that gifts may be disclaimed by donees: 'A person cannot be compelled to take what he does not desire to accept.'[8] Therefore, A's jural relations with B and X in respect of the tort of conversion as applied to the Book are *contingent* on A's assent to the gift. Though such assent may be presumed,[9] A may yet overturn that presumption by clearly disclaiming the gift once she comes to know of it.[10]

The above may be contrasted with what transpires when a chose in action is equitably assigned.

Example 3.2

A has rented B her vintage car (the 'Car') for two years, and B is to pay a rental fee of £200 per month.

Two weeks later, A sells the Car to C. C agrees to take the legal title to the Car subject to the rental agreement with B. A also equitably assigns the benefit of her

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8 *Halsbury's Laws* (5th edn, 2014) vol 52, para 250, and authorities cited therein.

9 'It was settled as long ago as the time of Lord Coke that the acceptance of a gift is to be presumed until his dissent is signified, even though the donee is not aware of the gift.': *London and County Banking Co Ltd v London and River Plate Bank* (1888) 21 QBD 535 (CA) 541. See also *Butler and Baker's Case* (1591) 3 Co Rep 25a, 26b–27a; 76 ER 684, 688–89; *Thompson v Leach* (1692) 2 Vent 198, 203; 86 ER 391, 394; *Siggers v Evans* (1855) 5 El & Bl 367, 380–81; 119 ER 518, 523; and *Standing v Bowring* (1855) 31 Ch D 282 (CA) 290.

10 *Standing v Bowring* (n 9) 288; *Mallott v Wilson* [1903] 2 Ch 494 (Ch) 501.

rental agreement with B to C. The assignment is effected orally and is not reduced into writing.[11]

B is informed of the equitable assignment, and B is also told that he should tender future payments of the monthly rental fee to C and not to A.

From the above, we may say that the obligations arising from the rental contract entails the following:

- B, having accepted A's offer of the rental agreement for the use and possession of the Car,
- is duty-bound to A, being the person who made the offer of the rental agreement for the use and possession of the Car which was accepted by B,
- *inter alia*,[12] to Φ, where 'Φ' means, 'pay a monthly rental of £200, to A'.[13]

In addition, we may also say that B was *not* duty-bound to C to Φ (not, at least, to begin with).

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11 The formalities required by s 53(1)(c), LPA1925 do not apply to equitable assignments of a legal chose in action.

12 There are probably other implicit duties, eg, a duty to keep the car in reasonable repair, and a duty to return the car to A in roughly the same condition as when B received it at the end of the rental period (fair wear and tear excepted).

13 Though the contract made no express mention as to whom rental was to be paid, by construction, we may infer payment is to be tendered to A.

Following the equitable assignment to C, *if* it were the case that B had become duty-bound thereby *to C* to Φ, that would mean the obligee to whom B was duty-bound had changed. As explained in Chapter II, both the specification of what an obligor is obligated to do, and to whom he is obligated, are necessary components for there to *be* an obligation recognised at law or in equity. Since the specification of the obligee to whom the obligor is obligated is part and parcel of the specification of the obligation, there is *still* a change to the obligation for which it would seem B's assent should be sought for it to be effective, and such assent is not to be presumed from the fact of notice, since the giving of notice is still a unilateral act.

In Example 3.1, no one had a jural relation *with* the Book, since it is an inanimate thing without legal personality. One may have jural relations with *other* legal persons *in respect of* the Book (or more accurately, 'in respect of' the legal title to the Book), but that is something quite different.

In contrast, in Example 3.2, though A might, loosely speaking, be said to 'own' the 'obligation' owed to her by B just as A 'owned' the Book following B's gift of the Book to her, we must not forget that the obligation 'owned' by A in Example 3.2 is really A's jural relation *with* B, whereas the same cannot be said of A's ownership of the Book in Example 3.1. We cannot speak of the obligation 'owned' by A in Example 3.2 without recognising that it is an obligation where B is obligated *to A*. So if the effect of an equitable assignment of the chose in action arising from that obligation was to *modify* that obligation, B's assent must be sought for such modification to be effective. Ergo, since equitable assignments are recognised to be perfectly effective without such assent, it must follow that equitable assignments do *not* entail such modification.

Conversely, no analogous concern arises with the conveyance of the legal title to a Book. This is because the Book is not an obligor who owes duties to A. Since the Book has no legal personality, it is axiomatic that it cannot be duty-bound to A.

So given the essentially different jural relations between Examples 3.2 and 3.1, it is inapt to draw any analogy between equitable assignment of A's chose in action against B and a conveyance of A's legal title in the Book, following B's gift of the same to her.

The analogy between a conveyance of legal title to tangible personalty, and an equitable assignment of the benefit of a contract is weak. If an equitable assignment entailed a change in the obligee to whom the obligor to the chose assigned was duty-bound, such change would require the obligor's assent for such change to be effective, so far as there is a principle rendering obligations voluntarily undertaken by an obligor to be invariable without his assent.

Though it appears that, in *some* cases, an obligation may be unilaterally changed by another without the obligor's assent (as in the case of the obligation arising under the tort of conversion), those obligations may be distinguished from the kinds of obligations presently being examined because they are framed differently. Those obligations are framed by reference to the association between legal persons with a thing, namely, the legal title to the chattel in question, and not by reference to what a particular legal person had done *with* another legal person so as to generate a jural relation between them.

The proposition that an equitable assignment effects a unilateral change to the obligation of the obligor to the chose assigned by substituting the assignee in place of

the obligee to that obligation, is therefore flawed, so far as such changes should not be effective without the obligor's assent.

Consequently, a different model of equitable assignment may be preferred: one which does *not* entail such 'substitutive transfer', but which leaves the claim-right/duty jural relation between obligor and obligee-assignor intact. This has led to a 'partial' trusts model of equitable assignment which analyses equitable assignments as involving a trust, at least in respect of *legal* choses in action.

(b) 'Partial' trusts model

The alternative view conceives equitable assignments as entailing some form of trust, at least when *legal* choses are equitably assigned. This may be termed a 'partial' trust model, since its proponents restrict it to assignments of legal choses in action.

Authority for the proposition that equitable assignment of a legal chose in action entails the constitution of a trust is not difficult to find. For example, in *Gorringe v Irwell India Rubber and Gutta Percha Works*, Fry LJ observed that by writing to the appellants that they would henceforth hold certain sums for the appellants' benefit until their indebtedness to the appellants was extinguished, the respondents had made themselves, 'trustee of the debt for the Appellants, and therefore it is equivalent to an equitable assignment'. [14]

Understanding equitable assignments of a legal chose in action as entailing some form of trust is inherently irreconcilable with the substitutive transfer model because the trust conception of equitable assignment does not entail any extinction or

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[14] (1886) 34 Ch D 128 (CA) 136.

regrant of the *claim-rights* arising between the assignor and the obligor to the chose. Instead, it entails encumbering the assignor-obligee's *powers* as are associated with those claim-rights, such that the assignor-obligee becomes obligated to the assignee as to their exercise.

To illustrate the difference between the trust and the substitutive models of equitable assignment, it is helpful to consider the following example.

Example 3.3

A lends B £10,000 to be repaid after 12 months have elapsed. One month later, A equitably assigns the benefit of B's loan to C.

On the substitutive transfer model of equitable assignment, A's equitable assignment to C would extinguish the creditor-debtor relationship between A and B, and replace it with an equivalent creditor-debtor relationship between C and B. B would then owe no duties to A as debtor, following the assignment, but would be indebted instead to C.

But conceived of in terms of a trust, A's equitable assignment to C would *not* extinguish the creditor-debtor relationship between herself and B. Instead, A would have created a new equitable relationship where A would be duty-bound to C to invoke her entitlements against B in a manner no different from A having constituted herself trustee of the benefit of her legal chose against B for C's benefit.

On this model, C does *not* take A's place in the debtor-creditor relationship with B: A *remains* B's creditor, precisely as she had been before her equitable assignment of the debt to C, and C remains a stranger to the debtor-creditor relationship between A and B. Consequently, A is still empowered to bring

proceedings at law against B should disputes arise over B's discharge of his common law obligations which are *still* owed to A,[15] though A is herself subject to *equitable* obligations to C as to whether, and when she is to invoke such power.[16]

One advantage of the trust model over the substitutive transfer model is, since the debtor-creditor relationship between A and B is unchanged, B's assent to effect a change to that relationship is not needed. The equitable assignment just binds A and C, and *only* A and C. And this is so, even absent notice of such assignment to B.

Most proponents of the trust model of equitable assignment suggest it only applies to equitable assignments of *legal* choses in action. For example, *Snell's Equity* distinguishes between instances where the whole of an equitable chose has been equitably assigned to an assignee, and cases where the assignment leaves some interest outstanding, as when there is an equitable assignment of part of a chose (whether legal or equitable), or in an equitable assignment of a legal chose, 'for in the latter case, even if the whole chose is assigned, the original creditor still owns the chose in law, holding it in trust for the assignee.'[17] However, where the whole of an equitable chose has been equitably assigned, 'equity has always permitted [the assignee of the equitable chose] to sue [the obligor to the chose assigned] in his own

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15 'The only person who can enforce a right is the right-holder, and persons who suffer loss because of the infringement of someone else's right do not have standing to sue': Stevens (2007) 173.

16 See, eg: *Bexhill UK Ltd v Razzaq* [2012] EWCA Civ 1376; *Kapoor v National Westminster Bank Plc* [2011] EWCA Civ 1083, [2012] 1 All ER 1201; *Three Rivers District Council v Governor and Company of the Bank of England* [1996] QB 292 (CA).

17 Snell (2015) para 3-023. They do not, however, express a view as to whether the trust is imputed by law (ie a constructive trust), or otherwise.

name without joining the original creditor [ie the equitable assignor],'[18] and 'the chose existed only in equity, and so equity was free to hold that the assignee was the sole owner and that no interest remained in the original creditor.'[19] So in effect, *Snell's Equity* endorses a 'substitutive transfer' conception of equitable assignment when *equitable* choses are assigned.

Guest and Liew adopt a broadly similar position, accepting that although an equitable assignment of a legal chose would entail the engrafting of duties on the assignor in the exercise of her entitlements against the legal obligor, an equitable assignment of an equitable chose would entail a 'transfer' of the right assigned. [20]

Smith and Leslie also accept that an equitable assignment of a legal chose in action is appropriately conceived as a trust over the benefit of that chose.[21] However, they deny this where an equitable chose is equitably assigned: [22]

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18 ibid para 3-022, citing the authority of *Cator v Croydon Canal Co* (1843) 4 Y & C Ex 593, 160 ER 1149 , at 4 Y & C 594, 160 ER 1149 (Court of Exchequer Chamber).

19 Snell (2015) para 3-022, citing the authority of *McMurchie v Thompson* (1906) OLR 637, 639. The correct citation for this case is *McMurchie v Thompson* (1906) 8 Ontario Weekly Reporter 637 (HC, Ontario, Canada), where at p 639, Anglin J held that an equitable assignment of an equitable chose in action was valid, even if it had been made gratuitously: 'It stands … as an equitable assignment of a chose in action incapable of legal transfer, for which neither writing nor any particular form of words is requisite, provided the intention to make a present transfer is satisfactorily proven … As the assignment … relates to property over which courts of equity had special jurisdiction, the assignee could sue in such courts in his own name.'

20 Guest and Liew (2015) para 3-07.

21 Smith and Leslie (2013) paras 11.09–11.18. They conclude, however, that the trust is a constructive trust: para 11.16.

22 ibid 219, para 11.05.

> … where the whole interest in an equitable chose has been vested in the assignee, equity permits the assignee to sue in his own name without joining the assignor. This is because—provided the *whole* interest has been assigned—the assignee is the sole owner and no interest remains in the assignor.

This, it would seem, follows from their reading of a passage from the Lord Chancellor's judgment in *Cator v Croydon Canal Co*,[23] and also certain passages in *Fulham v McCarthy*[24] and *Donaldson v Donaldson*.[25]

Lastly, Justice Edelman[26] and Dr Elliott argue that the trust conception of equitable assignment applies to equitable assignments of legal choses in action, and may *also* be applied to equitable assignments of equitable choses in action, and statements to the contrary in some of the recent cases should be cause for concern. But they, too, accept that the assignor of an equitable chose, though an intermediate bare trustee, nevertheless 'drops out',[27] citing the authority of *Cator v Croydon Canal* Co, *Redman v Permanent Trustee Company of New South Wales Ltd*,[28] and *Fulham v McCarthy*. They, too, appear to accept a 'transfer' conception of equitable assignment, albeit only where equitable (and not legal) choses are assigned, even

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23 *Cator v Croydon Canal Co* (n 18), at 4 Y & C 593–94, 160 ER 1149–50.

24 (1848) 1 HLC 708, 717–18; 9 ER 937, 943–44, an appeal to the House of Lords from the Irish High Court of Chancery.

25 (1854) Kay 711, 69 ER 303.

26 Supreme Court of Western Australia.

27 Edelman and Elliott (2015) 246. *Redman v Permanent Trustee Company of New South Wales Ltd* (1916) 22 CLR 84 (HCA), however, is not independent authority for the proposition since the sole reference on point was made by Isaacs J, *obiter* (at 22 CLR 95), relying on the authority on *Fulham v McCarthy* (n 24).

28 *Redman v Permanent Trustee Company of New South Wales Ltd* (n 27).

though they go on to acknowledge[29] that this may be inconsistent with views expressed by Lawrence Collins LJ (as he then was) in *Nelson v Greening & Sykes (Builders) Ltd*.[30]

Lawrence Collins LJ's views will be considered in greater detail in a subsequent Chapter.[31] But his analysis suggests that there is something seriously awry with the partial trust model of equitable assignment posited above.

By 1808, it had become accepted that equitable assignments of equitable choses entailed the present constitution of a trust over the subject-matter assigned. Without taking this step, the courts of equity would not have been able to recognise the validity of *gratuitous* equitable assignments of equitable choses. That such gratuitous assignments were valid had been conceded by the parties in *Lord Carteret v Paschal*.[32] And in 1808, in *Sloane v Cadogan*,[33] Grant MR held that a voluntary

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29 Edelman and Elliott (2015) 246. Whether a bare sub-trust of an equitable interest entails the sub-trustee 'dropping out' is contentious. Though there are views that cases such as *Onslow v Wallis* (1849) 1 Mac & G 506, 41 ER 1361, *Re Lashmar* [1891] 1 Ch 258 (CA) and *Grainge v Wilberforce* (1889) 5 TLR 436 (HC) dictate this, it has been argued that such a view is unprincipled, and that these cases have been mis-interpreted, and Collins LJ's statements in *Nelson v Greening & Sykes (Builders) Ltd* [2007] EWCA Civ 1358, [2008] 1 EGLR 59 would certainly be consistent with the latter view. These points are canvassed below in Chapter IV.

30 *Nelson v Greening & Sykes (Builders) Ltd* (n 29), at [57]. Those views, albeit *obiter*, formed part of his Lordship's reasoning, leading to his holding that there was no basis to say that the administrators of a deceased's estate were to be treated as if they had 'dropped out'. Those views have since been approved and applied in *Sheffield v Sheffield* [2013] EWHC 3927 (Ch); [2014] WTLR 1039, [82].

31 See Chapter V, Section 5.

32 (1733) 3 P Wms 197, 24 ER 1028

33 *Sloane v Cadogan* (1808), reported in Sugden (1846) 1119. A summary of the facts and decision of Sir William Grant MR in this case may be found in Sir L Shadwell V-C's decision

equitable assignment was effective notwithstanding that no consideration had been given in exchange.

In *Sloane v Cadogan*, William Cadogan ('A'), son of the Earl Cadogan, had an equitable reversionary interest in a fund that had been vested in the trustees of the Earl's marriage settlement ('T_1'). Prior to his own marriage, A assigned his equitable reversionary interest in the fund to other trustees ('T_2') on special trust for various volunteers, reserving to himself certain powers of appointment.

When A died without issue without exercising these powers of appointment, Jane Cadogan, A's widow, commenced proceedings against T_1, arguing that A had failed to completely constitute a trust over his equitable interest in the fund arising from the Earl Cadogan's marriage settlement because the assignment of that equitable interest to T_2 was voluntary, and thus ineffective. If so, A had not divested himself of his interest in the fund: it remained part of his assets, and that equitable interest fell to be distributed to A's widow in accordance with the terms of A's will.

This was rejected by Grant MR:[34]

> The Court will not interfere to give perfection to the instrument, but you may constitute one a trustee for a volunteer. Here the fund was vested in trustees [of the Earl's marriage settlement]: [A] had an equitable reversionary interest in that fund, and he assigned it to certain trustees [T_2], *and then* the first trustees [T_1] are trustees for his assigns, and they [the assigns, T_2] may come here, *for when the trust is*

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in *Beatson v Beatson* (1841) 12 Sim 291, 59 ER 1139, at 12 Sim 291–94, 59 ER 1139. Unfortunately, the learned V-C appears to have misapplied the principle on which *Sloane v Cadogan* was decided: Bailey (1932) 558, fn 30; and Shadwell V-C's reasoning in *Beatson v Beatson* was not followed by the Court of Appeal in Chancery in *Donaldson v Donaldson* (n 25).

34 *Sloane v Cadogan* (n 33) 1126 (emphasis added).

> *created no consideration is essential,* and the Court will execute it though voluntary.

The critical point in Grant MR's judgment is highlighted above: the reason why T_1, the trustees of the Earl's marriage settlement, were 'trustees for his [A's] assigns' was because A had *already* constituted a trust[35] in respect of his equitable interest.[36]

Since A had done nothing apart from execute the deed of assignment to T_2, that trust must have arisen by that very same deed. For the gratuitous 'assignment' to T_2 to be valid, Grant MR must have recognised that A had constituted *himself* to be a trustee of the benefit of his equitable reversionary interest and so, rendered himself duty-bound by such trust to his assignees, T_2, who were to hold their entitlements against A arising by reason of such trust, for the benefit of A's intended donees and not absolutely for their own benefit. And so far as one *has* constituted a valid trust, even if voluntary, a court in its equitable jurisdiction would enforce its terms.[37]

Subsequent authorities which have held that a gratuitous equitable assignment of an equitable chose by way of gift was valid also analyse an equitable assignment of

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35 Just over 50 years earlier, it had been held in *Tomlinson v Gill* (1756) Amb 330, 27 ER 221 that a trust could be validly constituted over a presently-existing chose in action.

36 Corroboration that this reading of Grant MR's judgment is correct may be found in *Blakely v Brady* (1839) 2 Drury & Walsh 311 (High Court of Chancery, Ireland), an excerpt of the relevant part of which may be found in Spence (1850) 903.

37 '[T]he distinction is settled, that in the case of contract, merely voluntary …, this Court will do nothing: but if it does not rest in voluntary agreement, but an actual trust is created, the Court does take jurisdiction …' : *Pulvertoft v Pulvertoft* (1811) 18 Ves Jun 84, 98–99; 34 ER 249, 254. See also *Kekewich v Manning* (1851) 1 De G M & G176, 42 ER 519; *Meek v Kettlewell* (1842) 1 Hare 464, 469; 66 ER 1114, 1116.

an equitable chose as entailing the constitution of a trust over the chose in question.[38] This line of authority was then extended in *Richardson v Richardson*[39] which held that a gratuitous equitable assignment of a *legal* chose was valid for the same reason.[40] Suggestions that an equitable assignment of an equitable chose does *not* entail the constitution of a trust over the chose assigned are, therefore, untenable.

2. A dualist 'trust plus agency' model

(a) The poverty of a monist 'trust' model

The challenge is to explain how, notwithstanding that equitable assignments entail the constitution of a trust, an equitable assignee may invoke the assignor's powers against the obligor directly without requiring the assignor's involvement. For example, as was recognised in *Donaldson v Donaldson*:[41]

> [I]n the case of an assignment of the equitable interest in stock standing in the names of trustees, … the donee may go with that deed [of assignment] to the trustees, and say, transfer to me the interest in this sum of stock …

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38 See, eg, *Kekewich v Manning* (n 37), *Voyle v Hughes* (1854) 2 Sm & Giff 18, 65 ER 283, *Harding v Harding* (1886) 17 QBD 442 (QB), *Re Spark's Trusts* [1904] 1 Ch 451 (Ch).

39 (1867) LR 3 Eq 686 (Ch).

40 Other authorities accepting that a gratuitous equitable assignment of a legal chose is valid include: *Fortescue v Barnett* (1834) 3 My & K 36, 40 ER 14; *Re Patrick* [1891] 1 Ch 82 (CA); *Moore v Moore* (1874) LR 18 Eq 474 (Ch); *Re King* (1879) 14 ChD 179 (Ch); and *Re Griffin* [1899] 1 Ch 408 (Ch).

41 *Donaldson v Donaldson* (n 25) at Kay 718–19, 69 ER 307. See also *Re Smith (sub nom Public Trustee v Aspinall)* [1928] 1 Ch 915 (Ch).

And numerous cases tell us that where an equitable chose has been assigned, the assignee may invoke the assignor's power to bring proceedings in equity against the obligor without needing to join the assignor.[42]

Part of the answer to this lies in a proper understanding of the rules on joinder of parties in equitable proceedings. But beyond the technical rules of joinder in equity, there is a further conceptual reason that explains why assignor involvement is unnecessary, that is, an equitable assignment is not merely a trust: it is a trust *plus* an agency of an atypical kind, akin to the Roman '*cessio actionum*'.[43]

The proposition in this thesis is that all equitable assignments (whether of legal or equitable choses in action) are underpinned by two effects.

First, an equitable assignment operates in the manner of an express bare trust:[44] that is, when a legal or equitable chose is equitably assigned, the assignor will be obligated to her assignee in just the same way as if she had expressly constituted herself a bare trustee of the chose for the benefit of her assignee. Second, an equitable assignment also entails the grant of authority to the assignee in an atypical manner: that is, having equitably assigned the chose to the assignee, the assignor will have authorised the assignee to invoke the assignor's powers vis-à-vis the obligor to the chose as if he were the assignor, *and* will have further authorised the assignee to

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42 Eg: *Goodson v Ellison* (1826) 3 Russ 583, 38 ER 694; *Cator v Croydon Canal Co* (n 18).

43 Holland (1924) 314–15. Broadly in agreement, see Ames (1887) and (1890); Ames (1913) 213, fn 1; and A Pretto-Sakmann, *Boundaries of Personal Property* (Hart Publishing, 2005), 158–163.

44 The nature of a bare trust has been explained in Chapter II.

invoke those powers *as the assignee pleased*.[45] Consequently, just as 'every charge is not an equitable mortgage, though every equitable mortgage is a charge',[46] every equitable assignment is a bare trust, though not every bare trust is an equitable assignment.

Cases which discuss and analyse equitable assignments as entailing some form of trust cannot be taken to mean anything else. If they meant equitable assignments to *be* trusts, and nothing more, it would be impossible to distinguish the institution of the trust from the institution of equitable assignment. But the cases are clear: the institutions of equitable assignment and the trust are so distinct from one another that the courts will not give effect to a failed disposition intended by the disponor to operate as an equitable assignment by recharacterising it as a trust *simpliciter* because the intention to effect an equitable assignment is *not* the same as the intention to constitute a mere trust.[47]

So far as an equitable assignment entails the constitution by the assignor of a bare trust over the chose assigned for the benefit of the assignee, that 'trust effect' divests the assignor of her *beneficial interest* in the powers associated with the chose:

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45 The question as to the revocability or otherwise of this 'agency' is addressed in Chapter V.

46 *Shea v Moore* [1894] IR 158 (CA, Ireland) 168 (Walker LC).

47 *Milroy v Lord* (1862) 4 De G F & J 264, 45 ER 1185. See also *Pearson v The Amicable Assurance Office* (1859) 27 Beav 229, 54 ER 89; *Richards v Delbridge* (1874) LR 18 Eq 11 (Ch); *Re Rose; Rose v Inland Revenue Commissioners* [1952] 1 Ch 499 (CA). This was also accepted by Eve J to be so in *Hill v Peters* [1918] 2 Ch 273 (Ch), leading him to conclude that the rule in *Dearle v Hall* (which will be explored in Chapters IX and X) would not apply to determine the priorities between the competing claims of a trust beneficiary and an equitable assignee, a view which Lord Reid agreed with in his speech in in *BS Lyle v Rosher* [1959] 1 WLR 8 (HL) 23, although Lord Kilmuir, Lord Morton of Henryton and Lord Cohen left the point open at pp 15, 17 and 24, respectively.

thereafter, she is longer privileged against her assignee to invoke her powers against the obligor to the chose – rather, she is duty-bound to invoke them as the assignee directs, *and only if the assignee directs*.

Thus, as has been observed in relation to what happens when a trust is constituted over the legal title to property:[48]

> The trustee has a legal title and access to common law courts and remedies, *but [she] is a driven vehicle for the superior rights of [her] beneficiary*. [She] litigates at common law in response to [her] equitable duties, and not to [her] common law rights, which have been subordinated. The trustee is now a manager in an institution which is a hybrid between the creation of an agency and the disposition of property.

And there seems no reason to doubt that the same is also true when the trust property is equitable in origin.

But at the same time, if the assignor *intends* to equitably assign the chose in action instead of merely constituting a trust over it, such assignor will also *intend* to enable the assignee to 'leap-frog' or 'bypass' his assignor in his dealings with the obligor; and *such* intent is given effect to by means of an atypical agency between the assignor and her assignee. Thus, every equitable assignment also entails the assignor authorising her assignee to act as if he were her, *and* as he pleases.[49]

Consequently, an assignee who has been equitably assigned an equitable interest in property held on trust for the sole benefit of the assignor may invoke the

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48 Jeffrey Hackney, *Understanding equity and trusts* (Fontana Press 1987) 21–22.

49 In the usual case, '[a]gency is a consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other.': WA Seavey, 'The Rationale of Agency' (1919-1920) 29 Yale Law Journal 859, 868.

assignor's power to require such trust to be fully executed;[50] and an assignee who has been equitably assigned the benefit of a contractual debt that was payable to the assignor may invoke the assignor's power to make an offer of release, on condition that the debtor tender payment to someone else.[51] Invocations of such powers of the assignor are valid, without court order, though judicial proceedings may be brought if the obligors fail to comply with such invocations of the relevant delegated power.[52] And so far as the courts of equity (but not the courts of common law) would have recognised such 'agency effect', an assignee may also invoke the assignor's power to initiate judicial proceedings *in equity* against the obligor to the chose to seek equitable judicial remedies, *without* any further involvement of the assignor, even though such assignee be a stranger to the equitable chose in question.[53]

Though such an agency relationship would be atypical, a principal who is owed fiduciary obligations by her agent certainly has the power to release her agent from those obligations, leaving the agent free to invoke those powers delegated to him by virtue of his appointment as agent *as he pleases* – rather as the Romans recognised

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50 *Donaldson v Donaldson* (n 25), at Kay 718–19, 69 ER 307: 'In the case of an assignment [by deed] of the equitable interest in stock standing in the name of trustees …, the [assignee] may go with that deed to the trustees, and say, transfer to me the interest in this sum of stock …'.

51 Ie the '*Hodgson v Anderson*' power discussed in Chapter II, Section 2(b). Consequently, as was accepted by Lord Cranworth LC in *Jones v Farrell* (1857) 1 De G & J 208, 218; 44 ER 703, 707: 'I think the only safe way for the debtor in such a case [where his creditor has assigned the debt to an assignee] would be to send at once to the assignee and pay him the debt. That would be a valid discharge. If my creditor tells me to pay A.B., and I accordingly pay A.B., and the creditor afterwards sues me, I have a good plea of payment.' See also discussion in Chapter V, Section 4.

52 As in *Cator v Croydon Canal Co* (n 18).

53 This point will be elaborated on in Part III: Joinder.

to be the case with a *cessio actionum*.[54] Consequently, the entitlements of the principal which have been delegated to the 'agent' may be invoked by that agent as the 'agent' pleases. And consequently, neither the default position that *delagatus non potest delegare*, nor the principle that an agent may not serve two masters, applies.[55]

This atypical 'agency effect' is absent from a trust *simpliciter*, so consequently, as Waller LJ said in *Barbados Trust Company Ltd v Bank of Zambia*, ''[A] declaration of trust is not an equitable assignment'.[56] Yet we may still say that, 'every equitable assignment is a trust' given that an equitable assignment is not *merely* a trust, but is a trust *plus*.

The proposition in this thesis, therefore, is that so far as a court in its equitable jurisdiction is concerned, there need not be any express words setting out the constitution of any trustee-beneficiary relationship between the assignor and the assignee; nor any express words of authority and release setting out the constitution of the atypical agent-principal relationship mentioned above. Rather, in concluding that the acts and/or words of the assignor have validly created an equitable assignment of a legal or equitable chose in action, the court in its equitable jurisdiction will have concluded that both such trust and agency have arisen so far as they are necessary and sufficient to allow the institution of equitable assignment to take effect.

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54 As was suggested in Holland (1924) 315.

55 The unusual nature of the 'agency' relationship arising between assignor and assignee will be expanded and explained further in Chapter V.

56 *Barbados Trust Company Ltd v Bank of Zambia* [2007] EWCA Civ 148, [2007] 1 Lloyd's Rep 495, [45].

(b) Dealing directly with the obligor

An assignee is empowered to deal directly with the obligor to the chose assigned in ways which go beyond his ability to bring judicial proceedings in equity without needing to join the assignor.

Example 3.4

Suppose T holds the legal title to 10,000 BCL shares on a testamentary trust 'for A's benefit'. The terms of the trust are that T is to pay the income generated from such holding to A until A turns 45 years of age. It does not vest T with any power of sale or reinvestment, nor does it provide A with any power to require T to convey his legal title to her order.

A, aged 30, subsequently equitably assigns her equitable interest in T's legal title in the shares to C by way of gift.[57]

By such equitable assignment to C, with or without notice to T, C would already have the power to require T to convey his legal title in the shares to C's order.[58] Though C may not exercise such power without informing T of the assignment, that is beside the point, the point being that if C (and not A) invoked the *Saunders v Vautier* doctrine to collapse the testamentary trust to a bare trust, and then directed T to fully execute that bare trust by conveying his legal title in the shares to C, T will have become a bare trustee by C's invocation of the *Saunders v Vautier* doctrine. If T then failed to fully execute the bare trust *per* C's request, T would

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57 As mentioned above, such assignments are effective and valid notwithstanding the lack of consideration in support: *Sloane v Cadogan* (n 33).

58 See *Donaldson v Donaldson* (n 25), at Kay 719, 69 ER 307.

breach his duties as such bare trustee, and proceedings might then be brought in respect of such breach.

Since the testamentary trust merely provided that T is to hold 'for A's benefit', no power of appointment having been reserved to A, A's equitable assignment to C does not turn C into a beneficiary of that trust on its own terms. And so far as an equitable assignment operates by creating a new trustee-beneficiary relationship between A and C, that does not make C any less a stranger to the testamentary trust between A and T. So analysing equitable assignment as entailing a trust relationship cannot explain how an assignee like C may validly invoke the *Saunders v Vautier* doctrine to collapse T's testamentary trust for A's benefit into a bare trust.

This thesis proposes that every equitable assignment of *any* chose in action (be it legal or equitable) entails an agency *as well as* a trust, and though C (as assignee) remains a stranger to the testamentary trust, C is nevertheless authorised to invoke any and/or all of A's entitlements against T as beneficiary to that trust. But can an agent be authorised to such effect?

(c) The acts of a duly authorised agent are the acts of his principal

When dealing with the question of agency, our concerns most often lie with questions whether and when an agent's actions bind his principal in a contractual relationship with a third party. In other cases, we might be concerned whether a principal may be held vicariously liable for his agent's tortious acts. Neither of these preoccupations, however, spans the entire breadth of the operation of the law of agency.

Bowstead and Reynolds on Agency observes:[59]

> An agent may execute a deed, or do any other act on behalf of the principal *which the principal might himself execute, make or do*; except for the purpose of executing a right, privilege or power conferred, or of performing a duty imposed, on the principal personally, the exercise or performance of which requires discretion or special personal skill, or for the purpose of doing an act which the principal is required, by or pursuant to any statute or other relevant rule, to do in person.

Leaving aside instances where personal action by the principal is required, if *sui juris*, whatever the principal is empowered to do, she may authorise *another* to invoke them in her right and on her behalf. Insofar as such powers and entitlements are invoked by the agent within the bounds of his authority, it would be *as if* they had been invoked by the principal, herself: '*Qui facit per alium facit per se*'.[60]

This includes the assignor's power to commence judicial proceedings. Hence, where such agency effect is recognised (as it would be by a court in its equitable jurisdiction), a court would permit an assignee to bring proceedings against an obligor even though the assignee was a stranger *because* it recognised the assignee to have been authorised to do so by the assignor, and it would be as if those proceedings had been commenced by the assignor herself.[61]

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59 Watts and Reynolds (2014) para 2-017 (emphasis added). See also Story (1882) §2. As authority, Story cites Co Litt 258a.

60 See 1 Bl Comm 417. It has been suggested that the principle which underlies it is simply a fiction of unity of identity between principal and agent or master or servant: OW Holmes, 'Agency' (1890-1891) 4 Harv L Rev 345 and OW Holmes, 'Agency II' (1891-1892) 5 Harv L Rev 1.

61 A distinct question as to whether such assignor would be bound by any decision reached in such proceedings would then arise. The operation of the rules of *res judicata* in the context of equitable assignments of legal and equitable choses will be explored in Chapters VI to VIII.

3. Applying the composite model to equitable assignments of choses in action

It is convenient now to set out in greater detail how the composite model of equitable assignment works.

Example 3.5

Suppose that A has lent B £10,000. A will have a legal chose in action against B in respect of the debt of £10,000. Accepting that this legal chose is property and can be dealt with, A tells C that she is giving the debt to him. For good measure, A makes this gift before independent witnesses. By such speech-act, A will have equitably assigned her legal chose in action against B to C[62] by way of gift.[63]

Unlike the example with B's Book in Example 3.1, the subject-matter of the gift in Example 3.5 is no longer a thing with which no jural relations are possible. Rather, the subject-matter of the gift is *itself* a set of jural relations encompassing claim-rights/duties, privileges/no-rights, powers/liabilities, and immunities/disabilities between A and B.

To begin with, A will have a claim-right against B that B repay £10,000 to A. Ordinarily, this claim-right will be associated with a number of powers. For the purposes of analysis, however, we will just consider one power, namely A's power

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62 An equitable assignment of a *legal* chose in action falls outside the ambit of s 53(1)(c), LPA1925 (which only applies to dispositions of subsisting equitable choses in action). It also falls outside the ambit of s 53(1)(b), LPA1925 (which only applies to the constitution of trusts over land).

63 For authority that gratuitous equitable assignments of legal choses in action may be validly made, see nn 39 and 40, above.

against B to offer to release B from his duty to repay £10,000 to A if B tenders repayment to C, A's nominee, instead.

In the following Tables, 'Φ' means 'repay £10,000 to A'; and 'Θ' means 'offer to release B from his duty to A to Φ if B tenders repayment to such person as A may name at a later date':[64]

Table 1

1.1	A has a claim-right against B that B Φ;
1.2	A has a power against B to Θ;[65]
1.3	A has a privilege against B to invoke her power against B to Θ, or not, as she pleases: she is under no duty to B to invoke that power, or not; and
1.4	A has an immunity against B changing A's jural relations with B in that B has no ability to effectively invoke A's power against B to Θ.[66]

Other jural relations also arise by reason of the loan between A and B. In particular, as between A and C, a third-party to the loan:

1.5	A has a privilege against C to invoke her power against B to Θ as she pleases, or not; she is under no duty to C to invoke it, or not; and
1.6	A has an immunity against C changing A's jural relations with B in that C has no ability to effectively invoke A's power against B to Θ.[67]

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64 Θ is, in essence, the '*Hodgson v Anderson*' power, being the power vested in A to offer to release B from his duty to Φ if he tenders to A's nominee. On these facts, it is not a power 'personal' to A as to be 'too personal' to be capable of being equitably assigned (see discussion in Chapter I, text to and following n 10).

65 If A invoked her power to Θ, she would change B's jural relations with herself in that by making such offer, B would be granted a power against A he previously would not have had: the power to cause A to be duty-bound to B to release B from his duty to A to Φ by *accepting* A's offer. B's power of acceptance is a Hohfeldian power so far as A would not, prior to B's acceptance, be under any duty to release B from his duty to her to Φ, at all.

66 A's offer to release B from his duty to Φ in exchange for his tendering payment to such person as A may name at a later date rests on A's power to release B from his duty by executing a deed of release. Since the latter power of release is for A to invoke, B's execution of such a deed (ie, a forgery) will be a nullity.

If an equitable assignment of the debt by A to C *substituted* C in place of A by extinguishing A's claim-right/duty jural relation with B, and substituting in its place a new claim-right/duty jural relation between C and B, such extinction and regrant would modify the entire suite of jural relations between A, B and C, as follows:

Table 2

2.1	If the equitable assignment of the debt to C had the effect of substituting C in place of A, ***C*** will now have a claim-right against B that B Φ (ie, repay £10,000 to A);
2.2	Given the changes to B's *duty*, ***C*** now has a power against B to Θ (ie, release B from his duty to Φ);
2.3	Given the changes to B's *duty*, ***C*** now has a privilege against B to invoke ***his*** power against B to Θ, or not, as he pleases: he is under no duty to B to invoke that power, or not; and
2.4	Given the changes to B's *duty*, ***C*** has an immunity against B changing C's jural relations with B in that B has no ability to effectively invoke C's power against B to Θ.

As to the relations between A and C, on the supposition that equitable assignment extinguished the claim-right/duty jural relation between A and B and replaced it with an 'equivalent' jural relation between C and B, A would then become the third-party to *that* 'new' obligation between C and B. Accordingly:

2.5	Given the changes to B's *duty*, ***C*** has a privilege against ***A*** to invoke his power against B to Θ as he pleases, or not; and[68]
2.6	Given the changes to B's *duty*, ***C*** has an immunity against ***A*** changing C's jural relations with B in that ***A*** has no ability to effectively invoke ***C's*** power against B to Θ.[69]

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67 A's offer to release B from his duty to Φ in exchange for his tendering payment to such person as A may name at a later date rests on A's power to release B from his duty by executing a deed of release. Since the latter power of release is for A to invoke, C's execution of such a deed (ie, a forgery) will be a nullity..

68 If B's duty to A had changed in the manner suggested by 'substitutive transfer' models of equitable assignment, A would no longer have any privilege against C to invoke her power against B to Θ because *she* would no longer have any such power.

The difficulty with such unilateral extinction and revesting of the entire suite of A's jural relations with non-A such as B and C in the above examples is that it rests on the unilateral modification of A's claim-right/duty jural relation *with B* (which is impermissible).

If we are careful to distinguish between what B was originally obligated (ie, duty-bound) to do (ie, repay £10,000 to A); and to whom B was so obligated (ie, to A), we can partially sidestep objections that one may not unilaterally change B's obligations, so far as in Table 2, we have not suggested that what B was duty-bound to do has changed. But B's obligation has *still* been changed because the other aspect of the obligation, 'to whom' he owed that obligation, has been changed.

This is just as much a change of the obligation between A and B as a change to the specification of what B was obligated to do. So in principle, a unilateral change to whom B is duty-bound should not be permissible, either. Yet the 'substitutive transfer' model of equitable assignment would seem to suggest that that is what equitable assignment does.

As noted earlier, the analogy with what happens when the legal title in a Book in Example 3.1 is given away is inapt because a Book has no jural relations with its owner, whereas B, the debtor to the loan contract patently does. Because a Book cannot 'voluntarily assume' any obligations to its 'owner', we are not concerned to obtain its 'assent' to a substitution of owners (even if that were possible). In contrast,

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[69] If B's duty to A had changed in the manner suggested by 'substitutive transfer' models of equitable assignment, A would no longer have any immunity against C changing A's jural relations with B by invoking A's power against B to Θ, because *she* would no longer have any such power.

in any contractual obligation, the obligee whose performance furnishes the benefit of the obligation must necessarily be a legal person who is subject to and has undertaken Hohfeldian duties and liabilities with regards some*one*, ie, some legal person. And any change to that obligation should require the obligor's assent to be effective. But is that what equitable assignment does?

It is not true that the jural relations between A and ***C*** may only be changed by modifying the jural relations between A and B. There are other ways of achieving the former, while leaving the latter entirely unmodified. Suppose A constitutes herself bare trustee of her legal chose in action against B for C's benefit, and simultaneously authorises C to invoke her entitlements against B, as if he were her, and as he pleased. By such acts, A would have assented in advance to the possibility that C might change her jural relations with B by invoking such delegated powers, and A would be powerless to preclude C from doing so.[70]

Given the bare trust, without changing the claim-right/duty jural relation between A and B, A's privilege against *certain* non-A (namely C, the beneficiary of such trust) to invoke her powers against B associated with her claim-right against B will have been lost since A will have become duty-bound and liable to C to invoke those powers in accordance with the bare trust she had constituted. A's constitution of the bare trust over the debt for C's benefit thus divests A of her *beneficial interest* in the debt whilst necessarily leaving her equitable jural relations with B entirely intact.

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[70] As will be explained in Chapter V, Section 1, such authority, when coupled with an interest, is irrevocable *inter vivos* and will survive even A's death.

The atypically broad grant of authority to C, meanwhile, would result in A losing her *exclusive* ability to effect changes in her jural relations with B (in that although she retains her powers against B in respect of the debt, she is no longer *immune* against C effecting changes to those jural relations when he invokes the powers she had delegated to him). We see, therefore, how it is possible to divest oneself of beneficial interest and *exclusive* control over the powers and liabilities arising from and associated with the claim-right and duty jural relation between A and B *without* having to effect any change to that underlying claim-right/duty jural relation or the associated power/liability jural relation. All we need is for A to not only authorise C to act in her place: but to also release C from the fiduciary duties that would normally accompany such grant of authority. Thus, we would have the following set of jural relations:

Table 3

3.1	A has a claim-right against B that B Φ;
3.2	A has a power against B to Θ;
3.3	A has a privilege against B to invoke her power against B to Θ, or not, as she pleases: she is under no duty to B to invoke that power, or not; and
3.4	A has an immunity against B changing A's jural relations with B in that B has no ability to effectively invoke A's power against B to Θ.
3.5	***By reason of the bare trust constituted in favour of C,*** A no longer has a privilege against C to invoke her power against B to Θ as she pleases, or not; she is under a duty to C to invoke her power against B to Θ, or not, in accordance with the terms of the bare trust; and
3.6	***By reason of the authority granted to C coupled with a release of his fiduciary obligations,*** A will ***no longer*** have an immunity against C changing A's jural relations with B in that C ***will now*** have the power against A to invoke A's power against B to Θ, ***and as he pleased***. That power is ***no longer*** for A, and A alone, to invoke; since A had authorised C to invoke such power as her agent. ***Furthermore, C is also privileged against A to invoke such delegated power against B as he pleases.***

The proposition in this thesis is that equitable assignment should be conceived as operating through the combination of a bare trust plus an atypical agency leading to the results spelt out in Table 3.

Though Tables 1 to 3 have only mentioned one of A's powers against B, namely her power to release B from his duty, the analysis may be applied to any or all of A's powers against B as arise in connection with her claim-right/duty jural relation with B by reason of the loan in Example 3.4. Thus, *mutatis mutandis*, we may apply the composite conception of equitable assignment to explain how C may invoke A's power to release B from his duty to tender payment of £10,000 to A by way of outright grant without any *quid pro quo*, whilst also having the power to restrain A from acting in any way as would frustrate the efficacy of such release; or how C may invoke A's power to bring judicial proceedings against B, should there be a dispute over B's performance of his duty, whilst also having the power to restrain A from invoking her power to release B from his duty and so on, and so forth.

The analysis above applies equally well to *equitable* obligations such as the obligation arising between a trustee and his beneficiaries, or the obligation arising between the executors of a will and the beneficiaries under the will, so on, and so forth.

Suppose T holds legal title to 10,000 Black Co Ltd ('BCL') shares on a bare trust for A, if A is *sui juris*, that trust entails A having a claim-right against T that T shall fully execute the bare trust by conveying his legal title in the shares to such person as A might name. This claim-right is, accordingly, associated with a variety of powers, amongst which would be A's power against T to name a person to whom T's legal title in the shares is to be conveyed to allow T to carry out his duty.

If we take 'Φ' to mean 'fully execute the trust by conveying T's legal title to such person as A may name'; and 'Θ' to mean 'name a person to whom T's legal title in the shares is to be conveyed to allow T to carry out his duty to Φ', we may see that the analysis above in Tables 1 to 3 will apply to similar effect. That is, the combination of the kind of trust and atypical agency described in Table 3 allows for a 'transfer' of control over the jural relations between obligor and obligee *without* needing to change any aspect of their jural relations *inter se*.

So in respect of T, A and C, jural relations 3.5 and 3.6 may be restated as follows:

3.5'	By reason of the bare trust constituted by A in favour of C, A will be duty-bound to C not to invoke her power against T to Θ, save in a manner sanctioned by the terms of the trust (ie, unless C directs her to do so).
3.6'	By reason of the atypical authority granted by A to C, C will have the power against B to invoke A's power against T to Θ, and what is more, C will be privileged against A to invoke A's power against T to Θ, or not, as C pleases.

We should notice the overlap between jural relations 3.6 and 3.6′ with jural relation 2.5. That is to say, we can approximate the result in jural relation 2.5, *without* needing to effect any change to the claim-right/duty jural relations between A and B (or T).

Comparison of jural relations 2.6 and 3.5 or 3.5′, however, reveal significant differences.

Jural relations 3.5 or 3.5′ set out the proposition that A is duty-bound to C not to invoke her power against B (or T) to Θ, unless C directs her to do so. But being duty-bound *not* to invoke her power against B (or T) to Θ does not mean that A no longer has such power. She does, save she may not invoke it without prior direction by C. Accordingly, jural relations 3.5 or 3.5′ tell us that A may still invoke her power

against B (or T) to Θ, even if no prior direction by C had been given: such invocation is valid *as against B (or T)*, albeit it will be a breach of her duty to C. Accordingly, C would *not* be immune to A changing C's jural relations with B (or T) (arising from his 'agency' under jural relations 3.6 or 3.6′) in that A, as 'principal' would necessarily retain her power to invoke *her* power against B (or T) to Θ.

This may be contrasted with the effect in jural relation 2.6: where the claim-right/duty jural relation between A and B had been extinguished, and a 'new' claim-right/duty jural relation between C and B had been constituted in its place, A would no longer have *any* power against B to Θ; that power would be exclusively (re-)vested in C. So C would thereafter be *immune* to A changing C's jural relations with B in that A has no ability to effectively invoke C's power against B to Θ.

This is significant, for the cases tell us that an equitable assignor may be enjoined by injunction from acting in such a way as would be contrary to the interests of her assignee.[71] Such injunction would be unnecessary, if equitable assignments

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[71] See, eg, *Applin v Cates* (1861) 30 LJ Chan 6 (Ch): injunction granted on application of assignee of a contractual debt payable by installments, to enjoin the assignor of the debt from accepting future tenders of installments by the debtor; *Kekewich v Manning* (n 37): injunction granted on application of assignees (being trustees of a settlement in favour of volunteers) of an equitable remainder interest in certain funds, to enjoin the assignor from vesting that interest in the trustees under a later settlement. See also *Fortescue v Barnett* (n 40), where the assignor of the benefit of a policy of assurance who had received bonuses on the policies and had successfully invoked his powers against his insurers by surrendering his policy was ordered to pay to the assignee such sum as had been secured by the policy, the bonus declared, as well as such further sum as would be sufficient to answer all future bonuses as would have been payable, had the policy not been surrendered. Such order could not be made if equitable assignments operated in the manner described in Table 2 since on that conception of assignment, any dealings with the assignor by the obligor of the *new* claim-right/duty jural relation envisaged in that model, would have been a nullity.

operated by way of substitutively transferring the assignor's claim-right/duty jural relation (as sketched out in Table 2). But such injunction would make eminent sense, if equitable assignments operated by means of the composite trust and agency model sketched out in Table 3.

The combination of trust plus agency explains how the outcomes in the cases may be achieved, whilst respecting the inherent invariability of the obligation voluntarily assumed by the obligor. Through changes to the jural relation between assignor and assignee, we can *approximate* the effects as would otherwise have to arise by changing the claim-right/duty jural relation between obligor and obligee.

4. Equitable assignments of choses in action arising from obligations imposed by law

The analysis thus far has concentrated on the operation of equitable assignment of choses in action arising from voluntarily assumed obligations. If equitable assignments are conceptualised as operating by means of a bare trust coupled with agency, since those mechanisms work by leaving the jural relations between obligor and obligee-assignor entirely unchanged, seeking obligor consent for the assignment to take effect is unnecessary because, in essence, it is none of his business.

As mentioned in Chapter I, not all obligations are voluntarily assumed. Many obligations such as the secondary obligation at common law to pay unliquidated damages arising after a contract has been breached are imposed by law.

The primary obligation at common law not to commit, say, the tort of trespass, is imposed by law. When that duty is breached, the law imposes a secondary obligation on the tortfeasor to pay unliquidated damages to such person as the law

defines and specifies to be the party to whom the tort duty is owed, and who has the power to bring legal proceedings to recover such damages.

Some obligations imposed by law may be equitably assigned. For example, unless precluded by statute or policy (for example, the policy against encouraging maintenance and/or champerty), it is now recognised that the chose in action arising from a contractual or tortious cause of action may be equitably assigned.[72] This is permissible *because* equitable assignments do not change any aspect of the jural relations between obligor and obligee as have been imposed by law by reason of the accrual of that cause of action.

As mentioned above, any model of equitable assignment predicated on exposing the obligor to a new obligation should provide a normative justification why such imposition is justified. Yet the cases reveal no such concern. That suggests that, whatever equitable assignment is doing, it is not operating in such a way as demands such justification. And that is precisely what the composite 'trust-plus-agency' model of equitable assignment proposed by this thesis does.

Consequently, whatever normative reasons justified the imposition of such secondary obligations on such obligor (as party-in-breach or tortfeasor) vis-à-vis such obligee pre-assignment, those normative reasons will be sufficient to justify continued imposition of those secondary obligations on the obligor vis-à-vis the obligee post-assignment. No new or further justification is required because, as matters stand between the obligor and the obligee, everything is precisely as it used to be.

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[72] See Smith and Leslie (2013) Chs 22 and 23; Guest and Liew (2015) Ch 4.

IV. MISCONCEPTIONS

The composite conception of equitable assignment set out in the preceding Chapter goes against the current of most contemporary accounts of equitable assignments which tend either towards a wholesale 'substitutive transfer' model, or a 'partial' trusts model according to which equitable assignments of legal choses entail the assignor holding the benefit of the chose assigned on trust for her assignee, but which concedes that equitable assignment of equitable choses may well take effect by means of a substitutive transfer. Neither of these approaches fully integrates the significance of the proposition that voluntarily undertaken equitable obligations, just as much as legal ones, are not generally capable of being unilaterally varied by the obligees thereto without the obligors' assent, whether such assent be given in advance, or at the time of such variation.

Proponents of the partial trusts model who concede that the 'trust' model is applicable only to equitable assignments of legal choses, but not equitable choses, appear to have made this concession because of a rather literal reading of authorities such as *Cator v Croydon Canal*.[1] They may also have been influenced by the proposition that where a bare sub-trust is constituted over an equitable chose, the bare sub-trustee 'drops out' such that the obligor to the chose assigned, the primary trustee, then holds on trust for the beneficiary of the sub-trust. Two points may be made in response:

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[1] (1843) 4 Y & C Ex 593, 160 ER 1149. This and other cases which are usually relied on for the proposition are discussed below in Section 2.

First, although some cases say that an assignor of an equitable chose retains 'no interest' post-assignment, such statements must be read contextually in light of authority and principle.

The authorities discussed in Chapter III show that an equitable assignment of an equitable chose entails the constitution of a trust over such chose for the assignee's benefit. Consequently, the assignor may not invoke or assert her interest or entitlements against the obligor as she pleases. She will have become duty-bound to her assignee to invoke or assert her powers against the obligor according to the terms of that trust. So the assignor of an equitable chose retains her equitable interest, and the resulting entitlements against the obligor, just that she may no longer invoke or assert them *for her own benefit*. Ie, the assignor loses her *beneficial* interest in the chose assigned.

This is corroborated by the universal acknowledgement that an equitable assignment, even of an equitable chose, is effective without notice to the obligor to the chose.[2] It is also universally accepted that an obligor who discharges his duties under that chose in ignorance of an equitable assignment of the benefit of that chose is exposed to no liability to either the assignor or the assignee for such acts.[3]

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2 *Hobson v Bell* (1839) 2 Beav 17, 23; 48 ER 1084, 1086; *Donaldson v Donaldson* (1854) Kay 711, 719; 69 ER 303, 307; *Weddell v JA Pearce & Major* [1988] Ch 26 (Ch) 32–33.

3 *Donaldson v Donaldson* (n 2) at Kay 719, 69 ER 307; *Low v Bouverie* [1891] 3 Ch 82 (CA) 104; *Ward v Duncombe* [1893] AC 369 (HL) 392 (Lord Macnaghten). For authorities holding that obligors under *legal* choses in action will be discharged of their legal obligations thereunder if they perform to their obligees in ignorance of their obligees' having equitably assigned such legal choses to assignees, see, eg: *Williams v Sorrell* (1799) 4 Ves Jun 389; 31 ER 198; *Stocks v Dobson* (1853) 4 De G M & G 11, 43 ER 411; *Herkules Piling Ltd v Tilbury Construction Ltd* (1992) 61 BLR 111 (Comm).

Thus, where a trustee, T, holds property on special trust for A, should A collapse that special trust to a bare trust by invoking the doctrine of *Saunders v Vautier*, and should A then invoke her power as beneficiary of such bare trust to require its complete execution by directing T to convey his title to the trust property to A, notwithstanding that A had equitably assigned her equitable interest under the special trust to C beforehand, T's compliance with A's instructions *whilst he was ignorant of A's prior assignment to C* will extinguish his obligations arising under that special trust without exposing him to any liabilities, equitable or otherwise, to C. That is so, despite T's actions having destroyed C's beneficial equitable interest in A's equitable interest in the trust property that had been held by T on special trust for A's benefit.[4] If equitable assignment of an equitable chose resulted in an extinction of the assignor's interest and a revesting of the same in the assignee, such a result would be impossible. The notion that such is the case is, accordingly, mistaken.

Second, there is also a view that even accepting that an equitable assignment of an equitable chose entails the constitution of a trust over that equitable chose, so far as such trust is conceived to be a *bare* trust, the assignor, as bare sub-trustee, will 'drop out', leaving the obligor to the chose obligated to the assignee. But the cases tell us that this is not what happens, either.

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[4] The effect of notice of assignment in generating a distinct and direct equitable obligation between assignee and obligor in connection with the equitable wrong of dishonest assistance will be explained in Chapters IX and X.

1. 'No interest whatsoever'

Smith and Leslie accept that where the chose assigned is legal, the assignment operates by way of a trust over the benefit of the legal chose in action.[5] However:[6]

> Where the whole interest in an equitable chose has been vested in the assignee, equity permits the assignee to sue in his own name without joining the assignor. This is because—provided the *whole* interest has been assigned—the assignee is the sole owner and no interest remains in the assignor.

And yet, where the benefit of a legal chose in action is held by T as trustee for the benefit of A (who therefore has an equitable interest in the benefit of that legal chose in action), when A equitably assigns her equitable interest to C, Smith and Leslie suggest that:[7]

> [t]he effect of the assignment is to cause assignor [A] to drop completely out of the picture. [A]'s equitable (beneficial) interest passes to *C,* and [T] holds on trust for *C* rather than [A]. …

As authority, Smith and Leslie cite the following passage from the judgment of Lord Lyndhurst LC:[8]

> It was said that, as these proceedings were instituted by the assignee, the assignor ought to have been made a party to the suit. It is quite clear that, where the assignor has a legal title and he assigns his interest, and any proceedings are taken by the assignee with respect to the property so assigned, the assignor must be a party to the suit, because, by his assignment, he does not part with the legal estate, and the person having the legal estate must be before the Court. But the principle clearly does not apply to the facts of this case. There was no sum awarded specifically to this gentleman, Mr Scott. All that he had was an equitable interest—an equitable title to be paid the sum of money if he made out his title to the land. That equitable interest and

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5 Smith and Leslie (2013) para 11.14.

6 ibid para 11.05 (emphasis in original).

7 ibid para 11.07.

8 *Cator v Croydon Canal Co* (n 1) at 4 Y & C Ex 593–94, 160 ER 1149–50.

> right he assigned before the suit; he parted, therefore, with all interest, and, having parted with all interest of every description, of course it was not necessary that he should have been a party to these proceedings.

Smith and Leslie also refer to *Donaldson v Donaldson*:[9]

> In the case of an assignment of the equitable interest in stock standing in the names of trustees, the deed of assignment passes the whole equitable interest of the donor, and the donee may go with that deed to the trustees, and say, transfer to me the interest in this sum of stock; and I think that in such a case it would not even be necessary to make the donor a party to a suit to enforce a gift[;]

and to *Fulham v McCarthy*, where Lord Cottenham LC said of the assignment before the court:[10]

> It is not an assignment of a legal right, it is an assignment in equity of a purely equitable interest; in which case, as Mr Turner very properly admitted at the bar, the course of practice of Courts of Equity is to file a bill, not by the assignor, who, if the assignment be valid, has no longer any interest in the property assigned, but by the party claiming as assignee.

It is debateable whether these passages support Smith's and Leslie's proposition, given their own admission that when A equitably assigns her equitable chose against T to C, A merely 'loses' her *beneficial* interest in the equitable chose ('[A]'s equitable (beneficial) interest passes to *C* …').[11] This undercuts the proposition that such assignee 'drops out completely' since the 'loss' of the assignor's 'beneficial interest' merely denotes that A no longer privileged against any non-A to invoke her entitlements as holder of that equitable interest for her own benefit.

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9 *Donaldson v Donaldson* (n 2) at Kay 718–19, 69 ER 307 (Page Wood V-C).

10 (1848) 1 HLC 708, 717–18; 9 ER 937, 943–44.

11 Smith and Leslie (2013) para 11.07.

Given the cases which tell us that equitable assignments of legal *and* equitable choses, alike, entail the constitution of a trust, judicial pronouncements that an equitable assignor of an equitable chose or interest retains 'no interest whatsoever' or has 'no equitable interest' following the assignment cannot be taken literally. Read in context, they should be taken to mean that post-assignment, the equitable assignor retains no *beneficial* equitable interest in the equitable chose or interest, such beneficial interest having passed to her assignee.

Indeed, the House of Lords in *Fulham v McCarthy* alluded to this, the Lord Chancellor holding that:[12]

> [i]f the assignees, that is, the trustees of the religious house, had filed a bill, then the defendant would have an interest in the question on the issue [as to whether the assignment to the assignees had been induced by their undue influence over the assignors], because every defendant has an interest in shewing that the party sueing [*sic*] him has no interest in the subject-matter of the suit; and it would be a perfectly valid course of defence to shew that this deed was not a deed which a Court of Equity could recognize as giving a *beneficial interest* to the party claiming under it.

Donaldson v Donaldson should be read similarly as it adopted and extended the reasoning of Grant MR in *Sloane v Cadogan*,[13] a decision which rests on the proposition that an equitable assignment of an equitable chose entails the constitution of a trust. Reading the references in *Donaldson* to the assignor as having 'no equitable interest whatsoever' literally would, therefore, be incoherent.

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12 (1848) 1 HLC 708, 717–18; 9 ER 937, 943–44 (Lord Cottenham LC, emphasis added).

13 *Sloane v Cadogan* (1808), reported in Sugden (1846) 1119; and discussed in Chapter III, text to n 33.

Unlike Smith and Leslie, Edelman and Elliott accept that equitable assignments of legal and equitable choses, alike, entail the constitution of a trust over the chose assigned. However, so far as such trust is a bare trust, they suggest that:[14]

> [o]n the trust conception of equitable assignment, cases involving equitable assignment of equitable rights can be explained *only* on the basis that an intermediate bare trustee 'drops out'. … [I]f A (assignor) holds on trust for B (assignee), and B holds on bare trust for C (sub-assignee), then if C wishes to sue, C does not need to join B because B has 'dropped out' of the picture. This was the dominant view held in the 19th century, and persisting into the 20th century, when it was thought that the assignee[15] who assigns an equitable interest 'has no interest in the subject matter'.

Such 'dropping out' appears to involve an insuperable contradiction. The trust analysis requires that the assignor/trustee *not* 'drop out.' But is there something odd about 'bare sub-trusts'? This leads us to a second misconception that occludes understanding of the law of equitable assignment.

2. 'Dropping out'

There is a view that where a primary trustee (T_1) holds property (eg, an equitable interest in realty or personalty) on trust for a beneficiary (T_2), who then constitutes herself bare sub-trustee of her equitable interest in the primary trust property for the benefit of a sub-beneficiary ('C'), T_2, as bare sub-trustee, 'drops out' of the primary trust so T_1 becomes trustee for C.

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14 Edelman and Elliott (2015) 246 (emphasis added), citing the authority of *Cator v Croydon Canal Co* (n 1), *Redman v Permanent Trustee Company of New South Wales Ltd* (1916) 22 CLR 84 (HCA), and *Fulham v McCarthy* (n 10). In any event, Edelman and Elliott recognize that their thesis would appear to be contradicted by dicta in *Nelson v Greening & Sykes (Builders) Ltd* [2007] EWCA Civ 1358, [2008] 1 EGLR 59. The relevant portion of the judgment is reproduced at text to n 55, Chapter V.

15 Ie, B, given the example posed by Edelman and Elliott.

Upjohn J assumed this to be so in his judgment in *Grey v Inland Revenue Commissioners*;[16] and many commentators[17] read *Onslow v Wallis*,[18] *Re Lashmar*,[19] and *Grainge v Wilberforce*[20] as supporting it, leading to the suggestion that *because* the bare sub-trustee of a subsisting equitable interest 'drops out', every constitution of such bare sub-trusts entails a disposition of that interest, and so must comply with the formalities prescribed by s 53(1)(c), LPA1925 to be validly constituted.[21]

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16 *Grey v Inland Revenue Commissioners* [1958] Ch 375 (Ch) 382. That view has been doubted: see, eg, PV Baker, 'Case note on *Grey v Inland Revenue Commissioners* [1958] 2 WLR 168' (1958) 74 LQR 180, 181–82; Gareth Jones, 'Section 53(1)(c) and (2) of the Law of Property Act 1925 - Recent Developments' [1966] Cambridge Law Journal 19, 22.

17 See, eg, Graham Battersby, 'Formalities for the Disposition of Equitable Interests Under a Trust' [1979] Conveyancer 17, 28; AJ Oakley, *Parker and Mellows: The Modern Law of Trusts* (9th edn, Sweet & Maxwell 2008) para 4-018; RA Pearce and Warren Barr, *Pearce & Stevens' trusts and equitable obligations* (6th edn, OUP 2015) 197; James Glister and James Lee, *Hanbury and Martin Modern Equity* (20th edn, Sweet & Maxwell 2015) para 6-014. The point was also made in DJ Hayton, *Underhill's Law relating to trusts and trustees* (13th edn, Butterworths 1979) 170; DJ Hayton, *Hayton and Marshall: cases and commentary on the law of trusts* (7th edn, Stevens 1980) 54. However, current editions of these two works have retreated from the proposition, given Lawrence Collins LJ's *dicta* in *Nelson v Greening & Sykes (Builders) Ltd* (n 14): see DJ Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law relating to trusts and trustees* (18th edn, LexisNexis 2010) para 12.15; Hayton and Mitchell (2015) para 3-082.

18 (1849) 1 Mac & G 506, 41 ER 1361.

19 [1891] 1 Ch 258 (CA).

20 (1889) 5 TLR 436 (HC).

21 Both Brian Green, 'Grey, Oughtred and Vandervell - A contextual reappraisal' (1984) 47 MLR 385, and JE Penner, *The law of trusts* (9th edn, OUP 2014) suggest that even if it were true that bare sub-trustees did 'drop out' (which they also doubt), all instances of sub-trusts, whether special or bare, should fall within the language of 'disposition' within s 53(1)(c), LPA1925, and so, should require a suitably signed writing to be valid. This thesis proposes that an equitable assignment of an equitable interest, being a trust *plus* agency, is conceptually

But if bare sub-trustees 'dropped out' such that T_1 no longer owed T_2 any obligations arising from the primary trust between them, and T_1 became directly obligated to C, then so far as equitable assignments of *equitable* choses might be conceived of as entailing a bare sub-trust, equitable assignments would seem to be effected by means of a form of substitutive transfer, after all. But, again, this misunderstands the cases.

Onslow decided that a trustee would be ordered to fully execute his trust by conveying to a sub-trustee who had duties to fulfil under the terms of the sub-trust.[22] In contrast, *Re Lashmar* merely decided that, when property is held on trust, the primary trustee will not be compelled to fully execute that trust by conveying his title therein to a sub-trustee whose sub-trust had failed. Therefore, these two cases do not support the proposition that, following constitution of a bare sub-trust, the equitable entitlements arising between the primary trustee and his beneficiary (now sub-trustee) are extinguished, and equivalent entitlements arise between the primary trustee and the sub-beneficiary, leading the bare sub-trustee to 'drop out'.[23] As for *Grainge v Wilberforce*, that was a case of statutory overreaching pursuant to the Settled Land Act 1882.

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distinct from a mere trust over that same interest, and so the former, but not the latter, is rightly viewed to be a 'disposition' for the purposes of s 53(1)(c), LPA1925.

22 Green (1984) 397.

23 As will be explained below, *Onslow v Wallis* (n 18) but not *Re Lashmar* (n 19), was distinguishable from the reasoning of the Lord Keeper in *Burgess v Wheate* (1759) 1 Eden 177; 28 ER 652 (High Court of Chancery). Consequently, '[*Re Lashmar*] simply decided that a party with no beneficial interest in property, and with no duties to perform as trustee of that property, could not claim that property from the party holding legal title to it.': Hayton and Mitchell (2015) 96, fn 99.

(a) Onslow v Wallis (1849)

In *Onslow v Wallis*, legal title in a freehold property was held by the principal trustee (T_1) on trust for a beneficiary (A) absolutely. A executed a will, stipulating that on her death, the legal title in the freehold was to be conveyed to testamentary trustees (T_2 and T_3) on a trust for sale, the proceeds from such sale to be used to pay A's creditors, and the balance to be distributed to legatees whose identity would be set out in a separate document.

A died a widow without any heirs. In her lifetime, she had not required T_1 to convey the legal title in the freehold property to her, though she could have done so, being the sole, *sui juris*, and absolutely entitled beneficiary under a bare trust of that freehold. Accordingly, at her death, all A had was an equitable interest in T_1's legal title in the freehold property which devolved to her testamentary trustees, T_2 and T_3.

They applied to T_1 to execute the trust on which he held the freehold so they could discharge their duties under A's testamentary trust, but T_1 declined, on grounds that the document identifying the legatees to whom the 'legacies' mentioned in A's will had been lost (those legacies had therefore failed), leaving only the creditors to A's estate, and T_1 was willing to pay those creditors out of other funds available to him. T_2 and T_3 then brought proceedings seeking an order to compel $T_1$to convey his legal title in the freehold to them to allow them to carry out their duties to A's creditors. The Lord Chancellor granted the order applied for.

On these facts, notwithstanding the 'failure' of the 'legacies' because the document identifying the legatees had not been found, even if A's legatees could not yet (or perhaps ever) be established, A still had creditors who were ascertainable, and T_2 and T_3 were duty-bound to collect in the trust asset (ie, the legal title to the

freehold), sell it, and use its proceeds to pay A's debts. *Onslow* was, therefore, distinguishable from the decision of the Lord Keeper in the case of *Burgess v Wheate*[24] in which it was recognised that, as the law stood at the time, it was possible for a sub-trust to fail for want of beneficiaries and so come to an end, the doctrine of escheat having no application in respect of equitable interests in land.[25]

As to the question of the excess funds, if any, after paying the creditors, such excess funds would be held by T_2 and T_3 for the legatees if the document specifying their identities was ever located. But that was a matter between T_2 and T_3 on the one hand, and those legatees and their successors-in-title, if they should ever emerge, on the other, and T_2's and T_3's obligations to those legatees were no concern of T_1's.[26]

(b) Re Lashmar (1891)

In *Re Lashmar*, T_1 and others held the legal title in a freehold property under P's will as trustees for certain life tenants, with remainder for the benefit of A, absolutely. In turn, A left his estate to T_2 and T_3 on trust for A's widow for her life, with remainder over absolutely to A's illegitimate son, H.

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24 *Burgess v Wheate* (n 23). Of that decision, Shadwell V-C said: '[W]hatever opinion might have been originally entertained about *Burgess v Wheate*, it has remained unreversed for more than eighty years; and, consequently, it must be considered as binding upon the Court. … The case was nothing more than this. A legal estate was vested in a trustee, in trust for A. who died without an heir; and it was held that the trustee might hold for his own benefit; the Crown having no equity to claim on the ground of escheat.': *Taylor v Haygarth* (1844) 14 Sim 8, 17; 60 ER 259, 262. See also: Paul Matthews, '*Burgess v Wheate* (1759)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012).

25 *Onslow v Wallis* (n 18), at 1 M & G 514, 41 ER 1364.

26 ibid, at 1 M & G 515, 41 ER 1365.

P died in 1859; and A died in 1868, while some of the life tenants under P's will were still alive. Thus, on A's death, his reversionary equitable interest arising under P's will devolved to T_2 and T_3 to hold on trust for the benefit of A's widow for her life, and thereafter, for H.

In 1880, H died intestate, and without heirs or creditors. A's widow then died in 1886 while some of the life tenants under P's will were still alive: the last of these life tenants only died in 1889.

When the last life tenant under P's will died, T_2 (being the sole surviving trustee under A's will) appeared to have gained the power to require T_1 (being the sole surviving trustee under P's will) to fully execute that trust under P's will by conveying his legal title in the freehold to T_2 for his own absolute benefit (since there was, by this time, no one to whom T_2 was duty-bound or liable under the trust under A's will). But when directed by T_2 to do so, T_1 declined on grounds that T_2 was no longer subject to any duties under the terms of A's will since A's widow had died, and H had died leaving no heirs or creditors.

T_2 applied for an order to compel T_1 to convey his legal title in the freehold to him. But the Court of Appeal dismissed the application. Bowen LJ agreed with Lindley LJ, who was persuaded to hold in favour of T_1 because:[27]

> [O]n the true construction of [A's] will, Moody [T_2], the trustee under it, having no duty whatever to discharge, and having nothing on earth to do with the property, cannot take the house in question from Penfold [T_1], who has got it. It appears to me that the true way to regard this will is to look through Moody [T_2] as nobody. So it comes to this, the property is in Penfold [T_1] on trust for nobody at all. Therefore, he keeps it …

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[27] *Re Lashmar* (n 19) 267–68.

In *Re Lashmar*, when A died while the life tenants under P's will were still living, A's equitable remainder interest in T_1's legal title in the freehold devolved to T_2 to hold on trust for the life of A's widow, and thereafter, for the benefit of H, A's illegitimate son, as remainderman. At that instant, A's widow acquired an equitable life interest in T_2's equitable remainder interest in T_1's legal title in the freehold, whereas H would have acquired an equitable remainder interest in T_2's equitable remainder interest in T_1's legal title in the freehold. So when A died, the beneficial interest in T_1's legal title in the freehold was dispersed between the life tenants under P's will still living, A's widow, and H (though A's widow and H would have had to act through T_2, as trustee of A's will and not directly).

When H predeceased A's widow in 1880, leaving neither heirs nor creditors, that opened a gap in the allocation of the beneficial interest in T_1's legal title in the freehold.[28] Accordingly, after H's death, T_1 was no longer liable to fully execute the testamentary trust. That could only arise if the life tenants, A widow, and H (or H's successors in title) had invoked the *Saunders v Vautier* power in concert. But H had died leaving no heirs and no creditors, and in circumstances under which neither the

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[28] The manner by which the gap in the beneficial interest arose in *Re Lashmar* (n 19) is different from the hypothetical gap in the vesting of beneficial interests that was suggested by counsel in *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291 (HL). In *Vandervell*, it had been suggested that the beneficial interest in the subject property (an option) might be 'in the air' until the terms of the trust were completely finalized, which suggestion Lord Wilberforce rejected (at 329): '[T]he equitable, or beneficial interest, cannot remain in the air: the consequence in law must be that it remains in the settlor.' In *Re Lashmar*, however, the beneficial interest in T_1's legal title in the shares was perfectly vested, at least to begin with: first in the life tenants of F's will, and in A, as remainderman, and later, following A's death, in the life tenants of F's will, A's widow and H. The 'gap' only arose in light of subsequent events.

doctrines of escheat nor *bona vacantia* to the Crown could operate. Thus, although T_1 was still not absolutely entitled, his liabilities had shrunk.

As to why neither escheat nor *bona vacantia* would apply on the facts:[29]

> Before 1926, the general rule was that realty undisposed-of went to the heir and personalty undisposed-of went to the next-of-kin. If there was no heir, then the undisposed-of beneficial interest in realty, if the death occurred before August 14, 1885 [*sic*], sank into the land for the benefit of the trustee or legal tenant;[30] where the death occurred after that date but before 1926, it escheated to the lord as if the interest were a legal estate in corporeal hereditaments.[31] If there was no next-of-kin, the undisposed-of interest in personalty went to the Crown by the prerogative.[32]

H's equitable reversionary interest in T_2's equitable reversionary interest in T_1's legal title in the freehold was realty. So had H died intestate with an heir, that equitable reversionary interest of H's would have devolved to his heir. But H died without an heir, so it could not so devolve.

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29 Lewin (2015) para 8-013.

30 See, eg, *Burgess v Wheate* (n 23); *Taylor v Haygarth* (n 24); *Cox v Parker* (1856) 22 Beav 168, 52 ER 1072.

31 'Escheat' of equitable interests in land was eventually permitted by statute: s 4, Intestates Estates Act 1884, which received the Royal Assent on August 14th, 1884. Thus, in *Re Wood* [1896] 2 Ch 596 (Ch), Romer J held that where the testatrix had devised her legal title in a freehold to trustees on a trust for sale, but had made no provision as to the residue of her estate by the will, the testatrix was to be taken to have died intestate as to the beneficial interest in the freehold and that it was escheated by reason of s 4 of the 1884 Act. The 1884 Act was repealed vis-à-vis deaths after December 31st, 1925 when the doctrine of escheat was abolished in its entirety as regards deaths after that date by s 45(1)(d), Administration of Estates Act 1925.

32 That is, by reason of bona vacantia. As to how bona vacantia formerly applied only to personalty (as supplemented by the doctrine of conversion), see *Middleton v Spicer* (1867) 1 Bro C C 201, 28 ER 1083; *Barclay v Russell* (1797) 3 Ves Jun 424, 30 ER 1087; *Taylor v Haygarth* (n 24); *Powell v Merrett* (1853) 1 Sm & Giff 381, 65 ER 167; *Cradock v Owen* (1854) 2 Sm & Giff 241, 65 ER 382.

Nor could it 'revert' to the Crown by escheat or devolve to it by way of *bona vacantia*. As was held in *Burgess v Wheate*,[33] escheat did not extend to equitable interests in land, and this was still the case in 1880 when H died because the statutory extension allowing escheat of equitable interests in land pursuant to the Intestates Estates Act 1884, had yet to be enacted. And at the time, the doctrine of *bona vacantia* applied only to ownerless *personalty*, as the statutory extension of *bona vacantia*[34] to also encompass realty lay decades ahead.[35]

Therefore, H's death in 1880 caused his 'share' in the beneficial interest in T_1's legal fee in the freehold to 'sink into the land'.

Accordingly, when H died in 1880, no one succeeded to H's power to act in concert with A's widow and the life tenants to require T_1 to fully execute the trust arising under P's will.

This is not to say that T_1 became completely free to invoke his entitlements as holder of the legal fee simple for his own benefit once H died: T_1 was still duty-bound to the life tenants, and also, to A's widow (acting through T_2) as the remaining successor-in-title to A. So A's widow (acting through T_2) would have been entitled to

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33 *Burgess v Wheate* (n 23); and discussed at length in Matthews (2012).

34 The doctrine of the Crown's acquisition of property of an intestate by reason of bona vacantia was limited to the intestate's personal property until January 1st, 1926, when ss 45(1)(d) and 46(1)(iv), Administration of Estates Act 1925, and s 28, Law of Property Act 1922, came into force. The commencement date for the 1922 Act was originally January 1st, 1925, but it was postponed to January 1st, 1926, by s 1 of the Law of Property Act (Postponement) Act 1924.

35 Had H died leaving a will directing that his realty be sold to pay his creditors, if any, on the authority of *Middleton v Spicer* (n 32), the Crown would have succeeded by the doctrine of bona vacantia to any such realty which would be treated as personalty by the doctrine of conversion.

require T_1 to restrain the life tenants from committing waste to safeguard her reversionary entitlement. And certainly, A's widow (acting through T_2) and/or the life tenants would have been entitled to restrain T_1 from dealing with his legal title in a manner inconsistent with the terms of P's will, for example, by selling his legal title to a third party.

When A's widow died while there were life tenants still living, her life interest in T_2's reversionary interest in T_1's legal title to the freehold would have ended. Accordingly, at this point, all beneficiaries to the trust arising from A's will would have been exhausted. As explained above, H left no successor in title. On the other hand, though A's widow could have had successors in title, none could have been devolved her life interest arising from A's will as that interest ended upon her death. T_2's sub-trust had therefore come to an end through exhaustion of the beneficiaries.

The Court of Appeal decided as it did not because T_2 was a 'bare sub-trustee' who had 'dropped out'. It simply applied *Burgess v Wheate*: T_2's sub-trust had failed and ended for want of beneficiaries. Consequently, there was no reason for the court to assist T_2 by ordering T_1 to convey the legal title in the realty in question to him as T_2 no longer had any trust to carry out: following the death of A's widow, T_2 was trustee for no one.

As for T_1, had he required equity's assistance, he, too, would have been refused. But T_1 already held the legal title in the freehold: he did *not* need the court's

assistance. Consequently, as T_1 no longer had any trust to perform either, T_1 was entitled to hold his legal title in the property for his own benefit.[36]

Thus, *Re Lashmar* cannot be understood as a case where the 'bare' sub-trustee 'drops out.'

(c) Grainge v Wilberforce (1889)

In *Grainge v Wilberforce*, the defendant was tenant for life of certain estates in Sussex. As tenant for life, he had leased a dwelling house to the plaintiff. The plaintiff then contracted to purchase the house from the defendant. But a dispute arose as to the form of the conveyance.

The defendant's interest as tenant for life arose under a number of deeds of settlement, dating from 1863, 1864, 1865 and 1867. Under the 1864 deed, the house in question had been appointed to one Charles Lloyd to hold in trust, with power to raise up to £15,000 by mortgage. In 1865, Lloyd conveyed the legal title in the house to mortgagees, subject to a proviso that if the persons entitled under the deed of 1863 paid the mortgagees £11,500 plus interest, the mortgagees should reconvey the legal title in the house to the use of Lloyd, or other trustee or trustees under the deed of 1864, or as he or they should direct.

The plaintiff contended that the conveyance for the house he had purchased from the defendant ought to include Lloyd as a necessary party thereto. The

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[36] *Cox v Parker* (n 30), at 22 Beav 171, ER 1073 (Romilly MR): 'The question is, whether the devise took effect at all, for if it did the trustee must take the legal estate. Having taken the legal estate[,] there are no trusts to perform, and they are, therefore, entitled to hold the property.'

defendant's view was that that was unnecessary. Being unable to agree as to the form of conveyance, in 1888, the defendant gave the plaintiff notice to quit the premises. The plaintiff then commenced proceedings seeking specific performance of the contract of sale to compel the defendant to execute a good and valid conveyance, and an injunction to restrain the defendant from dispossessing him.

Chitty J held:[37]

> The defendant was clearly tenant for life, and even if he was so under the deed of 1867 his conveyance, having regard to section 20 of the Settled Land Act [1882], passed the property free from all estates and interests under the deed of 1867 and bound every one claiming under that settlement.

Consequently, as Green has observed:[38]

> … [*Grainge v Wilberforce*] was simply a case where it was confirmed that a tenant for life under the Settled Land Act 1882 could successfully pass the legal estate to settled land without any need for the trustee of a sub-trust behind the settlement joining in the conveyance: an entirely justifiable result which owed nothing whatsoever to the fact that the sub-trustee was a bare trustee, and which would clearly have been the same even if the sub-trustee had had substantial outstanding active duties to perform.

In other words, *Grainge v Wilberforce* was decided according to the doctrine of overreaching provided for by ss 3 and 20(2) of the Settled Land Act 1882.[39]

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37 *Grainge v Wilberforce* (n 20) 437.

38 Green (1984) 397. See also Hayton and Mitchell (2015) 96, fn 99; McFarlane and Stevens (2010) 48, fn 55, crediting a suggestion made by Professor Paul Matthews.

39 Settled Land Act 1882. Section 1(3) of the 1882 Act provided that, unless otherwise provided for, this Act was to commence and take effect from December 31st, 1882. The report of *Grainge v Wilberforce* does not set out precisely when the contract of sale between the plaintiff and defendant was entered into, but it seems likely that it was entered into after 1882 (given Chitty J's application of the 1882 Act to the facts of the case) and before June 24th,

After observing that any conveyance of the legal title of the realty in question by the defendant as tenant for life would overreach the interests of anyone else claiming an entitlement under the settlements giving rise to that tenancy for life, and that it would not therefore be necessary to join any other interest holders under the settlements to the conveyance for the sale of the property in question, Chitty J held that:[40]

> Lloyd had no interest whatever, or, if he had any, it was only an equitable right as trustee for the persons interested under the deed of 1867. *The case, therefore, fell within the principle that where A was trustee for B, who was trustee for C, A held in trust for C, and must convey as C directed.* B—in this case Lloyd—might therefore be left out even under the old strict rules as to parties—'*Head v Lord Teynham*' (1 Cox 57). Therefore, Lloyd, or his heir, was not a necessary party to the conveyance, and the purchaser would be safe in completing without him.

Given the effect of ss 3 and 20(2) of the 1882 Act, Chitty J's assertions as to A, B and C (emphasised in italics), plainly do not form part of the *ratio* of his decision. But what, then, of the case of *Head v Lord Teynham* itself, which Chitty J referred to?

(d) Head v Lord Teynham (1783)

It is unclear why Chitty J thought the issues in *Grainge v Wilberforce* were analogous to those in the 18th century decision in *Head v Lord Teynham*, given that the former rested on the operation of a 19th century statute.

1888, which is when the defendant wrote to the plaintiff giving the defendant notice to quit the premises. The modern-day equivalent to s 20(2) of the 1882 Act may now be found in s 72(2) of the Settled Land Act 1925. For an account of this form of overreaching, see Megarry & Wade (2012) 396. A fuller account of the operation of the 1882 Act may be found in the 5th edition of *Megarry & Wade*, at 317–24.

40 *Grainge v Wilberforce* (n 20) 437.

In *Head v Lord Teynham*, a bill was filed in the High Court of Chancery seeking an order to compel the trustees of a will (T_1) to fully execute the testamentary trust. Under the terms of the will, lands were limited to trustees for 500 years to raise a sum of £4,000 for distribution between the settlor's younger children (ie, excluding the settlor's heir).

At his death, the settlor had six younger children. Two of these children, 'assigned their shares of the £4000 to a trustee [T_2] for the benefit of two other of the children'.[41] Proceedings were then brought by the testator's children, against the trustees of their father's will, T_1, to compel the due performance of the trusts under the will without joinder of the sub-trustee, T_2. T_1 objected on grounds that the suit ought not to be proceeded with without first joining T_2. But the objection was overruled. The report records as follows:[42]

> For plaintiff it was insisted that as the original trustees of the term who had the legal estate [T_1], and all the children who had the beneficial interest were before the court, there was no occasion to make the other trustee [T_2] a party, and the court would direct a sale of the term without his joining in the sale: and of that opinion was the court—and decreed accordingly.

However, this result is not based on T_2 'dropping out' on grounds that T_1 owed T_2 no equitable duties at all. This becomes clear when we contrast the decision in *Head v Lord Teynham* with that in *Fletcher v Ashburner*[43] (also a decision in the High Court of Chancery), and examine how the requirement for joinder of necessary

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41 *Head v Lord Teynham* (1783) 1 Cox 57, 57; 29 ER 1061, 1061.

42 ibid.

43 (1779) 1 Bro C C 497, 28 ER 1259.

parties in Equity works, the best explanation of which may be found in Calvert's *Treatise upon the law respecting Parties to suits in Equity.*[44]

In *Fletcher v Ashburner*, by his will, John Fletcher devised his personalty and his burgage house in Kendall to trustees on trust to sell so much as sufficient to pay his debts, and then to permit his widow, Agnes, to enjoy the residue during her life, and after her death, to sell and dispose such residue as remained, deduct certain small sums by way of costs and honoraria, and then to distribute the balance of the money realised thereby between his son William and daughter Mary, equally; but if either of them should die before his or her legacy became due, then to the survivor of them. The testator died, survived by Agnes, William, and Mary.

The report states that by custom of burgage tenure in Kendall,[45] Agnes was entitled to hold the Kendall burgage house so long as she did not remarry, notwithstanding the provisions of the will. Agnes did not remarry, and survived both her children, each of whom died unmarried having reached their majorities. When Agnes died, the heir at law of William and John Fletcher filed a bill against the trustees and personal representatives of the testator, John Fletcher, and also against the trustees and personal representatives of his widow, Agnes, seeking a declaration

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44 Calvert (1847) 6–11, repeating his analysis from the first edition (published in 1837). The significance of Calvert's insight was, unfortunately, missed by Story who, in his much more influential treatise on equity pleadings first published in 1838, mentioned having read Calvert's analysis, but thought it unhelpful: Joseph Story, *Commentaries on equity pleadings, and the incidents thereto, According to the Practice of the Courts of Equity of England and America* (A Maxwell, Bell Yard 1838) 74, fn 4. This has retarded understanding of the 'necessary party' doctrine: GC Hazard, 'Indispensable Party: The Historical Origin of a Procedural Phantom' (1961) 61 Columbia Law Review 1254, 1286–87.

45 For an account of burgage tenure, see Thomas Littleton, *Littleton's tenures in English* (Eugene Wambaugh ed, J Byrne 1903) 79–83.

to have, in particular, the Kendall burgage house devised by John Fletcher's will conveyed to him. The representatives of Agnes contended, however, that by reason of the direction that the realty be sold, it was to be treated as personalty by the doctrine of conversion, and so was to go to the personal representative of William, who had survived Mary, his sister.

When the matter came before Sir Thomas Sewell MR, an objection was taken that the personal representative of William had not been joined to the proceedings. The report records as follows: [46]

> 'But the Master of the Rolls was of opinion there were sufficient parties to sustain the question; that the personal representative [of William] was a mere *formal party*, and that, if he thought proper to make a decree, a personal representative might [then] be brought before the Master.'

Sewell MR therefore proceeded to hear the merits of the dispute, holding over the objection on grounds of (possible) misjoinder.

Joinder of William's personal representative ultimately proved unnecessary because Sewell MR held that the realty was to be treated as personalty. Therefore:[47]

> [i]n the present case, William Fletcher, the son, had the whole beneficial title vested in him as money, subject to his mother's interest for life or widowhood. She was his sole next of kin, and her personal representatives are now entitled to the estate as money; the bill must therefore be dismissed without costs.

Fletcher v Ashburner shows that parties with an interest in the subject-matter over which litigation is brought need not *always* be joined before a final decision is handed down. Rather, what was critical was ascertaining what the objective (or

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46 *Fletcher v Ashburner* (n 43) at 1 Bro C C 498, 28 ER 1259 (emphasis added).

47 ibid, at 1 Bro C C 502, 28 ER 1262.

'object', to use Calvert's terminology)[48] of such litigation was, and whether the judicial order(s) which the litigation sought to obtain could, in justice and fairness, be made, given the parties who *were* before the court.

Fletcher v Ashburner demonstrates that there may well be 'formal parties' who are 'interested' in the subject-matter of the litigation before the court, yet not 'interested' in the objective or judicial remedy sought by such litigation, and who are thus not *necessary parties* who must be joined before the court comes to its final decision on the litigation that judicial remedy. This view, as Calvert points out, is corroborated in many cases.[49]

Relying on these and other authorities, Calvert concludes as follows:[50]

> To select those persons as parties, *against whom a decree may be made*, or *against whom relief may be prayed,* or *who have an interest or power in the subject of the suit which requires to be bound by the decree,* or *who are interested in the question,* is to act upon the supposition that it is the mode in which the court is asked to deal with the subject of the suit; that, in other words, it is the object of the suit, which is the criterion whether any particular person is or is not to be made a party.
>
> If this distinction between the meaning of 'the subject of a suit,' and that of 'the object of a suit,' is borne in mind, it will be clear, that the word 'interest,' when introduced into the rule concerning proper parties to a suit, means interest in its object, not interest in its subject-matter.

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48 See Calvert (1847) 6–11.

49 See *Smith v Snow* (1818) 3 Matt 10, 11; 56 ER 413, 413; *Lloyd v Lander* (1821) 5 Madd 282, 288; 56 ER 903, 905; and *Small v Attwood* (1832) You 407, 458; 159 ER 1051, 1072.

50 Calvert (1847) 10–11 (emphasis in original).

Therefore: '[A]ll persons who have in the object or objects of the suit an interest or interests apparent upon the record, are necessary parties.'[51] Alternatively:[52]

> Another mode of expressing the general rule is, that under all circumstances, the question resolves itself into this, whether the relief sought in the bill, in other words, the equity of the bill touches any particular person, so as to obtain from him a benefit, or to fasten upon him a duty: that, if this question is answered in the affirmative, he is a necessary party.

This explains why T_2 did not need to be joined in *Head v Lord Teynham*. It was not because T_2 had 'dropped out' of the picture. Rather, joinder of T_2 was unnecessary because T_2 had no interest in the objective or object of the proceedings that had been commenced by the plaintiffs.

By their bill, the plaintiffs in *Head v Lord Teynham* sought a decree against T_1 to compel him to effect a sale of the term he had been granted and so raise the £4,000 for division between the younger children, precisely in conformity with the terms of the testamentary trust. With regard to such remedy, the joinder of T_2 was unnecessary since his entitlements against T_1 by reason of the sub-trust that had been constituted by two of the six younger children would not be affected by the decree being sought. Thus, T_2 had no interest in the *object* of the suit. T_2 was a merely 'formal party' (to use the terminology of *Fletcher v Ashburner*) whose joinder was not necessary: his non-joinder would not mean that the decree of the court was wrongly made, and should be set aside.

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51 ibid 13. See also *Prosser v Edmonds* (1835) 1 Y & C Ex 481, 496; 160 ER 196, 202.

52 ibid 16. As further illustrations, Calvert cites *Hereford v Ravenhill* (1839) 1 Beav 481, 48 ER 1026, 1 Beav 483, 48 ER 1027; *Balls v Strutt* (1841) 1 Hare 146, 66 ER 984; 1 Hare 150, 66 ER; *Baring v Nash* (1813) 1 V & B 551, 554; 35 ER 214, 216.

It follows that *Head v Lord Teynham* is no authority for the proposition that an intermediate trustee 'drops out'. It is simply an illustration of the rule as to joinder of necessary parties in equity.[53]

On closer examination, none of the cases usually relied on to support the point that bare sub-trustees 'drop out' actually stands for that proposition. And this is confirmed by Lawrence Collins LJ's *obiter dicta* in *Nelson v Greening & Sykes*,[54] statements which were cited with approval and applied by Judge Pelling QC in *Sheffield v Sheffield.*[55]

In short, even with a bare sub-trust, it is wrong to speak of the bare sub-trustee *substantively* dropping out because for there to *be* a sub-trust, there has to *be* subject-matter for that sub-trust to bite on. And when the subject-matter of the sub-trust is the sub-trustee's chose against the primary trustee, it is conceptually impossible for the sub-trustee to be substituted by her sub-beneficiary.[56]

This is not to say that for *some* purposes, it may be appropriate to short-circuit the analysis even whilst recognizing that there is no substitution of the assignee for the assignor. For example, in *Kapoor v National Westminster Bank Plc*,[57] the Court of Appeal was concerned with a question of statutory interpretation, namely, whether an

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53 For further discussion of the proper scope of this rule, see Hazard (n 44), who discusses and demonstrates both the true rule, as well as how some later English (and American) authorities have gone astray.

54 *Nelson v Greening & Sykes (Builders) Ltd* (n 14), and reproduced at text to n 55, Chapter V).

55 [2013] EWHC 3927 (Ch); [2014] WTLR 1039, [81]–[86].

56 See also McFarlane and Stevens (2010) 47–48.

57 [2011] EWCA Civ 68, [2012] 1 All ER 1201.

equitable assignee of a part of a debt owed by a bankrupt to the assignor was a 'creditor' for the purposes of voting at a meeting to approve the bankrupt's proposed Individual Voluntary Arrangement under Rules 5.21 and 5.22 of the Insolvency Rules 1986.[58] The Court of Appeal held that an equitable assignee *was* to be taken to be a 'creditor' for such purpose, notwithstanding that the assignor was, in principle, *still* the bankrupt's creditor at law.

[58] Insolvency Rules 1986, SI 1986/1925.

V. COMBINATION

As explained in Chapter IV, a bare sub-trustee does not 'drop out'. Therefore, so far as an equitable assignment of an equitable chose is conceived of as entailing the constitution of a bare sub-trust over that equitable chose, the assignor does not drop out, either. But if the equitable assignee does not replace the assignor as obligee to the equitable chose assigned, how is such assignee able to deal directly with the obligor to the chose, as the cases tell us he is?[1]

This thesis suggests the answer lies in conceiving equitable assignment as also entailing the atypical agency effect mentioned in Chapter I. This explains how an assignee of an equitable interest arising out of a trust is enabled to invoke the assignor's powers against the trustee to require full execution of that trust; and also how an assignee of a debt may make binding offers of variation of the contractual obligations arising from that debt whereby the debtor is to be released from his obligations under that debt contract if he were to perform (or agree to perform) in some alternate manner.[2]

Since the 'agency effect' means the assignee is duly authorised to invoke any and all of the assignor's powers, an assignee will also be authorised to invoke the assignor's powers to commence judicial proceedings against the obligor. So far as

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[1] See *Donaldson v Donaldson* (1854) Kay 711, 69 ER 303; *Goodson v Ellison* (1826) 3 Russ 583, 38 ER 694; *Re Smith (sub nom Public Trustee v Aspinall)* [1928] 1 Ch 915 (Ch). The same was accepted to be the case in *Cator v Croydon Canal Co* (1843) 4 Y & C Ex 593, 160 ER 1149, so far as the court there recognised that the assignees in that case had validly required the Croydon Canal Co to fully execute the constructive trust on which they held the funds in question and could bring proceedings in equity against the Croydon Canal Co for its failure to do so in their own names without needing to join the assignor.

[2] As mentioned in Chapter III, Section 2.

such agency effect is recognised, it would be 'as if' such proceedings had been commenced by the assignor herself.[3] Not only might the assignee, a stranger to the obligation between assignor and obligor be thereby enabled to commence proceedings in relation to that obligation by such 'agency', taken together with the rules of *res judicata,* a final decision as would bind the assignor could be handed down, and so, in many circumstances, it would not be necessary as a matter of principle to join the assignor to such proceedings.

To illustrate: in *Cator v Croydon Canal Co*,[4] the assignor ('A') was entitled to be paid a sum of money for damage to and compulsory acquisition of his land. The entitlement arose by way of a constructive trust constituted over a fund of money held by the Croydon Canal Co ('T') for the benefit of affected land owners.[5] A, therefore,

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3 A striking illustration of this may be found in *Bates v Pilling and Seddon* (1826) 6 B & C 38, 108 ER 367. This was not a case of equitable assignment, but a simpler case where a judgment creditor granted actual authority to his solicitor to commence execution proceedings against his judgment debtor. The solicitor wrote to the judgment debtor, informing him that if the judgment debt was not satisfied by a certain date and time, he would commence execution proceedings as instructed by the judgment creditor. The judgment debtor paid the judgment debt to the judgment creditor within the stipulated deadline, but the judgment creditor failed to inform his solicitor of the same; so the solicitor instructed bailiffs to seize the judgment debtors' chattels in execution of what, to the solicitor's knowledge, was an unsatisfied judgment debt. The judgment debtor then brought proceedings in detinue against the judgment creditor for having wrongfully detained his goods, through the actions of his duly-authorized agent. The action succeeded, on grounds that so far as the solicitor was acting within the scope of his authority, his acts in commencing execution proceedings against the judgment debtor were to be taken to be the acts of his principal, the judgment creditor: '*qui facit alium facit per se.'*

4 *Cator v Croydon Canal Co* (n 1).

5 Under the terms of the statute which empowered the Croydon Canal Co to acquire the affected lands to effect the construction of the proposed Croydon Canal, if the compensation monies could not be immediately paid out because of doubts over the claimant's title to the land in question, those monies should have been paid into Court pending resolution of such doubts. In

had an *equitable* chose in action against T that it execute its trust by paying the compensation sum in accordance with the terms of the trust.

A sold his legal title to the land in question, and also equitably assigned such interest as he had against T to Cator ('C'). C then brought proceedings in equity against T seeking to compel it to fully execute its trust over the fund.

C succeeded, having shown that he was assignee of A's equitable interest in the compensation sum, such assignment not being void for maintenance or champerty since it was in support of his legal title to the land in question, although A was not party to the proceedings. That is, C successfully invoked A's powers to commence proceedings in equity against T in his own name as A's assignee, *and* obtained final judgment, without joining A, the assignor, even though C remained a stranger to the constructive trust that had been imposed on T in A's favour.

This would be inexplicable if equitable assignments were merely bare trusts. Even on Calvert's conception of the rule of joinder in pre-Judicature equity, since the order sought required T to fully execute the constructive trust on which it held the compensation sum, A *would* be a 'necessary' party being 'interested' in the 'object' of such proceedings since T's compliance with such order would extinguish A's claim-right against T arising from that constructive trust.

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the assignor's case, instead of complying with that requirement, the sums to be paid in respect of the assignor's land were retained by the Croydon Canal Co in its accounts. Consequently, a constructive trust was imposed on those monies for the benefit of such person as would satisfactorily establish his title to the land in question: *Cator*, ibid, at 4 Y & C Ex 419, 160 ER 1070.

Neither may cases like *Cator* be rationalised to be cases of derivative actions brought by trust beneficiaries because the trustee must still be joined to the proceedings, albeit as defendant, in such derivative actions.[6] Thus, in *Meldrum v Scorer*[7] (a case involving a derivative action in respect of breaches of equitable duties owed by a testamentary trustee to the trustees for the derivative claimant) and *Roberts v Gill & Co*[8] (which was concerned with a derivative action in respect of breaches of common law duties owed by a solicitor to the trustees for the derivative claimant), the trustees holding those choses in action in trust for their respective beneficiaries had to be joined to the proceedings.

To address the question as to how a stranger to the obligation may have the *standing* to bring proceedings against the obligor, one answer may be found in the 'agency effect' which has been suggested underpins the operation of equitable assignments. This, together with the operation of the rules of *res judicata*, explain why joinder of the assignor is not required when equitable proceedings are brought against an equitable obligor by an assignee before a final decision is handed down in those proceedings.

Discussion of the effect of the rules of *res judicata* will, however, be held over for now.[9] The remaining Sections in this Chapter will instead examine the important role which the agency effect plays, over and beyond when judicial proceedings are brought, its irrevocability, how such assignees conceived of as 'agents' may

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6 Lewin (2015) para 43-012.

7 (1887) 56 LT 471 (Ch).

8 [2010] UKSC 22; [2011] 1 AC 240.

9 They will be discussed in Part III: Joinder.

nevertheless have the power to sub-delegate, how substantial damages may be recovered by an assignor in light of such trust and agency effects, and how problems of double-liability are resolved on the dualist, composite model of equitable assignment proposed in this thesis.

1. Irrevocable grants of authority

The composite model of equitable assignment proposed in this thesis rests on an atypical form of agency where the assignee is authorised to invoke the assignor's powers against the obligor as the assignee pleases. So he may act as if he were the principal (the assignor) *and* he is privileged against all others (even against the assignor who granted him such authority) to invoke such delegated powers *as he pleases.* Conceiving the 'agency' arising by reason of equitable assignment in this manner has interesting consequences.

Generally speaking, agents owe their principals fiduciary obligations,[10] and their agency is freely revocable.[11] And yet:[12]

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10 Watts and Reynolds (2014) para 1-001.

11 The discussion below applies independently of the provisions of the Powers of Attorney Act 1971, ss 1 and 4 of which provide that where a power of attorney has been created in an instrument complying with the formalities required in s 1, such power, if expressed to be irrevocable, and if given to secure a proprietary interest in the power's donee or the performance of an obligation owed to the donee, so long as the donee retains that interest or the obligation remains undischarged, such power may not be revoked by the donor without the donee's consent; nor will such power be revoked by the donor's death, incapacity, bankruptcy, or where the donor was a body corporate, its winding-up or dissolution.

12 FMB Reynolds, 'When is an Agent's Authority Irrevocable?' in Ross Cranston (ed), *Making Commercial Law* (Clarendon Press 1997) 260 (emphasis added). See also Watts and Reynolds (2014) paras 10-007 and 10-010. The point was first made in 1976 by the editors of the 14th edition of *Bowstead* at 436.

> There are … cases where authority is actually conferred in terms that purport to make it irrevocable, and the law recognizes the irrevocability as such. … These cases are usually in English law referred to as cases of 'authority coupled with an interest'. The interest is that of the agent in carrying out the authority; and herein lies the organizing idea of this part of the law. We are here really not in the general law of agency at all. The central idea of agency is that of someone who acts on behalf of another and in that other's interest: it is for this reason that agents in general owe fiduciary duties and their authority can be revoked. But in these cases of authority coupled with an interest the agent acts, and exercises his authority, *in his own interest*. We have therefore a case where agency reasoning is deployed to achieve a different effect from the paradigm cases at which it is directed. It is a standard technique of law to use reasoning in this way.

Since an equitable assignment entails the conferring of authority by the assignor in the assignee whereby the assignee is also privileged to invoke such delegated powers as he pleases, and such agency is twinned with an equitable interest in the subject-matter which the equitable assignment has also vested in him, the 'agency effect' as underpins equitable assignment would seem to be a paradigm example of an agency that is irrevocable *inter vivos*.[13] And such agency is also not revoked even where the donor of the power is made a bankrupt.[14]

But what if the 'principal' dies?

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13 *Smart v Sandars* (1848) 5 CB 895, 136 ER 1132; *Gaussen v Morton* (1830) 10 B & C 731, 109 ER 622. See also: WA Seavey, 'Termination by Death of Proprietary Powers of Attorney' (1921-1922) 31 Yale Law Journal 283, 283.

14 *Alley v Hotson* (1815) 4 Camp 325, 171 ER 104 (Lord Ellenborough in the King's Bench): 'When the order of 8th January 1812 was given, the bankrupt had a power to give it, and being coupled with an interest, I think it was not countermanded by his subsequent bankruptcy. The transaction is entirely free from fraud.' *Bowstead* suggests that an authority coupled with an interest granted by corporation would similarly survive the corporation's winding-up or dissolution: Watts and Reynolds (2014) Article 118(3), and references cited therein.

In general, agent-principal relations do not survive the principal's death.[15] And it is often said that the grant of an authority coupled with an interest will not survive the death of the principal, either, following *Watson v King* where Lord Ellenborough rhetorically asked:[16]

> A power coupled with an interest cannot be revoked by the person granting it; but it is necessarily revoked by his death. How can a valid act be done by a dead man?'

It is not clear that the courts of common law were entirely *ad idem* on the point. In *Shipman v Thompson*,[17] Fortescue J (whose decision was ultimately upheld by Willes CJ in the Court of Common Pleas) observed as follows:[18]

> It is said that the defendant had an authority by letter of attorney to receive the testator's rents, that this authority did not determine with the testator's death, and that therefore, as the defendant received it by

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15 *Wallace v Cook* (1803) 5 Esp 117, 170 ER 757 (Lord Ellenborough at Nisi Prius). This is, '…an ancient and well-settled doctrine of the common law.': Story (1882) §488. Equity appears to have adopted the same position: *Mitchell v Eades* (1700) Prec Ch 125, 24 ER 60, so far as one was concerned with a *mere* power of attorney, but not where the power of attorney was granted together with an interest: see cases discussed below.

16 (1815) 4 Camp 272, 274; 171 ER 87, being a decision at Nisi Prius in the court of King's Bench. This is unsurprising, given Lord Ellenborough's decision in *Wallace v Cook* (n 15). It has been suggested that Lord Ellenborough's decision in *Watson v King* was impelled by the need to comply with Lord Liverpool's Acts (26 Geo III c 60, 1786 and 34 Geo III c 68, 1794): see MC McGaw, 'A history of the common law of agency with particular reference to the concept of irrevocable authority coupled with an interest' (DPhil thesis, University of Oxford 2005) 261–62.

17 The appeal to Willes CJ from Fortescue J's decision is reported at *Shipman v Thompson* (1738) Willes 103, 125 ER 1078; whereas Fortescue J's decision in the court below may is reported at note (a) to Willes 104, 125 ER 1078. The reasoning of Willes CJ (and, implicitly, Fortescue J) was explained and accepted to be correct by Romilly MR in *Lambarde v Older* (1853) 17 Beav 542, 546; 51 ER 1144, 1146.

18 *Shipman v Thompson* (n 17), at Willes 105, 125 ER 1080.

> the authority of the testator it is money had and received to his use, and it shall not be presumed to have been received by the consent of the executor. But I think as this is a naked authority and not coupled with any interest it could not subsist after the testator's death.

So it seems there may have been a view at common law that although the grant of a 'naked authority' not coupled to any interest would not survive the testator's death, matters were otherwise where the authority *was* coupled with an interest.

Further, equity's rules were different, given *Dale v Smithwick*,[19] which was followed in *Lepard v Vernon*,[20] *Gurnell v Gardner*,[21] *Spooner v Sandilands*,[22] and *Kiddill v Farnell*,[23] all decisions of the High Court of Chancery. Thus, *Meagher, Gummow and Lehane* alerts us that:[24]

> [a]t law a power of attorney, although coupled with a grant to a donee of an interest, was necessarily revoked by the death of the donor, even if the donee had no notice thereof, but semble in equity it was not so revoked.

Dale, *Lepard*, *Gurnell, Spooner*, and *Kiddill* suggest that, where an equitable interest has been created and where the creator of that equitable interest couples it with an agency relationship thereby enabling the beneficiary of that equitable interest to enjoy the benefits of his entitlement without having to act through the creator of that equitable interest, equity imposes a duty on the donor of the authority (and her

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19 (1690) 2 Vern 151, 23 ER 704.

20 (1813) 2 V & B 51, 35 ER 237.

21 (1863) 4 Giff 626, 66 ER 857.

22 (1842) 1 Y & C C C 390, 62 ER 939.

23 (1857) 3 Sm & Giff 428, 65 ER 723.

24 Meagher, Gummow & Lehane (2015) para 2-085, sub-para (i), contrasting the positions arrived at in equity (in *Lepard v Vernon* (1813) 2 V & B 51, 35 ER 237 (n 20)) and at common law (in *Watson v King* (n 16)).

personal representatives) *not* to revoke that authority. These cases tell us that where an authority is coupled with an interest, the donor of the authority is duty-bound in equity to the donee of that authority *not* to invoke her power to revoke it. And consequently, the donee's authority becomes irrevocable so far as such donee could obtain an injunction in equity to prevent the donor from revoking that authority, if the same was threatened; and so far as such authority *had* already been revoked by the donor, the donee would have the power in equity to require the donor to reinstate the donee's authority *with retrospective effect*, if necessary.[25] And where the donor had died, such *equitable* duties would be exigible against the donee's personal representatives by reason of the equitable interest that had been granted.

And then, so far as the rule in equity diverged from the rule at law, it is pertinent to apply s 25(11) of the Judicature Act 1873,[26] now, recast as s 49(1) of the Senior Courts Act 1981,[27] whereby the rules of equity are to prevail over those of common law (if different), so far as no provision otherwise had been made within ss 25(1) to (10) of the 1873 Act.[28]

In conclusion, where a chose in action has been equitably assigned, by reason of the interplay of the trust and agency effects which underpin the operation of such assignment, the assignee obtains, in effect, an *irrevocable* power to act as if he were the assignor, and such power will survive the assignor's death (and, by analogy, where the assignor is a corporate entity, the dissolution of such corporate form).

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25 This would be an application of the doctrine of ratification of authority.

26 Supreme Court of Judicature Act 1873, s 25(11).

27 Senior Courts Act, s 49(1).

28 As noted in Chapter I; and see Meagher, Gummow & Lehane (2015) para 2-085, sub-para (i).

Through the combination of trust (which vests in the assignee a proprietary equitable interest) and agency (which allows the assignee to bypass the assignor), the institution of equitable assignment allows for the 'transfer' of control over an equitable chose *without*, however, jeopardising the personal autonomy of the obligor to the chose.

2. Sub-delegation and making further assignments

The release of the assignee from the usual fiduciary obligations arising on the grant of authority by a principal to her agent is important in another respect. Besides rendering such authority irrevocable, it also enables the assignee to effect further assignments of the chose in question by permitting the assignee to constitute further trusts over that chose, and to further sub-delegate such authority as he had been delegated by the assignor by reason of the equitable assignment.

In a typical agent-principal relationship, by reason of the default fiduciary obligations which are imposed on an agent, it would be impermissible for such agent to subject himself to any additional duties to a third party to invoke his delegated powers in a manner which would conflict with his fiduciary duty to his principal. Hence, an agent may not constitute himself trustee of the powers he had been delegated by his principal for the benefit of a third party. Doing so would lead the agent to become obligated to two masters and expose him to the possibility of being put in a position of conflict. So far as the agent is subject to fiduciary obligations to his principal as to his manner of exercising his delegated powers, it would follow that those duties also entail a duty that he not put himself into a position of conflict of interest: this is the 'no-conflict' fiduciary duty.

At the same time, in the usual case, because the agent is to invoke his delegated powers for the benefit of his principal, it is implicitly accepted that the

principal will be relying on the judgment and good sense of *this* agent to carry out his fiduciary duties. So unless the context clearly shows otherwise, an agent is not ordinarily authorised to sub-delegate, that is, to delegate to another such powers as had been delegated to him: '*delegatus non potest delegare*'.

As Professor Mechem put it:[29]

> The selection of an agent in any particular case is made, as a [general] rule, because he is supposed by his principal to have some fitness for the performance of the duties to be undertaken. In certain cases his selection is owing to the fact that he is considered to be especially and particularly fit. … [U]nless the principal has expressly or impliedly consented to the employment of a substitute, the agent owes to the principal the duty of a personal discharge of the trust. …
>
> Hence it is the general rule of the law that in the absence of any authority, either express or implied, to employ a subagent, the trust committed to the agent is presumed to be exclusively personal and cannot be delegated by him to another so as to affect the rights of the principal.

However, the agency relationship proposed in this thesis is atypical. It entails not only authorising the assignee to invoke the assignor's powers against the obligor, but also entails a simultaneous release of the assignee from the typical fiduciary duties associated with the creation of an agent-principal relationship. So far as there

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[29] §§305-306, FR Mechem, *A treatise on the law of agency: including not only a discussion of the general subject, but also special chapters on attorneys, auctioneers, brokers and factors*, vol I (2nd edn, Callaghan 1914). See also Watts and Reynolds (2014) para 5-002. As to the constraints posed by the Trustee Delegation Act 1999, since the assignor would have had, at the point of assignment, no beneficial interest in the chose assigned, those constraints would not apply, either (see s 1(1)). The constraints posed by the Trustee Act 2000, ss 11–23, are also irrelevant because they constrain the ability of trustees to delegate their powers *qua* trustees. The delegation arising from cases of assignees effecting a re-assignment entails delegation of the powers that had been delegated to them *qua* agent.

are *no* duties owed by the assignee 'agent' to the assignor 'principal', the basis for the general rule of *delegatus non potest delegare* falls away.

Given the above, an assignee can equitably assign to a third party that which had been equitably assigned to him, and so on and so forth down a chain of multiple assignees.[30]

3. Recovery of substantial damages in right of the assignor

Where an obligor is duty-bound to Φ, and a specific remedy is sought to compel the obligor to Φ, the fact that such proceedings may have been commenced by an assignee acting as 'agent' of the assignor seems unobjectionable. But what if the remedy sought was substitutive (eg, an order of damages)?[31]

Example 5.1

Suppose A enters into a contract with B whereby B is to rust-proof and respray A's Car in exchange for £1,000. The contract expressly stipulates that B is to apply a reputable rust-proofing treatment and to respray using a suitable brand of paint so that the Car will not need to be repainted for at least another five years. A pays B the fee for his labour and materials, and B commences work.

Shortly after completion of the work, A sells the Car to C on an 'as seen, as is' basis: A makes no warranties as to the soundness of the Car, or the quality of the work that had been done on it. As part of the sale, A equitably assigns the benefit of

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30 The effect, therefore, *approximates* what occurs when legal title to realty or tangible personalty is conveyed. The discussion in the text does not, however, have anything to do with the trust and sub-trust arrangements which underpin indirect holdings of securities.

31 The analogous situation for 'statutory' assignments will be discussed in Chapter XI.

her contract with B to C. The document setting out the assignment also includes a clause by which A authorizes C to bring such legal proceedings against B as may be needful should there be any dispute over B's discharge of the contract. No *written* notice of the assignment is ever given to B, so such assignment is not 'statutory.'

Within a few months, the paint applied by B begins to flake and peel. The evidence reveals that this is because B used a brand of paint which was incompatible with the rust-proofing treatment. The Car will now have to be repainted at a cost of £1,800.

Given the express authority that A had given C to bring proceedings at law against B, should it be needful, it is clear that C may bring proceedings against B for B's breach of contract as A's duly authorized agent.

But even supposing such words had been left out, C could still bring proceedings against B by reason of the equitable assignment alone, though that would entail a few more steps.

First, as Blackstone pointed out, where a legal chose is equitably assigned:[32]

> [T]he form of assigning a chose in action is in the nature of a declaration of trust, *and an agreement* to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore, when in common acceptation a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person, to whom it is transferred, being rather an attorney than an assignee.

Since the assignment to C had been given for valuable consideration, A's *agreement* or *promise* to allow C to make use of her name (if needful), that is, to

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[32] 2 Bl Comm 442 (emphasis added).

authorize C to bring proceedings at law in A's name as A's duly authorized agent, would be specifically enforceable. C could, therefore, bring proceedings in equity to compel A to grant him such authority if A did not wish to cooperate by granting such authority without order. And so authorized, C could then bring the proceedings at law against B as A's agent.

But these two proceedings could be joined in accordance with the '*Vandepitte*' procedure. So instead of bringing one proceeding after the other, both could be brought at once, naming A and B as co-defendants. Even so, the essential characteristic of such proceedings is that they are proceedings in right of A. B has breached his contractual obligations *to A*, and the equitable assignment from A to C has not altered that.[33]

As Channell J recognized in *Torkington v Magee*, and leaving aside the operation of the Judicature Act 1873:[34]

> I believe it to be clear that in such a case as the present, if the assignor Rayner refused to sue the defendant for damages for the benefit of the present plaintiff, the assignee, the plaintiff could have taken proceedings in a Court of Equity, and have got a decree that he should be at liberty, on giving a proper indemnity, to use the assignor's name for the purpose of suing the present defendant. Thus by going to two Courts the plaintiff would have got his damages from the defendant, assuming, of course, that there had been a breach of contract by the defendant.[35]

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33 These points will be discussed in greater detail in Chapters VII and VIII.

34 [1902] 2 KB 427 (KB) 432 (Channell J, delivering the judgment of the Divisional Court on an appeal from the Mayor's Court).

35 The Court of Appeal ultimately reversed the decision of the Divisional Court, but only on grounds that the defendant had not breached the contract of sale as, 'neither the plaintiff's assignor, Rayner, nor the plaintiff himself, was ready and willing to carry out the contract [of sale] in accordance with the terms.': *Torkington v Magee* [1903] 1 KB 644 (CA) 645.

Now, what damages might the equitable assignee obtain in such split proceedings prior to the administrative fusion effected by the Judicature Acts?

As a matter of common law, if satisfied that the defendant had indeed breached the contract, the court would assess the loss sustained by the party who was privy to and had provided consideration in respect of the contract in question (ie, the assignor). So in Example 5.1, the court in its common law jurisdiction would assess the damages to be awarded by reference to the loss sustained by *A*.

The same result would obtain today. On the facts in Example 5.1, the C3PA would be of no use to C, since the contract between A and B was plainly beyond its ambit. It might then appear that A would have sustained no substantial loss, since the car was no longer A's, A had breached no common law duty to C, and A was under no common law liability to C to pay for B's poorly-done work to be made good. The loss caused by B's breach would, seemingly, have gone down a 'black hole.'

The unstated assumption in this, is that as A had sold the Car to C, A has no need to expend any money to address the problems with the Car since it is no longer hers; nor is A under any duty to C to address the problems with the Car, since it was sold to C on an 'as is, as seen' basis. But this ignores A's equitable liabilities to C arising by reason of her equitable assignment of the benefit of B's contract with A to C.

As Channell J himself recognized:[36]

> The Court of Equity would undoubtedly have recognized his [the assignee's] right, and would have treated the assignor as being trustee

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[36] *Torkington v Magee (KB)* (n 34) 431–32.

> for his assignee, and they would have given to the assignee all the rights and remedies as against his assignor which they gave to a cestui que trust against his trustee, and would have given to him [the assignee] against the other party to the contract all the rights and remedies which they gave to a cestui que trust against a third person dealing with his trustee in reference to the subject of the trust after notice of the trust.

It has been suggested elsewhere[37] that when a trust is constituted over the benefit of a contract, the trustee holding the benefit of such contract will come under an equitable duty to her beneficiary to preserve the trust asset. Where the trust asset is a contractual chose in action, the 'asset' is, by its very nature, not a static 'thing', but a promise by the contractual promisor to achieve some stated end. So the trustee's duty to 'preserve' such non-static asset must go beyond maintaining the status quo.

It has been suggested that in this context, the trustee's duty to 'preserve' the trust asset translates into a duty to ensure that that which the promisor promised would be done, *is in fact done*. And if the promisor failed to perform that which he had promised would be done, the trustee would have to ensure that that state of affairs which should have resulted had the promisor duly performed his promise, does in fact ensue.[38]

Applying the above to the facts in Example 5.1: when A equitably assigns the benefit of her contract with B to C, she will have come under an *equitable* duty to C to preserve the trust asset (by reason of the trust effect which underpins equitable assignments). Given the nature of the trust asset (a contractual chose in action), A will

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37 CH Tham, 'The 'trustee exception' in *Lloyd's v Harper*: loss, liability, and 'black holes'' (2016) 132 LQR 148.

38 ibid 152.

be duty-bound to C to *ensure* that that state of affairs which had been promised by B would in fact come about.

When B breached the contract by using unsuitable paint, B caused A to breach this *equitable* duty to C, and therefore caused A to become liable to C in equity for breaching such duty. C could seek a remedy in equity against A, requiring A to do her equitable duty, if A did not do so voluntarily without judicial compulsion. As a result, A would have to expend funds to put the Car into the state it should have been in. Consequently, by reason of B's breach, A *would* sustain a substantial (and not nominal) loss by reason of her *equitable* liability to C arising by reason of the trust effect which underpins her equitable assignment of the benefit of her contract with B to C.[39]

It might be thought that one possible constraint upon A's recovery of substantial damages from B in light of her equitable liability to C would be the question of remoteness of loss: it might be argued that so far as B did not know (and could not have known) that A would sell the Car to C and bind herself to C by way of assignment subsequent to her contract with B, such loss attributable to her equitable liabilities to C would be too remote, and therefore, irrecoverable.

This objection should not hold.

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[39] The result may be different if the contract between A and B contained an anti-assignment clause which precluded A from effectively assigning the benefit of the contract to B: see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL) 110 (Lord Browne-Wilkinson): 'One party to a contract cannot be liable for damages flowing from the doing of an act by the other party which the contract itself expressly forbids.'

As noted above, A is equitably liable to C because of her duty to ensure that that which B had promised would be done, was in fact done. This means that A is liable to C to incur costs to make good such deficiencies in performance resulting from B's breach of contract, which is to say, A will be liable to C (in equity) to incur costs of *curing* the faults arising from B's breach of contract. It is not difficult to see that so long as such costs of cure as A would be liable to incur fell, nevertheless, within the losses as would arise in the 'natural course of things' following on from C's breach, being costs A would have incurred had the Car not been sold to C, and the cause of action not been assigned to C,[40] it would not matter that A was *equitably* liable to C to incur them. The point is that so long as such 'cost of cure' falls within the ambit of the 'ordinary or natural course of things' as would arise from B's breach, such loss would amount to a 'normal' or 'ordinary' type of loss which would not be 'too remote' by reason of their coming within the first limb of *Hadley v Baxendale.*[41] Accordingly, it does not matter that B did not and could not have known when he was contracting with A that the Car would eventually be bought by C and the benefit of his contract with A be assigned to C. Such knowledge is irrelevant so far as A's claim against B pertains to a *type* of loss which falls within what B would be taken to have known at the time of contract, since such loss would be *normal* loss.

But what, then, of mitigation? It might be thought that A had mitigated her loss entirely by selling her car to C on an 'as seen, as is' basis, But this is an error.

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40 Echoing the qualifications put forward by Staughton LJ in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1992) 30 Con LR 1 (CA) 17; cited with approval in *Offer-Hoar v Larkstore Ltd (Technotrade Ltd, Part 20 defendant)* [2006] EWCA Civ 1079, [2006] 1 WLR 2926 [51].

41 *Hadley v Baxendale* (1854) 9 Ex 341, 156 ER 145.

Although losses which have actually been avoided may not be recovered, even if such loss-avoiding steps could not have been required of A by way of mitigation,[42] whatever 'loss' A had averted through ridding herself of the Car would be matched by an equivalent 'loss' by reason of her equitable duties and liabilities to C. Furthermore, since such 'loss' arising from A's equitable liability vis-à-vis C would mirror her 'loss' in making good the defective paintwork had she not entered into the subsequent dealings with C, they do not *worsen* her position and do not violate her 'duty' to mitigate.

4. Double liability

The dualist model of equitable assignment in this thesis proceeds on the basis that where a debt has been equitably assigned, such assignment effects no change to the common law obligation arising by way of the debt in any way. If so, for such debt to be discharged at law by performance, payment must *still* be made in precise conformity with the original terms of the debt contract. Hence, if A lent B £10,000 on terms that B was to repay £10,000 to A in one year's time, even if A had equitably assigned the debt to C and notice thereof had been given to B, discharge of that debt obligation at law by precise performance would still entail B tendering payment *to A*.

Accordingly, if B tendered payment to C on being satisfied that C had indeed been duly assigned the benefit of A's contract with B, B would *not* have discharged his obligations under that debt contract at law by performance, and so, might seem to be liable to be sued by A for failing to do so. In other words, B might face the risk of having to pay a second time should A sue for payment of the debt.

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[42] Chitty (2015) para 26-095.

Fortunately for B, there is an answer to this conundrum. As the Court of Appeal in Chancery observed in *Jones v Farrell*:[43]

> I think the only safe way for the debtor [who has been informed that the benefit of his debt has been assigned] would be to send at once to the assignee and pay him the debt. That would be a valid discharge. If my creditor tells me to pay A.B. and I accordingly pay A.B. and the creditor afterwards sues me, I have a good plea of payment.

As this was a decision in equity, all the court may be taken to have said was that such debtor would have a good plea of discharge or payment *in equity*, though by statute, such *equitable* discharge could also be pleaded at law.

A creditor has, even without expressly providing for it, a right to 'insist on payment to the creditor or such person as the creditor thinks fit.'[44] As explained in Chapter II, this 'right' is more accurately conceived as the Hohfeldian power to make an offer of release where, in consideration of the debtor effecting payment by tendering payment to the creditor's nominee, the creditor promises to release the debtor from his debt obligation.

When the debtor elects to accept such offer and tenders payment to the creditor's nominee, once the nominee accepts such tender, the debtor will have performed the act requested in the creditor's offer of release. The creditor would then be bound by her promise to release the debtor, and so, the original debt obligation would be discharged, not by *precise performance*, but by an accord and satisfaction through the debtor's having successfully effected payment to the creditor's nominee.

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43 (1857) 1 De G & J 208, 218; 44 ER 703, 707.

44 Ie, the power mentioned in *Hodgson v Anderson* (1825) 3 B & C 842, 107 ER 945.

The situation where B has received notice of an equitable assignment to C, and where C has asked B to pay C, and not A, would be taken by a court of equity to be an instance of C invoking A's power (relying on the 'agency effect') to make an offer to release B from his duty to tender payment to A in exchange for B tendering payment to C. When B accepts such offer made by C as A's 'agent' and tenders payment to C (being the 'requested-for' act in the offer), B's duty to tender payment to A would be discharged by accord and satisfaction, so far as a court of equity would be concerned. And although a court of common law would not regard the debt to have been discharged,[45] prior to 1875, a court of equity would enjoin A from bringing any subsequent action at law against B on the debt on the above facts by granting a common injunction. Conversely, were B to bring an action at law against A in respect of a dispute over some other legal obligation, prior to 1875, a court of equity might also enjoin A from pleading non-payment of this debt by way of defence. [46]

From 1854, these powers were co-opted by the common law courts:[47]

> LXXXIII. It shall be lawful for the Defendant or Plaintiff in replevin in any Cause in any of the Superior Courts in which, if Judgment were obtained, he would be entitled to Relief against such Judgment on equitable Grounds, to plead the Facts which entitle him to such Relief by way of Defence, and the said Courts are hereby empowered to receive such Defence by way of Plea; provided that such Plea shall

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45 See Chapter VI, Section 3.

46 See WW Kerr, *A treatise on the law and practice of injunctions in equity* (W. Maxwell & Son 1867), 14–15. The power to issue common injunction to preclude proceedings after they had been commenced was abrogated by s 24(5), Judicature Act 1873.

47 Sections 83 and 85, Common Law Procedure Act 1854 (hereafter, 'CLPA1854') were repealed by the Statute Law Revision and Civil Procedure Act 1883, but subject to the saving now found in s 209 of the Supreme Court of Judicature (Consolidation) Act 1925.

> begin with the Words "For Defence on equitable Grounds," or Words to the like Effect.[48]
>
> …
>
> LXXXV. The Plaintiff may reply, in answer to any Plea of the Defendant, Facts which avoid such Plea upon equitable Grounds; provided that such Replication shall begin with the Words "For Replication on equitable Grounds," or Words to the like Effect.[49]

These statutory provisions were preserved, expanded and augmented in ss 24(1)–(6), Judicature Act 1873,[50] restated as ss 36–42, Supreme Court of Judicature (Consolidation) Act 1925, before being replaced by s 49, Senior Courts Act 1981.[51]

Although s 49 makes no explicit mention of 'defences' or 'replications' on 'equitable grounds', since it merely, 'states in a more economical fashion the fusion of equity and law … which was originally contained in nine successive sections of the old Judicature Acts …',[52] such 'defences or replications on equitable grounds' persist

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48 See, eg, *Wodehouse v Farebrother* (1855) 5 El & Bl 277, 287; 119 ER 485, 488; *Jeffs v Day* (1866) LR 1 QB 372 (QB). Such defence was only available where a court of equity would have granted relief unconditionally: *Gee v Smart* (1857) 8 El & Bl 313, 319; 120 ER 116, 119; *Flight v Gray* (1857) 3 CB (NS) 320, 323; 140 ER 763, 765.

49 See, eg, *De Pothonier v De Mattos* (1858) El Bl & El 461, 120 ER 581. Section 85 may have regularized the practice of the common law courts to decline to permit debtors who had obtained a release from or claimed to have paid their creditors, notwithstanding notice of assignment, to plead such release or payment (as occurred in *Legh v Legh* (1799) 1 Bos & Pul 447, 126 ER 1002).

50 Section 24(2), Judicature Act 1873 was re-enacted as s 38, Supreme Court of Judicature (Consolidation) Act 1925: *Re Kay's Settlement* [1939] Ch 329 (Manchester District Registry) 334 (Simonds J); *Hanak v Green* [1958] 2 QB 9 (CA) 19 (Morris) LJ; *Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169 (CA) 185 (Willmer LJ).

51 The Supreme Court of Judicature (Consolidation) Act 1925 was repealed by s 152(4) read with Schedule 7 of the Senior Courts Act 1981.

52 Hansard, HL Deb 18 December 1980, vol 415 col 1214 (Lord Hailsham LC). In the Supreme Court of Judicature (Consolidation) Act 1925, the 'nine successive sections' referred to were ss 36–44.

to this day, though we have to look between the lines of s 49 of the 1981 Act to perceive them.

Nor is this analysis limited to obligations to pay fixed sums of money. It is applicable to any contractual obligation where the obligor is duty-bound to do Φ, (where 'Φ' can be any act as the parties may have specified in their contract). Ordinarily, the obligee will have the power to make an offer of release in the above manner, promising to release the obligor from his duty to Φ, in exchange for his doing Ω (where 'Ω' is some other act, distinct from Φ), instead. Though the obligor is by no means obligated to accept such offer, he certainly *may*. And if he does so, that will discharge the original contractual obligation by means of accord and satisfaction.

5. Combining the trust and agency effects

And so it comes to this. The combination of trust *and* agency supplies[153] the defects of each doctrine standing on its own.

Where T holds the legal title in 10,000 BCL shares on bare trust for A, and where A has subsequently constituted herself to be a *mere* bare sub-trustee of her equitable interest in T's legal title in the BCL shares for C, C has no direct recourse against T.[54] Though A has the power to require T to execute the bare trust by

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53 In the sense of, 'making up for a deficiency or fulfilling a want or need': *The new shorter Oxford English dictionary: on historical principles* (Lesley Brown ed, 4th edn, OUP 1993), Vol 2, 3152.

54 *Joseph Hayim Hayim v Citibank NA* [1987] 1 AC 730 (PC), where Lord Templeman stated (at 748F–G), after examining English and Hong Kong authorities, that, '[t]hese authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owned [*sic*] by the trustees to the beneficiary to protect the trust

conveying his legal title in the shares in accordance with her directions, and A is duty-bound (by virtue of the sub-trust she had constituted) to C to invoke such power at C's direction, should C wish T to convey his legal title in the shares to, say, C, C must give effect to such wish by going *through* A: C must direct A to require T to execute the bare trust by conveying his legal title in the shares to C, as *A* had instructed; and if C were to attempt to bypass A and direct T to execute the bare trust, though T *may* do so, T is by no means obliged to C to do so – a point which Lawrence Collins LJ made clear in his judgment in *Nelson v Greening & Sykes (Builders) Ltd*: [55]

> It is also true that in *Grey* (affirmed [1960] 1 AC), at p 715, Lord Evershed MR (dissenting, but not on this point) said that where a person who is the owner beneficially of property (and the legal estate is vested in another as trustee for him) makes a declaration of trust, the practical effect would seem … to amount, or be capable of amounting, to the 'getting rid of' a trust or equitable interest then subsisting. It is said in *Snell's Equity* ((31st ed) McGhee, 2005), in para 19-11, that 'where property is transferred to T "on trust for B absolutely" … [i]f B in turn becomes a bare trustee of his equitable interest for C, T will hold directly in trust for C …', citing *Head v Lord Teynham* (1783) 1 Cox Eq 57 (which holds only that where trustees and the beneficiary are before the court, an intermediate trustee of the equitable interest need not be made a party).
>
> These authorities do not bind this court to hold that, as a matter of law, an intermediate trustee ceases to be a trustee. I accept the submission ... that saying (as Lord Evershed MR said) that the practical effect would seem to amount to, or be capable of amounting to, the 'getting rid' of the trust of the equitable interest then subsisting,

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estate or to protect the interests of the beneficiary in the trust estate.' This passage was referred to with approval by Nourse LJ in *Parker-Tweedale v Dunbar Bank Plc* [1991] Ch 12 (CA) 19, and in that case, Purchas LJ also noted (at 25) that in most cases, '[t]he beneficiary's rights are against the mortgagor as trustee upon whom there is a duty to take reasonable care to preserve the assets of the trust but this does not extend to give a right of action directly to a beneficiary against a third party who has, or may have, caused a loss to the trust assets.' See also *Bradstock Trustee Services Ltd v Nabarro Nathanson (a firm)* [1995] 1 WLR 1405 (Ch).

55 [2007] EWCA Civ 1358, [2008] 1 EGLR 59, [56]–[57] (Collins LJ, with whom Wall and Ward LJJ agreed).

> is not the same as saying that, as a matter of law, it does get rid of the intermediate trust. What he was saying was that in the case of a trust and sub-trust of personal property, the trustees may decide that, as a matter of practicality, it is more convenient to deal directly with the beneficiary of the sub-trust.[56]

But that would not be the case where C had been *authorised* to invoke A's entitlements against T as though C were A, and where A had granted C the privilege against all non-C to invoke those entitlements as C pleased.

If, as this thesis proposes, when A equitably assigns her equitable chose against T to C, C is empowered and privileged by A to invoke A's entitlements against T as if he were A and as he pleased, T would be liable to C 'changing' T's duty to preserve his legal title in the shares to a duty to convey his legal title in the shares in accordance with the directions given by C (as A's 'agent' given the 'agency effect'). And if T failed to do so, T would then be liable to C (as A's 'agent', given the same 'agency effect') bringing proceedings in equity against T in respect of his breach of his duty to fully execute the trust by conveying his title in the shares in accordance with the directions issued by C as A had authorised him to do.

Next, although, '[t]he dominant assumption in the cases is that a grant of authority is of its nature revocable',[57] so that agent-principal relations are generally revocable *inter vivos* by the principal, or automatically upon the principal's death, given Lord Ellenborough's rhetorical question, 'How can a valid act be done in the

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56 Collins LJ does not refer to this, but this may draw on the common-sense idea that, 'what a trustee … is compellable to do by suit, he may do without suit …': Henry Ballow, *A treatise of equity: with the addition of marginal references and notes*, vol 2 (John Fonblanque ed, 5th edn, J & WT Clarke 1820) 172.

57 Watts and Reynolds (2014) 688, para 10-007.

name of a dead man?' in *Watson v King*,[58] we may quote Professor Powell's observation that that decision, 'overlooks the fact that an authority coupled with an interest is really a transfer of property.'[59] The extinction of such authority would not apply in respect of C's 'agency', above, since the *trust* effect which also underpins A's equitable assignment would have simultaneously vested C with the requisite interest as would render the agency to be irrevocable.[60]

Through the combination of the trust and agency effects, equity *simulates* (though only approximately) the result when legal title in tangible personalty is conveyed, without needing the assignor's entitlements against the equitable obligor to be extinguished and then re-constituted or revested in the assignee. This dualist, composite conception of equitable assignment is more consistent with the authorities that apply the same trust-based analysis to equitable assignments of legal or equitable choses in action. [61] It is also more respectful of the principle that the obligor's voluntarily undertaken obligations may not thereafter be unilaterally varied or altered without his assent.[62] So far as we understand how an equitable assignment effects a 'transfer' by means of this simulation, no intellectual damage is done. But we forget this at our peril.

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58 (1815) 4 Camp 272, 274; 171 ER 87, 87 (reproduced above at text to n 16).

59 Raphael Powell, *The Law of Agency* (2nd edn, Pitman 1961) 388, fn 5.

60 Watts and Reynolds (2014) 688, para 10-008.

61 As sketched out in Chapter III.

62 As sketched out in Chapter II.

PART III:

JOINDER

VI. JOINDER OF ASSIGNOR IN EQUITABLE PROCEEDINGS

In this and the following two Chapters, it will be shown why, given the composite, dualist conception of equitable assignment, joinder of the equitable assignor to proceedings brought by the assignee against the obligor to the chose assigned before a final decision is handed down is necessary in some cases, but not others.

1. Joinder of assignor to equitable proceedings when the chose assigned is equitable

As Calvert explained:[1]

> [U]nder all circumstances, the question [of joinder of necessary parties in equitable proceedings] resolves itself into this, whether the relief sought in the bill, in other words, the equity of the bill touches any particular person, so as to obtain from him a benefit, or to fasten upon him a duty: that, if this question is answered in the affirmative, he is a necessary party.

Where an assignee of the benefit of a trust brings proceedings against the trustee to compel the trustee to fully execute the trust by conveying such title as he has in the trust property to the assignee, the assignor would be 'interested in the object of such suit' since such an order, if complied with, would 'obtain from [the assignor] a benefit', namely, the assignor's equitable interest in that trust property. If so, the assignor should, of necessity, be joined before a final decision is handed down by the court. But this is not what the cases tell us. Repeatedly, we see that when an assignee of an equitable chose brings proceedings (necessarily in equity) against the obligor,

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[1] Calvert (1847) 16. See Chapter IV, Section 2(d).

joinder of the assignor is not required as a rule, though the assignor *may* be joined if there be some good reason to do so.[2]

Although joinder of the assignor would seem to be necessary by reason of her interest in the object of such suit, such joinder is rendered unnecessary because of the combination of the trust and agency effects underpinning the assignment.

First, the assignor's power to bring judicial proceedings will have been delegated to the assignee. So far as such agency effect will be recognised by the court in its equitable jurisdiction, the assignee may commence such proceedings against the obligor-trustee notwithstanding that the equitable assignment does not make the assignee any less a stranger to that obligation (leaving aside cases where the obligor undertook to be obligated to the obligee or her assigns, as in Example 2.3).

Second, the assignor will be bound by the decision of the court, notwithstanding her non-joinder. For *res judicata* purposes, the principal-agent and/or the trustee-beneficiary relationships between assignor and assignee are sufficient to bind assignor and assignee to the decisions of a court in proceedings brought by either of them.[3]

This is not to say that an assignee of an equitable chose may always bring proceedings in equity against the obligor without needing to join anyone else. That depends on the nature of the remedy sought, and whether anyone else, apart from the assignor, might be affected by the object of such proceedings.

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2 *Goodson v Ellison* (1826) 3 Russ 583, 38 ER 694; *Cator v Croydon Canal Co* (1843) 4 Y & C Ex 593, 160 ER 1149; *Donaldson v Donaldson* (1854) Kay 711, 719; 69 ER 303, 307.

3 See discussion in Sections 2(c) and (d), below.

2. Being 'bound' by a decision: estoppel by *res judicata*

To illustrate how joinder of the assignor is not necessary in such equitable proceedings, and when joinder of others might still be required, we may consider the following.

Example 6.1

T holds the legal fee simple in Blackacre on trust for 'A_L for his life and A_R as remainderman.'

A_R equitably assigns her equitable remainder interest in T's legal title in Blackacre to C absolutely by way of gift.

C and A_L subsequently agree to bring the special trust to an end. Invoking the doctrine in *Saunders v Vautier*, they order T to fully execute the trust by conveying his legal title in Blackacre to X.

T refuses, on grounds that he holds his legal title in Blackacre absolutely for his own benefit.

On the above facts, should it be desired to bring equitable proceedings against T for an adjudication whether:

<I> T was duty-bound to A_L for his life and A_R as remainderman by reason of the special trust; and

<II> T was in breach of his duties under that trust when he refused to comply with the directions of A_L and C, as A_R's assignee,

must A_L and/or A_R be joined?

As explained above, by reason of the 'agency effect', C may commence these proceedings against T even though C is a stranger to the trust on which the proceedings are brought. But it seems clear C may not bring such proceedings alone.

In principle, A_R should be joined to these proceedings since she is plainly interested in their object. If C succeeded in obtaining the order prayed for, T's compliance with such order by conveying his legal title in Blackacre to X would extinguish A_R's equitable remainder interest in that legal title. But as will be explained below, so far as A_R and C may be treated to be one and the same party ('identity of parties') by reason of their principal-agent relationship, *or* to be in 'privity of interest' by reason of their trustee-beneficiary relationship, A_R would not need to be joined as a party to be bound by such final decision as might be handed down in her absence.

The same, however, cannot be said of A_L. Being interested in the object of the suit, A_L is a necessary party to these proceedings, and a final decision may not be made without joining A_L.

The wisdom of staying proceedings against T until A_L be joined follows from the rules of *res judicata*[4], in particular, the doctrine of 'issue estoppel'.[5]

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[4] Estoppel by *res judicata* is a substantive right, and is not merely a rule of evidence or public policy: *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (HL) 59E (Lord Millett); *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 WLR 1041, [15].

[5] 'Issue estoppel may be a comparatively new phrase, but I think that the law of England – unlike the law of some other countries – has always recognized that estoppel per rem judicatem includes more than merely cause of action estoppel.': *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] AC 853 (HL) 913.

Suppose that C brought proceedings in equity against T in his sole name, without joining either A_R *or* A_L. Suppose also the court proceeded to final judgment and decided that in respect of issue **<I>**, T was *not* trustee of the legal title in Blackacre for the benefit of A_L for life, and A_R by way of remainder. The consequence is that the court would not need to decide on issue **<II>**. Accordingly, the court dismissed C's application for an injunction.

If A_L was not made party to C's proceedings against T, A_L would not be party to the decision on **<I>**. Accordingly, A_L would not be bound by that decision, and no estoppel by reason of *res judicata* may be asserted against her by T should A_L re-litigate the same issue in subsequent proceedings, leading to the possibility of conflicting findings.

(a) Requirements

T may raise *res judicata* as an estoppel against any subsequent claim in which issue **<I>** is to be re-litigated as long as T can show that:[6]

> (i) the [prior] decision, whether domestic or foreign, was judicial in the relevant sense;
> (ii) it was in fact pronounced;
> (iii) the [prior] tribunal had jurisdiction over the parties and the subject matter;
> (iv) the [prior] decision was–
> (a) final;
> (b) on the merits;
> (v) it determined a question raised in the later litigation; and
> (vi) the parties [in the later litigation] are the same [as the ones in the prior litigation] or their privies,[7] or the earlier decision was *in rem*[.]

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6 Handley (2009) para 1.02.

(b) Decision in rem or in personam?

The court's decision on issue **<I>** is not a decision *in rem* for *res judicata* purposes. As *Spencer, Bower and Handley* explains:[8]

> A decision *in rem* conclusively determines the status of a person or thing; that is its jural relation to persons generally, not just parties and privies. … It would have been clearer if decisions had been classified *inter omnes*, and *inter partes* …

The court's decision on issue **<I>** merely decided there was no *in personam* relationship of trustee and beneficiary between T on the one hand, and A_L and A_R on the other. For *res judicata* purposes:[9]

> Status is the 'legal position of the individual *in or with regard to the rest of the community*'; 'the condition of belonging to a class in society to which the law ascribes peculiar rights and duties, capacities and incapacities', *and* 'a condition attached by law to a person which confers or affects or limits a legal capacity of exercising some power that under other circumstances he could not or could exercise without restriction.

Thus, the decision on issue **<I>** is not a decision *in rem* as to T's status as a person for *res judicata* purposes because it is not a decision as to T's legal position 'in or with regard to the *rest of the community*': it is simply a decision as to T's legal position with regard to A_L and A_R, whether he be duty-bound to either of them in his ownership of the legal title in Blackacre in the manner of a trustee.

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7 '[T]here is no doubt that the requirement of identity of parties is satisfied if there is privity between a party to the former litigation and a party to the present litigation. … It has always been said that there must be privity of blood, title or interest …': *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* (n 5) 910E, 910G (Lord Reid).

8 Handley (2009) para 10.01.

9 ibid para 10.05 (references omitted, emphasis added).

Neither is the decision on issue **<I>** a decision *in rem* on grounds that it 'conclusively determines the status … of a thing.' As mentioned, the decision on issue **<I>** was that T was *not* in a trustee/beneficiary relationship with A_L and A_R. It was not, therefore, a decision as to the status of a *thing.* Thus, the court's decision on issue **<I>** so far as it concerns A_L's relationship with T is only a decision *in personam.*[10] It was a decision as to the *in personam* relations between T, on the one hand, and A_L and A_R, on the other.

(c) Identity of parties

T may only successfully invoke issue estoppel to bar re-litigation over issue **<I>** if he can satisfy the six requirements listed above. It is clear that T will be able to satisfy the first five requirements. And if subsequent proceedings were brought by C to re-litigate issue **<I>**, there would be identity of parties as would allow those subsequent proceedings to be barred by reason of issue estoppel.

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[10] Although the court's decision on issue **<I>** is a decision *in personam* so far as A_L is concerned, should A_L attempt to bring further proceedings against T in respect the same issue, it is not *invariably* a decision *in personam* for everyone, and for all purposes. The court's decision on issue **<I>** is a decision *in rem* so far as may concern, say, Z, to whom T had contracted to sell his unencumbered legal title in Blackacre. If Z repudiated the contract, and T brought proceedings against Z for his repudiatory breach, Z would be barred by reason of issue estoppel if he sought to justify his repudiation on grounds that T did *not* have unencumbered title to Blackacre, but held it on trust for A_L and AR. In *that* context, the court's decision in the proceedings brought by C on issue **<I>** would be a decision *in rem* as would bind the whole world, so far as with regards such a defence by Z, it would be a decision as to the status of a thing, the thing being T's legal title in Blackacre. Hence, '[t]here is no reason why an order should be characterized as either wholly in rem or wholly in personam … The extent (if any) to which an order operates in part in rem and in part in personam is a matter of analysis.': *Pattni v Ali* [2006] UKPC 51, [2007] 2 AC 85, [37].

Since A_L is obviously not C, nor was C acting on A_L's instructions, they may not be regarded as being one and the same party for *res judicata* purposes.

As for A_R, C was enabled to bring the initial proceedings because of the 'agency effect'. In a straightforward case of 'mere' agency, where a principal instructs an agent to bring judicial proceedings in the agent's own name, the courts have identified such principal to be the 'real' party for whose account or benefit the party on record is suing or defending.[11] So in such cases, the courts are prepared to regard such 'real' party and her agent to be the same party, such that subsequent proceedings by the 'real' party would be estopped by *res judicata.*

But by the same token, A_R had authorised C to act as C pleased. So the fact that C had brought the proceedings without A_R's direct involvement was something for which A_R was responsible. In effect, A_R had authorised and directed C *in advance* to bring such proceedings, so A_R and C may be taken to be the same party for *res judicata* purposes.

(d) Privity of blood, estate or interest

Alternatively, by reason of the 'trust effect', A_R held the benefit of her equitable remainder interest in Blackacre for C's benefit. So there would be 'privity of interest' as between A_R and C by reason of such trustee-beneficiary relationship. As Megarry V-C held in *Gleeson v J Wippell & Co*:[12]

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11 Handley (2009) para 9.14.

12 [1977] 1 WLR 510 (Ch) 515G; cited with approval in: *Johnson v Gore Wood & Co (a firm)* (n 4) 32E (Lord Bingham); *Barakot Ltd v Epiette Ltd* [1998] 1 BCLC 283 (CA) 287–88. For general discussion, see Handley (2009) para 9.44.

> [H]aving due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest.' Thus in relation to trust property I think there will normally be a sufficient privity between the trustees and their beneficiaries to make a decision that is binding on the trustees also binging on the beneficiaries, and vice versa.

Consequently, if A_R were to re-litigate issue **<I>** in subsequent proceedings involving T, T would be able to plead issue estoppel against A_R.

However, no such relationship exists between A_L and C. So they do not share any privity of interest. Further, as A_L and C do not share privity of blood nor estate, and as noted above, as A_L and C are distinct entities with no agent-principal relationship between them, it follows that T may not raise issue estoppel against A_L.[13] Consequently, A_L could bring subsequent proceedings in equity against T without fear of being barred by reason of *res judicata*, leading not only to additional costs to T, but also to the risk of conflicting decisions.

This reinforces the point made above, that A_L is a *necessary* party to the proceedings brought by C in equity against T, seeking an order that T be compelled to convey his legal title in Blackacre to X. A_L is obviously interested in the object of such suit. So it is plainly unjust to decree orders as would affect A_L in A_L's absence.

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[13] Were T able to show that A_L knew of the proceedings brought by C, but, though having a right to be joined and intervene was, 'content to stand by and see his battle fought by someone else in the same interest' (*Re Lart* [1896] 2 Ch 788 (Ch) 794 (Chitty J)), the courts may be prepared to treat A_L to be party to those earlier proceedings: see Handley (2009) para 9.12. But on the facts of the Example above, since C kept A_L in the dark throughout, even this measure of judicial commonsense would be denied to T.

It follows, therefore, that on the above set of facts, joinder of A_L is *necessary* before any final decision can be made. However, joinder of A_R is not needed, by reason of the agency and/or trust effects as underpin equitable assignments.

3. Joinder of assignor to equitable proceedings when the chose assigned is legal

Similar concerns as to the impact of *res judicata* arise when certain *legal* choses in action are equitably assigned and proceedings in *equity* are brought to adjudicate disputes over such common law duties.

For example, when a common law obligation arising from contract is breached, in most cases, the remedy of damages awarded by a court within its common law jurisdiction would be an adequate remedy. But if such remedy in a particular case be inadequate, the court's *concurrent* equitable jurisdiction to award an equitable remedy such as specific performance may be resorted to.

If the obligee to such contractual obligation had equitably assigned the benefit of such contract to an assignee, the assignee may bring proceedings against a defaulting obligor in the court's concurrent equitable jurisdiction. Though the assignee would be a stranger to the contract between the obligor and the obligee-assignor, when the assignee brings such proceedings within the court's equitable jurisdiction, the court would recognise the agency and trust effects which underpin the equitable assignment, and would recognise that the assignee had the authority to bring such equitable proceedings.

Because of the agency and trust effects, joinder of the assignor to those equitable proceedings is excused even if the assignor might be interested in the object of such proceedings. This is reinforced by the operation of *res judicata* on the

assignor: that decision *would* bind the assignor by reason of her being treated as having as if she were the same party as her assignee by reason of the principal-agent relationship, or her privity of interest with the assignee because of their trustee-beneficiary relationship. Thus, the assignor would be barred from re-litigating the issue before the court within its equitable jurisdiction for the reasons explained above,[14] *mutatis mutandis*. However, unlike the case where proceedings are brought in equity in respect of an *equitable* chose in action, proceedings in equity in respect of a *legal* chose in action derived from a *common law* obligation entail an additional complication.

Pre-Judicature, disputes concerning such common law obligations could also be brought before a court of common law. As the Judicature Acts merely fused the administration of the courts of common law and equity within the Supreme Court of Judicature, contractual obligees may still, in principle, bring proceedings before the court within its common law *or* its equity jurisdiction. That is to say, since proceedings pertaining to performance of the obligor's contractual duty may be brought in either equity *or* at law, the problem of multiplicity of proceedings would still arise.

The following illustrates the problem.

Example 6.2

A enters into a contract with B, an electrician, for B to re-wire A's manor-house which A runs as a boarding house.

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[14] See Sections 3 (c) and (d), above.

B starts work, but A then sells the mansion to C. As part of the sale, A also *equitably* assigns the benefit of her contract with B to C.

The re-wiring work goes very slowly, and months after completion of the sale of the manor-house to C, more than 75% is still undone. Eventually, B tells C that he will not be finishing the job.

C makes enquiries as to the possibility and cost of getting in an electrician to carry on from where B had left off. C finds that hardly anyone is available to do the work, and finishing off the outstanding works would cost as much, if not more, than just starting from scratch. Given this, C decides to apply to the court within its equitable jurisdiction for an order of specific performance. Importantly, C elects *not* to seek assistance from the court within its common law jurisdiction at all, making this plain by not claiming for damages.

To obtain specific performance, apart from satisfying the court of the inadequacy of common law remedies, C would need to establish that:

<III> a contract had formed between A and B;

<IV> that B had failed to fully perform his duties under that contract;

<V> that there was no excuse for such failure; and

<VI> that A had validly equitably assigned the benefit of such contract to C.

Suppose the court decides issues **<III>** and **<IV>** in favour of C, and holds that a contract *had* been validly formed between A and B. However, as to issue **<V>**, it decides against C, holding that on the true construction of the contract, B had a contractual power to terminate the contract prematurely, which B had validly

invoked, thereby releasing himself from any further duty to complete the works. Accordingly, there would be no need to hand down any decision on issue **<VI>**, and specific performance would not be ordered, there being no outstanding contractual obligation.

If C sought to re-litigate issue **<V>** in subsequent proceedings within the court's equitable jurisdiction, B would be entitled to raise a *res judicta* estoppel against C, as all the requirements to raise such estoppel[15] would be satisfied as between B and C.

Similarly, B could successfully raise *res judicata* estoppel against A, should A seek to re-litigate issue **<V>** in subsequent proceedings within the court's equitable jurisdiction, since a court in its equitable jurisdiction would recognise the trust or agency effects underpinning A's equitable assignment of the contractual chose to C, such that A and C would be taken to have sufficient privity of interest or be regarded as one person for *res judicata* purposes.

But if A were to bring subsequent proceedings at law against B, although the earlier proceedings brought by C against B in the court's equitable jurisdiction would satisfy the first five of the six criteria required for *res judicata* to be successfully raised, so far as the court's decision in its equitable jurisdiction as to issue **<V>** is merely a decision *in personam* and not a decision *in rem*, to raise *res judicata* against A in such subsequent proceedings at law, B would need to show that A and C were to be regarded for *res judicata* purposes to be the same entity (identity of persons), or

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15 See text to n 6.

that A and C were to be regarded for *res judicata* purposes to be in privity of blood, estate, or interest.

For the reasons set out in the preceding Section, it is most unlikely that the court's decision as to issue **<V>** will be characterised as an *in rem* decision. Taken as a decision *in personam*, it is unlikely that A and C will be regarded to be the same person by reason of agency or be in privity of interest by reason of trust, since a court of common law would not recognise the equitable assignment as having any effect as a matter of common law, at all.[16]

Having created the institution of equitable assignments, the courts of equity would recognise its effects. But the courts of common law declined to do so, leaving equitable assignments a matter for decision within the exclusive jurisdiction of the courts of equity. Post-Judicature, the same division was retained, with equitable assignments (like trusts), remaining subject-matter falling within the exclusive equitable jurisdiction of the Supreme Court of Judicature, over which the court in its common law jurisdiction continued *not* to have any jurisdiction.

Though it seems odd to us today, we must remember that Parliament did not enact that the Supreme Court of Judicature was to have a *single* jurisdiction, in which the rules and doctrines as developed by the courts of common law and equity were to be applied *mutatis mutandis*. That is to say, it did not enact any provision to cause that equity and law should be 'blended and united.'[17] Instead, the Judicature Act 1873

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16 This issue is discussed further in Chapter VII.

17 That had been a feature of the High Court of Justice Bill (as amended), PP 1870, clause 9, which passed the House of Lords, but was withdrawn before debate in the Commons. Some of the features of the 1870 Bill are summarized in SM Waddams, 'Equity in English Contract

merely enacted that each of the jurisdictions of the superior courts, in particular, the courts of equity and the courts of common law, were to be *transferred to* the Supreme Court of Judicature, and as to the operation of the High Court and the Court of Appeal (which, together, comprise the Supreme Court of Judicature), the 1873 Act provided as follows:[18]

> 16. The High Court of Justice shall be a Superior Court of Record, and, subject as in this Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any of the Courts following; (that is to say,)
>
> > (1.) The High Court of Chancery, as a Common Law Court as well as a Court of equity …
> >
> > (2.) The Court of Queen's Bench;
> >
> > (3.) The Court of Common Pleas at Westminster;
> >
> > (4.) The Court of Exchequer, as a Court of Revenue, as well as a Common Law Court;
>
> …
>
> 22. From and after the commencement of this Act the several jurisdictions which by this Act are transferred to and vested in the High Court of Justice and the said Court of Appeal respectively shall cease to be exercised, except by the said High Court of Justice and the said Court of Appeal respectively, *as provided by this Act …*
>
> 23. The jurisdiction by this Act transferred to the said High Court of Justice and the said Court of Appeal shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such Rules and Orders of Court as may be made pursuant to this Act; and *where no special provision is contained in this Act or in any such Rules or Orders of Court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or by any of such Courts.*

Law: the Impact of the Judicature Acts (1873-75)' (2012) 33 Journal of Legal History 185, 186–87.

[18] Judicature Act 1873 (emphasis added).

No further provision was made in the Rules or Orders of Court as were subsequently promulgated, nor is there any further provision in the 1873 Act of the kind mentioned in the first clause of s 23. Consequently, the second clause of s 23 (highlighted in italics, above) applies without qualification. That is, the multiple jurisdictions of the various superior courts that had been transferred to the Supreme Court of Judicature by operation of s 16 were to be exercised by it 'in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or by any of such Courts.'

That this was the limited intent and effect of the 1873 Act is plain (subject to those substantive changes to common law which were enacted in s 25). The point was made most clearly by Sir John Coleridge, the Attorney-General, when the Bill was sent to the Commons:[19]

> *The Bill was not one for the fusion of Law and Equity*. Law and Equity would remain, and for this reason—they were not the creatures of statute; an inherent distinction existed between them, and the subject-matter of Law and of Equity was not the same, and could not be made the same by Act of Parliament. The defect of our legal system was, not that Law and Equity existed, but that if a man went for relief to a Court of Law, and an equitable claim or an equitable defence arose, he must go to some other Court and begin afresh. *Law and Equity, therefore, would remain if the Bill passed, but they would be administered concurrently, and no one would be sent to get in one Court the relief which another Court had refused to give*. Great authorities had no doubt that Law and Equity might be fused by enactment; but in his opinion, to do so would be to decline to grapple with the real difficulty of the case. *If an Act were passed doing no more than fuse Law and Equity, it would take 20 years of decisions and hecatombs of suitors to make out what Parliament meant and had not taken the trouble to define*. …

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[19] HC Deb 9 June 1873, vol 216, cols 644–45 (emphasis added). Broadly similar comments were made by Lord Selborne LC during the Second Reading of the Bill before the Lords: HL Deb 13 February 1873, vol 214, col 339.

Parliament did *not* intend by the Act to fuse the substantive law as had been developed by the various superior courts (save for the specific matters provided for in s 25). Its primary goal was to eliminate the administrative problem of litigants being sent from pillar to post, seeking remedies in one court which another could not grant.

The 1873 Act, therefore, did not authorise the High Court or the Court of Appeal to blend the rules of common law and equity and to apply such blend within a single jurisdiction. The 1873 Act vested the High Court and the Court of Appeal with a notional multiplicity of jurisdictions, and within each jurisdiction as had been transferred to it, the High Court and the Court of Appeal were to apply such transferred jurisdiction in precisely the same manner as the courts from which such jurisdiction had originated.[20]

Therefore, if, before Judicature, a court of equity would not have given recognition to a voluntary promise arising under a covenant executed by way of deed (because equity does not assist volunteers), the High Court to which such equitable jurisdiction had been transferred, would do likewise so far as it was acting within its equitable jurisdiction. Conversely, if, before Judicature, a court of common law would not have given recognition to the obligations arising under a trust, the High Court to which such common law jurisdiction had been transferred, would do likewise when acting within its common law jurisdiction.

Consequently, if, before Judicature, a court of common law would have declined to recognise the trust effect as underpinned the operation of an equitable

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[20] See also Meagher, Gummow & Lehane (2015) para 2-110 and 2-115. For judicial authorities, see *Salt v Cooper* (1880) 16 Ch D 544 (CA) 549 (Sir George Jessel MR); *Ind, Coope & Co v Emmerson* (1887) 12 App Cas 300 (HL) 309 (Lord Watson).

assignment, the High Court today would similarly be bound, when acting within its common law jurisdiction, to conclude that there was *no* common law relationship between A and C as would allow it to conclude there to be privity of interest between them for *res judicata* purposes.

Returning to our problem in Example 6.2, the court acting within its common law jurisdiction would have to conclude that A had *no* privity of interest with C, so B would be unable to bar subsequent proceedings by A at law by reason of issue estoppel arising from the decision that the court in its equitable jurisdiction had reached earlier in respect of issue **<V>.**

But if A had been joined to those first proceedings in equity, the risk of multiplicity of proceedings and re-litigation of issues in equity and at law would evaporate. This, accordingly, is the source of the rule of *practice* requiring joinder of the assignor of a *legal* chose in action to proceedings brought in the court's *equitable* jurisdiction.[21] Thus, as Viscount Cave LC observed:[22]

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[21] Given the analysis in the main text, there may be a corresponding rule of practice at common law where the final decision of the court in its common law jurisdiction in proceedings brought by the assignor of a legal chose in action ought not be handed down without the *assignee's* joinder to those proceedings. This would ensure that if equitable proceedings were brought subsequently by or against the assignee, issue estoppel might be asserted against such assignee, so binding him to the prior decision reached by the court in its common law jurisdiction. But in *Kapoor v National Westminster Bank Plc* [2011] EWCA Civ 1083, [2012] 1 All ER 1201, Etherton LJ suggested in *dicta* that, 'the assignor [of a debt] cannot bring proceedings to recover the assigned debt in the assignor's own name for the assignor's own account. The assignor can sue as trustee for the assignee if the assignee agrees, and, in that event the claim must disclose the assignor's representative capacity. *In any other case, the assignor must join the assignee, not because of a mere procedural rule but as a matter of substantive law in view of the insufficiency of the assignor's title.*' (at [30], emphasis added). It is suggested that the cases cited by Etherton LJ in support do not go so far.

> That an equitable owner [of a legal chose] may commence proceedings alone and may obtain interim protection in the form of an interlocutory injunction, is not in doubt; but it was always the rule of the Court of Chancery, and is, I think, the rule of the Supreme Court, that, in general, when a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action … If this were not so, a defendant, after defeating the claim of an equitable claimant might have to resist like proceedings by the legal owner, or by persons claiming under him as assignees for value without notice of any prior equity, and proceedings might indefinitely and oppressively be multiplied. ... Further …, no action can now be defeated by reason of the misjoinder or non-joinder of any party; but this does not mean that judgment can be obtained in the absence of a necessary party to the action, and the rule is satisfied by allowing parties to be added at any stage of a case. Subject to these observations, I think that the general rule is still operative …

Quite different rules apply, however, when proceedings are to be brought *at common law* in respect of a dispute over the discharge of a legal chose in action. This will be discussed in the following Chapter.

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22 *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 (HL) 14; cited with approval in *Roberts v Gill & Co* [2010] UKSC 22; [2011] 1 AC 240, [65].

VII. JOINDER OF ASSIGNOR IN PROCEEDINGS AT COMMON LAW

This Chapter will concentrate on the rules as to joinder of parties when proceedings are brought at *common law*. It will show how the rules as to parties to proceedings at common law and in equity are distinct from one another.

1. Non-recognition of equitable assignment by courts of common law

By 1808,[1] the courts of equity had come to recognise that a chose in action was a presently existing thing over which a trust could be constituted, and so, could be '*equitably* assigned.' But the courts of common law persisted in the view that a chose in action was a mere expectancy whose realisation depended on the bringing of an action.[2]

Consequently, where a *legal* chose in action had been equitably assigned, and the assignee sought to bring proceedings against the obligor before a court of common law, those courts declined to take such assignee to have been authorised to bring such proceedings at law by reason of the assignment. Such assignment had no effect *as a matter of the common law*, and so far as the assignee remained a stranger to the obligation on which the proceedings were brought, the assignee would have no standing to commence proceedings at law, unless he had been duly authorised by the assignor to do so. Thus, Willes J in the Common Pleas observed:[3]

> The rule [at common law] against assigning a chose in action stood in the way of an actual transfer of the debt, so as to enable the plaintiff to

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1 See *Sloane v Cadogan* (1808) in Sugden (1846) 1119, briefly discussed in Chapter III.

2 Following *Sir Moyl Finche's Case* (1590) 4 Co Inst 85. This report should not be confused with the report of subsequent proceedings in *Sir Moyle Finche's Case* (1606) 6 Co Rep 63a, 77 ER 348.

3 *Gerard v Lewis* (1867) LR 2 CP 305 (CP) 309.

> sue in his own name; and therefore, it became necessary to give the power of attorney. But the intention of the parties in giving that power was to give the assignee the conduct and control of the litigation necessary for enforcing payment of the debts assigned.

Such authorisation would have to be established by words or acts evidencing the requisite grant of authority to the assignee by the assignor over and beyond mere words of assignment. As Elphinstone observed in 1871:[4]

> Bearing in mind the importance, where a legal chose in action is assigned, of being able to sue the debtor at law in the name of the original creditor, a power of attorney is *always* inserted in the assignment of a legal chose in action, enabling the assignee 'to demand, sue for, recover, receive, and give effectual discharges for the debt, in the name of the assignor.'

It is not immediately obvious why the courts of common law declined to develop the common law in parallel with the developments in equity. Perhaps the traditional view was retained because the position adopted in equity appeared to serve the requirements of the time sufficiently well.[5] But whatever their reasons, until s 25(6), Judicature Act 1873 came into force, the courts of common law continued to view choses in action to be mere expectancies which were incapable of being presently dealt with. Indeed, the very enactment of s 25(6) confirms that that had remained the case as it would not have been necessary to enact s 25(6), otherwise. Thus, as Scrutton LJ observed in 1919:[6]

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4 Elphinstone (1871) 206–07. This practice appears still to be current: Beale, Gullifer and Paterson (2016) 223.

5 Bailey (1932) 549–50, suggested that the common law may have resisted recognition of the effects of an equitable assignment at common law so long as debtors who had not paid their debts were liable to be imprisoned, reform of which only began in 1869.

6 *Ellis v Torrington* [1920] 1 KB 399 (CA) 410–11.

> It is elementary knowledge that for a long time Courts of common law and Courts of equity differed as to how far choses in action, and particularly causes of action, could be assigned. The common law treated debts as personal obligations and assignments of debts merely as assignments of the right to bring an action at law against the debtor and, except in a strictly limited number of cases, did not recognize any such assignments. Courts of equity always took a different view. They treated debts as property, and the necessity of an action at law to reduce the property into possession they regarded merely as an incident which followed on the assignment of the property.

Accordingly, even today, in order for proceedings at law to be brought on a contractual chose in action that had been equitably assigned to an assignee, the assignee *must* have been authorised to bring the proceedings, apart from the fact of assignment.

Such authority may be granted by way of a formal document. Or the obligee might provide for such authority in express words within the equitable assignment documentation. Or, if no such provision had been made, the assignor might be called on by the assignee to grant such authority, before proceedings at law were brought; and if the assignor refused to provide such authority voluntarily without order, the assignee might initiate proceedings *in equity* against the assignor to compel her to furnish such authority, since the courts of equity had long recognised that in respect of assignments of contractual choses in action:[7]

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[7] 2 Bl Comm 442 (emphasis added). See also Co Litt 232b, note (1); Joseph Story, *Commentaries on equity jurisprudence, as administered in England and America*, vol II (1st edn, Hillard, Gray & Company 1836) §1040. Anticipating Blackstone, much the same point was made in Thomas Wood, *An institute of the laws of England: or, the laws of England in their natural order, according to common use* (8th edn, Henry Lintot, 1754) 297: 'A Thing in *Action*, as a Statute, Bond, a Just Debt, is vulgarly said to be assignable over: But then One must Sue for the same in the Name of the Assignor. So that in Reality, it amounts to little more than a Letter of Attorney, to Sue in His Name'.

> [T]he form of assigning a chose in action is in the nature of a declaration of trust, *and an agreement* to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore, when in common acceptation of a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person, to whom it is transferred, being rather an attorney than an assignee.'

If the assignor refused to permit the assignee to make use of the assignor's name to bring proceedings *at law* as her duly appointed 'attorney', the assignee might bring proceedings *in equity* to so compel her to do so, but only if the assignment was supported by consideration (since equity will not assist a volunteer).[8] Once such order in equity was made, and the assignor ordered to perform as promised, the assignee might then bring the proceedings *at law* as the assignor's duly authorised 'attorney'.

2. The '*Vandepitte*' procedure

Prior to the administrative fusion effected by the Judicature Acts, the assignee of a contractual chose would need to bring two different proceedings before two different courts if he desired to bring an action at law against the obligor but the assignor was un-cooperative. But after the Judicature Acts, these two proceedings could be brought by the assignee jointly in one proceeding before a single court by means of the 'procedural short-cut'[9] arising by means of the '*Vandepitte*' procedure.[10]

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8 *Re D'Angibau* (1880) 15 Ch D 228 (CA), 246: '[V]olunteers have no right whatever to obtain specific performance of a mere covenant which has remained as a covenant and has never been performed.'

9 *Don King Productions Inc v Warren* [2000] Ch 291 (Ch) 321D (Lightman J).

10 *Vandepitte v Preferred Accident Insurance Corpn of New York* [1933] AC 70 (PC) 79 (Lord Wright). For the history of its development, see Marcus Smith, 'Locus standi and the enforcement of legal claims by cestuis que trust and assignees' (2008) 22 Trust Law International 140, 145–55.

In order to avoid circuity of action,[11] the *Vandepitte* procedure may be used to permit joinder of two proceedings into one, as when a trustee holds the benefit of a contract on trust for trust beneficiaries and proceedings in equity are needed to compel the trustee to sue the contractual obligor at law. Should the contract be breached, the trustee is duty-bound in equity by reason of his trust to bring proceedings at law against the defaulting obligor to seek damages to remedy any loss as may arise by reason of such breach. If the trustee declines to perform his equitable duty to bring such proceedings, his trust beneficiaries may bring proceedings in equity against him to compel him to bring such proceedings at law.

When this procedure is applied to join the proceedings in equity against an un-cooperative trustee for hearing together with the proceedings at law against the defaulting obligor, the beneficiary is not *joined* to the latter proceeding at law – the latter is still a proceeding at law between the trustee and the defaulting obligor; nor may the beneficiary be joined to that proceeding at law since the beneficiary remains a stranger to that contract.

The *Vandepitte* procedure may also be applied in the context of equitable assignments.[12] If the obligee to a contract equitably assigned the benefit of that contract to an assignee, the court in its equitable jurisdiction would recognise that such assignment entailed a trust of the benefit of the contract as well as an agreement to lend the assignee her name should it be necessary to bring proceedings at law. Thus, so far as the 'agreement' was supported by consideration, if the assignor refused to perform in accordance with the latter agreement, the assignee could bring

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11 Smith and Leslie (2013) para 11.41.

12 *Barbados Trust Company Ltd v Bank of Zambia*, [99] (Rix LJ).

proceedings in equity against the assignor to compel her to authorise the assignee to bring proceedings as her 'attorney', and then, bring proceedings at law against the defaulting obligor.

And even if the agreement was *not* supported by consideration, and so was not enforceable in equity, since the assignment also entailed a trust, the assignee might bring proceedings against his assignor on the basis of the trustee-beneficiary relationship between them to compel the trustee to commence legal action against the defaulting obligor. So again, if the assignorFive Y (looked on as trustee of the benefit of the chose assigned) refused to bring such proceedings at law against the obligor, the assignee (looked as beneficiary of such trust) could bring proceedings in equity against the assignor to compel her to do so.

An equitable assignee of a contractual chose in action will, at law, remain a stranger to that contract. So an equitable assignee of such contractual chose has no standing at law by reason of such assignment. Similarly, so far as the common law will rarely (if ever) have defined duties arising in tort to be owed to equitable assignees *by reason of such assignment alone*, the fact of an equitable assignment will not give an assignee standing to bring proceedings at law in respect of any accrued cause of action arising from a breach of tort duties. So far as such tort duties were not owed to the assignee *as* assignee, an assignee will remain a 'stranger' to the cause of action.

Consequently, an equitable assignee of a legal chose in action may only bring proceedings at law against the obligor if he had already been authorised by the assignor to bring them, whether by reason of a grant of authority at the same time as

the assignment, or, if none had been granted at that time, then before proceedings were commenced against the obligor.[13]

If no such grant of authority had been made before commencement of proceedings, the *Vandepitte* procedure allowed the assignee to simultaneously bring proceedings in equity against the assignor, and at law against the obligor.[14] But even then, the assignor would still need to be made party to such proceedings at law. Consequently, the suggestion made by Smith and Leslie that the *Vandepitte* procedure may explain why an assignor need not be joined to proceedings that have been brought by an assignee against a defaulting obligor is, with respect, not entirely convincing.[15]

Yet cases like *Brandt's*,[16] *Performing Right Society*,[17] *The Aiolos*,[18] *Weddell v JA Pearce & Major*,[19] *Three Rivers District Council*,[20] *Bexhill UK Ltd v Razzaq*[21] and

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13 And in such a case, the claimant-assignee would have to state clearly that he was bringing such proceedings at law in his representative capacity as the assignor's duly authorized agent.

14 Or, if the assignment were voluntary, to compel the assignor to bring proceedings at law against the obligor because of her 'trustee-beneficiary' relationship with her assignee.

15 Smith and Leslie (2013) paras 11.43 to 11.47. Similar doubts have also been expressed in Meagher, Gummow & Lehane (2015) para 6-520.

16 *William Brandt's Sons & Co v Dunlop Rubber Co* [1905] AC 454 (HL).

17 [1924] AC 1 (HL).

18 [1983] 2 Lloyd's Rep 25 (CA).

19 [1988] Ch 26 (Ch).

20 [1996] QB 292 (CA).

21 [2012] EWCA Civ 1376.

Raiffeisen Zentralbank Österreich AG[22] each contain statements which may be taken to stand for the proposition that, 'there is now a preponderance of authority supporting the proposition that when a legal chose is assigned, the need to join the assignor is procedural and not substantive', [23] leading to the supposition that the court may waive joinder of the assignor when proceedings *at law* are brought by the equitable assignee. For the reasons explained earlier, this is difficult. As *Meagher, Gummow & Lehane* have pointed out, 'How a person not the legal owner can, the Judicature Act [1873] notwithstanding, prosecute what is, in effect, an action at common law for damages is not explained.'[24]

The solution to this conundrum may lie in challenging the unstated assumption that *Brandt's* was a case brought by assignees within the court's *common law* jurisdiction.

Though most judicial proceedings brought in respect of breaches of duties arising at law will be brought within the court's common law jurisdiction, that is not necessarily the case. Since the court has a concurrent *equitable* jurisdiction over many legal choses, an obligee (and hence, her assignee) may certainly bring proceedings within the court's equitable jurisdiction. And within that jurisdiction, the trust and agency effects which conceptually underpin the operation of equitable assignment may be given full recognition.

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22 *Raiffeisen Zentralbank Österriech AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825.

23 Smith and Leslie (2013) para 11.35.

24 Meagher, Gummow & Lehane (2015) para 6-520

The following Chapter will show how an equitable assignee of a legal chose in action may bring proceedings against the obligor within the court's *equitable* jurisdiction, even when the remedy sought may entail the payment of damages, and/or entail the payment of a fixed sum of money. Consequently, a case like *Brandt's* (in which the court ordered the defendant-debtor to pay a fixed sum of money to the plaintiff-assignee) may well have been decided by the court in its equitable jurisdiction where there is only a rule of *practice* requiring joinder of the assignor,[25] instead of its common law jurisdiction where, as a matter of substantive common law, no stranger to the obligation may commence any proceedings at law.

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[25] As explained in Chapter VI.

VIII. EQUITABLE ASSIGNMENTS OF LEGAL CHOSES AND NON-JOINDER OF THE ASSIGNOR

Different rules apply to the question of joinder of parties, depending on whether the proceedings are brought within the court's equitable or common law jurisdiction. These complications do not arise so far as one is concerned with equitable choses, since by definition, these are matters as to which the courts of common law have no jurisdiction. But proceedings may be brought in the court's common law or concurrent equitable jurisdiction in respect of many legal choses in action.[1]

Pre-Judicature, one could easily tell whether proceedings had been brought within the court's common law or equitable jurisdiction: one merely had to see which physical courtroom the dispute had been brought. But post-Judicature, it is no longer so obvious, since the High Court has both common law and equitable jurisdiction.

Even the remedy that is ordered is only an uncertain guide, given that the equitable remedy of injunction is not restricted to obligations other than to pay a fixed sum of money, and, since 1858, courts of equity have been empowered to award compensatory damages.

If the above is accepted, the proposition that *Brandt's*[2] may have been a decision of the court acting within its equitable jurisdiction becomes far less outlandish.

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1 The exceptions are legal choses arising from covenants so far as they are unsupported by consideration, as 'equity will not aid a volunteer'.

2 *William Brandt's & Co v Dunlop Rubber Co* [1905] AC 454 (HL).

1. The equitable remedy of injunction or specific performance

Pre-Judicature, if an assignee wished to obtain equitable remedies against the obligor, he would have had to seek the assistance of the courts of equity, since by definition, the courts of common law would have had no power to grant equitable remedies (leaving aside the effects of the CLPA1854).[3]

Even today, an assignee of a contractual chose wishing to obtain an order of specific performance against the obligor to compel him to perform that which he had promised would seek this remedy within the court's notional equitable jurisdiction. And for an example of the circumstances where such proceedings might be brought by an equitable assignee within the court's concurrent equitable jurisdiction, reference may be made to the discussion of Example 6.2 in Chapter VI.

2. Equitable damages pursuant to Lord Cairns' Act

Suppose B's dilatory progress in Example 6.2 had caused C to sustain pecuniary losses, as well: because of the delays, C had not been able to find tenants for the boarding house, and accordingly, had lost the rent he could have earned had the work been completed on time. Could C seek damages from B in his proceedings before a court of equity?

If the facts in Example 6.2 had occurred before 1858, the answer would have been, 'no'. To recover damages, C would have had to bring further proceedings before a court of common law.

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[3] Pursuant to ss 79 and 82, CLPA1854, the common law courts were given statutory powers to grant orders of injunction in certain circumstances.

But in that forum, if B challenged C's standing to sue him at law, a court of common law would hold that C, being a stranger to the contract, could not bring such proceedings. C would need to obtain the requisite authority from A first, by suit, if A refused to honour the agreement arising implicitly from the equitable assignment to provide such authority.

The exclusivity of damages as a remedy of the common law courts was done away with by s 2 of the Chancery Amendment Act 1858 (commonly known as Lord Cairns' Act): where a plaintiff could show a court of equity that he was entitled to relief by way of specific performance or injunction, and there were also grounds as would entitle him to damages were he to go to common law, s 2 granted the court of equity power to award such damages, absolving the plaintiff from having to initiate separate proceedings at law.[4]

The effects of s 2 were preserved by s 24(7) of the Judicature Act 1873. Thus, so far as the jurisdiction of the Court of Chancery had been transferred to the High Court of Justice and the Court of Appeal, that equitable jurisdiction also encompassed a *statutory* power to award damages.

Had the events in Example 6.2 arisen in, say, 1880, if A also sustained pecuniary losses by reason of B's breach of contract, A could have brought proceedings against B in the High Court's equity jurisdiction to seek damages pursuant to s 2 of Lord Cairns' Act, so far as the dispute entailed a cause of action in equity for specific performance or an injunction. Consequently, C, as A's assignee,

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4 *Ferguson v Wilson* (1866) LR 2 Ch App 77 (Ch) 88 (Turner LJ): 'The [principal] object … was to prevent parties from being so sent from one Court to the other …'; *Jaggard v Sawyer* [1995] 1 WLR 269 (CA) 284 (Millett LJ).

would be empowered by the agency effect to bring such proceedings in equity to seek an injunction against B, and damages, as well, without needing to join A.

The court today still retains a power to award equitable and/or legal remedy or remedies as appropriate, notwithstanding that it may be acting entirely within its equitable jurisdiction, given the modern-day equivalent to s 24(7) of the Judicature Act 1873 now found in s 50 of the Senior Courts Act 1981.

It is not necessary to dwell on the 'broader' effect of Lord Cairns' Act beyond what is set out on its face.[5] It suffices to note that since 1858,[6] a court acting within its equitable jurisdiction has the power to award such damages as would be awarded by a court in its common law jurisdiction. On the facts of Example 6.2, so far as C *had* come within equity's jurisdiction, C could seek damages in addition to or in lieu of an order of specific performance against B, and such proceedings would *still* be entirely within the court's equitable jurisdiction in which the grant of authority to C to commence such proceeding in equity arising from A's equitable assignment to C, in and of itself, would be recognised. And as explained in Chapter VI, A would be bound in equity by such decision, notwithstanding her not having been joined. It

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5 Namely, the extent to which Lord Cairns' Act conferred the court with a power to award damages in respect of future breaches. 'In terms it gave power to substitute damages for an injunction. Such a substitution in the very nature of things involves that the damages are to deal with what would have been prevented by the injunction if granted.': *Leeds Industrial Co-operative Society, Ltd v Slack* [1924] AC 851 (HL) 857 (Viscount Finlay); *Jaggard v Sawyer* (n 4) 286–87. See also JA Jolowicz, 'Damages in Equity - A Study of Lord Cairns' Act' (1975) 34 Cambridge Law Journal 224, 227.

6 The power to grant Lord Cairns' Act damages may have been 'accidentally' repealed in 1974, before being reinstated in the Senior Courts Act 1981: Jolowicz, ibid. But *cf* PM McDermott, 'Survival of Jurisdiction under the Chancery Amendment Act 1858 (Lord Cairns' Act)' (1987) 6 Civil Justice Quarterly 348.

would be advisable, however, as a matter of *practice*, to join A as a party to ensure that issue estoppel could be invoked against A should subsequent proceedings at law be brought by or against A. But there would be no substantive requirement such that non-joinder of A would render those proceedings to be flawed.

3. Equitable order compelling payment of fixed sums of money where common law remedies are inadequate

In Example 6.2, the obligation owed by B to A at common law was an obligation to perform an act other than to pay a fixed sum of money. Had proceedings been brought at law against B in respect of his breach of that obligation, the remedy at law would have been damages. But what if the obligation in question were an obligation to pay a fixed sum of money? Suppose the following:

Example 8.1

B has borrowed £10,000 from A. The terms of the loan contract specify that the loan is to be repaid in one year's time by tendering payment **to C** in ten equal instalments, at such times as C may demand. Even so, the contract stipulates that the provisions of the C3PA are not to apply to give C any third-party statutory rights.

Six months later, A equitably assigns the benefit of her legal chose against B under the contract to C. Unfortunately, the issue as to C's authority to bring judicial proceedings against B as might be necessary to reduce the chose into possession is not discussed, as both parties assume that the words of equitable assignment are sufficient to have such effect in equity and at law.

As the twelve months following A's loan to B come to an end, C informs B that he would like B to pay him £1,000 for the first instalment on the anniversary date of the loan. C also informs B of A's equitable assignment to him.

B refuses to pay C anything at all.

B has plainly repudiated the terms of his contract with A. C is not privy to the contract between A and B. Nor has C given any consideration at B's request thereunder. Thus, C would have had no standing in his own right to bring proceedings at law against B for B's repudiatory breach. Furthermore, since C has no entitlements arising under the C3PA, if C wished to bring proceedings against B in respect of this repudiatory breach, C may only do so as A's equitable assignee.

Suppose A had not effected any equitable assignment to C. In such circumstances, were A to bring proceedings at law against B for failing to tender payment to C once C had made a valid demand, the only remedy which A might obtain would be *damages*.[7] It would not be open to A to seek an order pursuant to the action for debt, because B's obligation was not a duty to pay a fixed sum of money *to A*.

But damages would likely be an inadequate remedy given that B's duty was not just to tender a single payment – it was an ongoing obligation to tender payments to C in ten equal instalments, on C's demand. A could, therefore, bring proceedings against B within the court's *equitable* (concurrent) jurisdiction, on grounds of the

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[7] The statutory power granted to a court in its common law jurisdiction to issue an injunction under s 79, CLPA1854, though preserved under the Judicature Act 1873, could not be invoked to order payment of sums not yet due.

inadequacy of the remedy at common law, seeking an order of specific performance to compel B to perform that which he had promised – ie, tender payment to C on C's demand.[8]

If so, C, as A's assignee, would be taken by a court in its equitable jurisdiction to be authorised by reason of the 'agency effect' to bring such proceedings in equity as A's 'agent'. And, as explained in Chapter VI, it would not be necessary to join A to such proceedings since A would be bound in equity by the court's decision.

It would be entirely appropriate for the court, acting within its equitable jurisdiction, to grant the order sought by C, being an order of specific performance to compel B to perform that which he had contractually bound himself to do, namely, to pay a fixed sum of money (ie, £1,000, being one-tenth of the £10,000 of the loan) to C, on demand. Notwithstanding that the remedy looks somewhat like a common law remedy, it is not – it is an *equitable* remedy.

Accordingly, non-joinder of A to such proceedings in the equitable jurisdiction of the court does *not* amount to a substantive defect as a matter of equitable principles. But again, to ensure that A would be subject to issue estoppel were proceedings at law brought subsequently by or against A, it would be advisable as a matter of practice to join A to such proceedings in the court's equitable jurisdiction.

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[8] See, eg *Beswick v Beswick* [1968] AC 58 (HL). The possibility that an order of specific performance may issue in respect of a breach of a contractual obligation by B to pay a fixed sum of money to A on the application of C, to whom A had equitably assigned the benefit of the debt owed by B, is implicitly accepted in *Hammond v Messenger* (1838) 9 Sim 327, 59 ER 383. This point is more fully explained in Section 4, below, at text to n 26.

4. Equitable order compelling payment of fixed sums of money where common law remedies are *not* inadequate

Sections 1 to 3 above have shown that where the assignee of a legal chose in action brings proceedings against a defaulting obligor entirely within the court's equitable jurisdiction to obtain *equitable* remedies such as orders of specific performance, injunction and/or (equitable) damages pursuant to Lord Cairns' Act, since the court's common law jurisdiction is not engaged, there is no need to join the assignor to the proceedings.

But it must be admitted that the analyses above hardly represent typical cases. Much more typical would be something like the following.

Suppose A sells goods to B. B becomes duty-bound to pay the price for those goods to A: B becomes indebted to A. Should B fail to pay the price, notwithstanding his acceptance of the goods and title thereto having passed to B, A's sole remedy at law is an action in debt to compel B to pay the price for the goods.[9]

Should A equitably assign to C the benefit of B's indebtedness to her, it is clear that as a matter of substantive law, C has no *locus standi* to bring an action of debt against B: C is neither privy to the contract of sale between A and B, nor has C provided consideration at B's request in respect of that contract.

If the equitable assignment to C had been accompanied by suitable words of authorisation as would be recognised by a court of law, C *could* bring an action of

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[9] Damages are not generally available for non-payment of the principal sum. Damages are sometimes available in respect of consequential loss arising from late or non-payment, and/or interest for late payment. The issue is discussed in H McGregor, M Spencer and J Picton, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), at paras 28-001 to 28-011.

debt as A's 'attorney' against B.[10] But absent such words, so far as a court in its common law jurisdiction was concerned, the fact of A's equitable assignment to C would not be recognised as a valid grant of authority at law.

Consequently, if A was unwilling to grant such authority to C, notwithstanding her being taken in equity to have agreed to do so, if the equitable assignment was supported by consideration from C, C could bring proceedings in equity to compel A to honour her agreement, and so, be compelled to authorise C.

Alternatively, if the equitable assignment was gratuitous, so far as such equitable assignment entailed a trustee-beneficiary relationship between A and C by reason of the 'trust effect', C could bring proceedings in equity to compel A to bring proceedings at law against B as C's trustee.

Either way, proceedings at law could then be brought against B, either by C as A's duly authorised agent, or by A as trustee for C. And under the *Vandepitte* procedure, C might then bring both sets of proceedings for hearing together, naming A and B as co-defendants.[11]

This statement of the law is, however, incomplete.

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10 Keeping in mind that the express authority granted to C would entail C being authorized 'to demand, sue for, recover, receive, and give effectual discharges for the debt, in the name of the assignor': Elphinstone (1871) 206–07, If such authority was granted, the court could then order B to pay the amount owed to C as A's 'attorney'.

11 As explained in Chapter VII.

In *Brandt's*, Lord Macnaghten observed as follows:[12]

> Strictly speaking, Kramrisch & Co [the assignor], or their trustee in bankruptcy, should have been brought before the court. But no action is now dismissed for want of parties, and the trustee in bankruptcy had really no interest in the matter. At your Lordships' bar the [sic] Dunlops [the debtor] disclaimed any wish to have him present, and in both Courts below they claimed to retain for their own use any balance that might remain after satisfying Brandts [the assignee].

Relying on this and observations made in an assortment of other cases,[13] and, in particular, *The Aiolos*,[14] Peter Gibson LJ concluded that:[15]

> [t]hese authorities … clearly establish that the equitable assignee can be regarded realistically as the person entitled to the assigned chose and is able to sue the debtor on that chose, but that save in special circumstances the court will require him to join the assignor as a procedural requirement so that the assignor might be bound and the debtor protected.

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12 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 (HL) 462. Earl Halsbury LC agreed with Lord Macnaghten. Lord James took a different view. Though he agreed with the majority that the assignor (Kramrisch & Co) had only equitably (and not statutorily) assigned the debt owed them by the debtor (the Dunlop Rubber Company) to the assignee (William Brandt's Sons & Co), he merely held that 'the defect in the parties to the suit can be remedied', so he did not agree that non-joinder of the assignors to the proceedings against the debtor could be entirely dispensed with by reason of the equitable assignment alone (at 464). Ultimately, Lord James held that on the facts, non-joinder was justified on the basis that there had, in effect, been a novation: '[F]or myself I go further, and think the plaintiffs [the assignees] are entitled to recover upon the ground that Dunlops [the debtors] *undertook* to pay them the amount in question. It seems to me that when the plaintiffs received the letter from the defendants of January 8, 1903, signed by Gooding, they were entitled to rely and act upon it.' (emphasis added, at 464).

13 Namely, *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 (HL), *Weddell v JA Pearce & Major* [1988] Ch 26; *Deposit Protection Board v Dalia* [1994] 2 AC 367 (CA) 387–88 (Sir Michael Fox).

14 [1983] 2 Lloyd's Rep 25 (CA).

15 *Three Rivers District Council v Governor and Company of the Bank of England* [1996] QB 292 (CA) 313F–G.

In so doing, Peter Gibson LJ (and Waite LJ, who was in agreement) followed the reasoning of the Court of Appeal in *Walter & Sullivan Ltd v J Murphy & Sons Ltd*. That was an unusual case where the assignor of a debt sought to bring proceedings in the court's common law jurisdiction against the debtor. Parker LJ (delivering the judgment of the court) said in *dicta*:[16]

> Normally …, it is the assignee who … seeks to recover the debt, and in a case where, as here, section 136 of the Law of Property Act 1925 does not apply, he would have to join the assignor in order to bind him at law.

The question is how the court is able to ignore the need for joinder of the assignor as suggested by Lord Macnaghten in *Brandt's*. It is suggested that the basis for such non-joinder may lie in recognising that in cases like *Brandt's*, the assignee is still seeking an *equitable* remedy by way of injunction within the court's *auxiliary* equitable jurisdiction. That is, as with the examples in Sections 1 to 3, above, the assignee is *not* bringing proceedings against the obligor in the court's common law jurisdiction, at all.

Although the discussion thus far has focussed on the court's concurrent equitable jurisdiction, the court's equitable jurisdiction arises from other bases, as well. There is also an exclusive jurisdiction over institutions such as the trust and equitable assignment, as well as an auxiliary jurisdiction:[17]

> Where relief was sought in the Court of Chancery by a plaintiff suing upon a legal title, and the relief did not come within any of the recognised heads of the concurrent jurisdiction, it was only granted, according to the principles of the court as laid down in the eighteenth

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16 *Walter & Sullivan Ld v J Murphy & Sons Ld* [1955] 2 QB 584 (CA), 588 (Parker LJ).

17 Ashburner (1933) 5–6 (references omitted).

> century, either to prevent a multiplicity of suits or to prevent an irreparable injury. The cases in which relief was granted were said to come under the auxiliary jurisdiction, and, where the Court of Chancery was exercising its auxiliary jurisdiction, the court did not itself adjudicate upon the validity of the plaintiff's claim. That adjudication was made by the courts of common law; but the assistance of the Court of Chancery was asked either before the adjudication, to keep matters in *statu quo* until the rights of the parties could be determined at common law, or after the adjudication, to give a more complete remedy to the party in whose favour it had been made than he could obtain at common law.

One might speculate as to why this was so, but it may have been that the Chancery judges were reluctant to adjudicate on issues at law because of the different procedures available to them, and to a common law court, on matters of evidence.[18]

The common law courts had the jury, and could make findings as to contested facts. But there was no jury in Chancery, and the only evidence available to a Chancery judge were the documents pertaining to the dispute, and depositions taken on written interrogatories of the witnesses. Defects with this system were numerous:[19]

> The interrogatories were framed by counsel, who had no direct communication with the witness to be examined and often had no means of ascertaining what precise information he could give. Interrogatories for the cross-examination of adverse witnesses were of little use and rarely employed, as they were necessarily prepared without the least knowledge of what had been asked or said upon the examination-in-chief. The examiner in town never deviated from the interrogatories and never asked for any explanation. Commissioners in the country were sometimes instructed on the matters which were in issue between the parties, and they occasionally required further information. *At the hearing, if the evidence was conflicting or unsatisfactory to the court, as was frequently the case, the court directed issues to be sent to a court of common law*, and the evidence

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[18] Though there were some attempts at harmonization. So s 62, Chancery Procedure Act 1852, empowered the court of Chancery to decide on issues of legal title or rights, without requiring the parties to go to law; and s 1, Chancery Regulation Act 1862, required the Chancery court to determine all questions of law or fact on which the parties' entitlement to relief depended.

[19] Ashburner (1933) 24 (emphasis added, references omitted).

> taken previously became altogether useless, as the finding of they jury on the issues, and not the original examination, determined the fact.

But where the evidence before the court of equity was satisfactory and the key issues were not disputed, where a plaintiff had already come within the court of equity's jurisdiction on an obligation arising at common law, the court might be prevailed upon *not* to send the matter to be heard at common law for a legal remedy to be granted. Instead, on the principle that, '[t]he court of equity in all cases delights to do complete justice, and not by halves',[20] to avoid the needless multiplication of proceedings, the court could be persuaded to grant a final order as would settle the entire matter between the plaintiff and defendant, even though the common law remedy would have been entirely adequate.

That is to say, once the jurisdiction of the court of equity had been properly invoked, inadequacy of relief at common law being just one ground of jurisdiction among many, there was no basis to deny the court power to grant a remedy in equity as would completely dispose of the dispute before it, even if a court of common law could grant a perfectly adequate remedy as well.

Drawing on this proposition, *Ashburner's Principles of Equity* puts the matter as follows:[21]

> If the court was properly seised of one matter, which was closely connected with another matter not usually cognisable in equity, the acknowledged jurisdiction over the one drew to it a jurisdiction over the other, although that matter in itself could be properly dealt with in a court of law.

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20 *Knight v Knight* (1734) 3 P Wms 331, 24 ER 1088, 1089 (Talbot LC).

21 Ashburner (1933) 42.

A number of authorities are cited as examples of this, but of these, the case of *Pearce v Creswick*[22] is most pertinent in the present context.

(a) Pearce v Creswick (1843)

In *Pearce v Creswick*, a dispute arose between the administrator of one George Hurst, and the Sheffield and Rotheram Banking Company. Prior to George Hurst's death, the Company had become indebted to him by reason of deposits he had placed with it totalling £200. Hurst was given two receipts dated August 18th, 1837, each stating that the Company had received of 'George Hurst the sum of one hundred pounds, to be accounted for.'[23]

The practice of the Company was that the recipients of such receipts were to return within the year and either give up and cancel the receipts in exchange for payment of the capital sum plus interest, or leave the sums in deposit for a further year on issue of further receipts in place of the earlier ones.

Hurst died on January 21st, 1838. By his will, he bequeathed the bulk of his property to the plaintiff, Pearce. Unfortunately, by unknown means, the two receipts which had been issued by the Company in respect of the £200 deposited by the deceased came into possession of the deceased's nephew, also named George Hurst.

The nephew endorsed the receipts with his name, 'George Hurst'. They were presented for payment at a branch of the Nottinghamshire Bank, which cashed them, ignorant of the nephew's forgery.

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22 (1843) 2 Hare 286, 67 ER 118.

23 ibid 2 Hare 286, 67 ER 119.

On February 3rd, 1838, the sum paid out on encashment of these receipts was charged by the Nottinghamshire Bank to their London bankers to whom were remitted the two receipts bearing the fraudulent endorsement. On February 5th, 1838, the Company directed the London bankers to credit the Nottinghamshire Bank for the amount paid, the two receipts having been delivered up to the Company for cancellation. But on February 8th, 1838, the Company was informed of Hurst's death.

The plaintiff was appointed administrator of the deceased's estate on November 21st, 1839. He filed a bill against the defendant, being the director and public officer of the Company, seeking an order of discovery of the documents pertaining to the debt that was owed to the deceased. *Inter alia*, the plaintiff's bill also prayed that an account be taken of such sums as were due on the two receipts, and that the Company be decreed to pay the plaintiff (as the deceased's legal personal representative) such sums as would appear to be due from them on the taking of such an account.

Sir James Wigram V-C summarised the issues before him as follows:[24]

> The [deceased] was a creditor of the Sheffield and Rotheram Bank at the time of his death and the debt has not been paid to his executor, or to any person lawfully claiming under him. It cannot, therefore, be disputed that the Plaintiff will be wronged if he do [*sic*] not get relief in this or some other Court against some party. … [T]he main question argued before me was this—whether the Court, in the case made by this bill, has jurisdiction both to give relief as well as discovery, or whether the bill ought not to have been confined to discovery only?

As to the question of jurisdiction, Wigram V-C ultimately held as follows:[25]

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24 ibid 2 Hare 292–93, 67 ER 121.

25 ibid 2 Hare 297–99, 67 ER 123–24 (emphasis added).

> The only remaining question is whether … I ought to send the case to be tried in a Court of law … It does not appear to me that there is in this case any need of sending the Plaintiff to a Court of law … to try the question whether he is entitled to payment of the debt for which the receipts were given, in order to entitle him to delivery up of the receipts. There is, in truth, no answer set up to the Plaintiff's claim, so far as the debt is concerned, apart from the mode of recovering it. … I cannot say that there is anything in such circumstances which has, in equity, absolved the Defendants from their original liability to pay the debt of which the receipts are evidence, or any reason why a Court of Equity should not exercise its jurisdiction to investigate a legal question with a view to equitable relief, or any reason why I should not myself decide that legal question. Having come to this conclusion with respect to the right of the Plaintiff to the money expressed in the receipts, and, as a necessary consequence, his right to the instruments, which are evidences of the debt, so long as the debt is unpaid, I think the jurisdiction of this Court is not confined to relieving the Plaintiff from the mere difficulty which the absence of these instruments occasions, reserving further directions, and leaving him to try the same question in a Court of law which, upon all the evidence that it is suggested the case affords, I have already decided in his favour; but that the Court may, at the hearing *decree payment to the Plaintiff of the principal debt and the interest and costs*.

Pearce v Creswick demonstrates that a court of equity may issue an injunction to compel the payment of a sum of money, notwithstanding that an action at law leading to the grant of a perfectly adequate common law remedy might well have been brought. The Vice-Chancellor was not barred from granting an order in equity to the same effect, so long as some part of the entire dispute was properly within the equity jurisdiction and if there was no good reason to send the matter for trial at law.

Since, in *Pearce*, no major issues of fact were in dispute, and equity's jurisdiction had already been validly invoked by reason of the need for discovery, to avoid *needless* multiplication of proceedings, it was apposite for the Vice-Chancellor to make the order of injunction sought by the plaintiff.

(b) Hammond v Messenger (1838)

The possibility that a court in its equitable jurisdiction may issue an injunction to compel a debtor to tender payment of a fixed sum of money to an assignee is hinted at in *Hammond v Messenger* where an equitable assignee of a debt sought a decree ordering the debtor to tender payment to him.

Shadwell V-C declined to make the order. He began his judgment with the following observation:[26]

> If this case were stripped of all special circumstances, it would be simply a bill filed by a plaintiff who *had obtained* from certain persons to whom a debt was due *a right to sue in their names for the debt*.

By this, it would seem the plaintiff-assignee had *already* obtained 'a right to sue in their [the assignors'] names for the debt'. One would expect that that would have been the case since this appears to have been the standard commercial practice whenever legal choses were equitably assigned.[27]

Accordingly, Shadwell V-C's's decision to dismiss the bill is easily understood: if the assignee was *already* authorised at law to bring proceedings at law against the debtor, Messenger, for non-payment of the debt, there was no obvious basis to invoke the equity jurisdiction:[28]

> It [the Plaintiff's prayer for relief] then proceeds as follows: 'or that the Plaintiff may be at liberty to use the name of the Defendants, Wilks & Wooler, in an action at law to be brought by him against Messenger.' There is, however, no case stated which shews that Wilks

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26 (1838) 9 Sim 327, 332; 59 ER 383, 385 (emphasis added).

27 As one would expect of any prudent businessman of the time. See text to 4, in Chapter VII, above.

28 (1838) 9 Sim 327, 337; 59 ER 383, 387.

> & Wooler have at all interfered to prevent, or that they intend to prevent the Plaintiff from using their names at law.

Shadwell V-C did not hold that the proposition that a court of equity might issue an order of injunction to compel the debtor to pay a fixed sum of money was untenable. *Hammond v Messenger* suggests that there could be cases where a court might issue an injunction within its equitable jurisdiction to compel performance of even a fixed sum of money.

What might those circumstances be?

Suppose, in *Hammond v Messenger*, no power of attorney had been granted, contrary to the usual commercial practice. Without such grant of authority for the purpose as would be recognised by a common law court, no proceedings at law could be brought by the assignee against the debtor. But, as previously explained,[29] by reason of equity's recognition that an equitable assignment of a legal chose in action amounted to a trust of the benefit of the contract *and an agreement* to lend the assignee the assignor's name should proceedings at law be required, [30] such assignee could bring proceedings in equity to compel performance of that agreement by injunction if the assignment was supported by consideration.

Alternatively, if the assignment were gratuitous, since equity recognised that such assignment operated by means of a trust, the assignee could bring proceedings in equity to compel the assignor to bring proceedings at law against the obligor to the contract. Either way, an assignee of the benefit of a contract could legitimately seek

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[29] See Chapter VI, Section 4.

[30] 2 Bl Comm 442.

the assistance of equity where the assignor was un-cooperative. And once within that jurisdiction, to avoid needless multiplicity of proceedings, it would be open to the court to grant an injunction, not just to compel the assignor to duly authorise the assignee so he could bring proceedings at law against the obligor, or to compel the assignor to bring those proceedings at law, the court could order the obligor to pay the sums in question to the assignee on the principle in *Knight v Knight*.[31]

There seems to be no reason why the reasoning employed in the later decision in *Pearce v Creswick* on the basis of the principle in *Knight v Knight* might not be applied to a case where the court's equitable jurisdiction had been validly invoked to seek an injunction to compel the grant of an authority, or to compel the bringing of an action at law. For as Story observed:[32]

> Perhaps the most general, if not the most precise, description of a court of equity, is, that it has jurisdiction in cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate and complete remedy cannot be had in the courts of common law. The remedy must be plain; for if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for, if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity. *And it must be complete;* that is, it must attain the full end and justice of the case. *It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time, and in future; otherwise equity will interfere and give such relief and aid as the exigency of the particular case may require*. The jurisdiction of a court of equity is, therefore, sometimes concurrent with the jurisdiction of a court of law; it is sometimes exclusive of it; and it is sometimes auxiliary to it.

Consequently, had it been the case in *Hammond v Messenger* that no authority which would have been recognised by a court in its common law jurisdiction had been granted to the assignee-plaintiff, or, having granted such authority, the assignor

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31 *Knight v Knight* (n 20).

32 Story (1884) §33 (emphasis added, references omitted).

had revoked it, or was threatening to do so, it seems likely that Shadwell V-C would have decided the other way. In such circumstances, there *would* have been grounds to seek the assistance of equity to enforce the assignor's *agreement* to lend her name to the assignee by a mandatory injunction to compel the assignor to so authorise the assignee, if it had not previously been granted; or a prohibitory injunction to compel the assignor to refrain from carrying out any threat to revoke such authority, if already made; or a mandatory injunction to compel the assignor to authorise the assignee anew, if he had already revoked such authority which had previously been granted. And once the assignee came within the jurisdiction of the court of equity, so far as it was possible for the court to completely dispose of the issues in dispute between the obligor and the assignee, it would make such orders to resolve those disputes, even if a court of common law could grant common law remedies as would have been adequate to the task.

(c) Durham Brothers v Robertson (1898)

The position hinted at in *Hammond v Messenger* was preserved post-Judicature. Section 24(1), Judicature Act 1873 provided:

> If any plaintiff or petitioner … claims to be entitled … to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the said Courts respectively …, and every Judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of the Act.

Hence, as Chitty LJ observed in *Durham Brothers*:[33]

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[33] *Durham Brothers v Robertson* [1898] 1 QB 765 (CA) (emphasis added).

> As is well known, an ordinary debt or chose in action before the Judicature Act [1873] was not assignable so as to pass the right of action at law, but it was assignable so as to pass the right to sue in equity. *In his suit in equity* the assignee of a debt, even where the assignment was absolute on the face of it, had to make his assignor, the original creditor, party in order primarily to bind him and prevent his suing at law, and also to allow him to dispute the assignment if he thought fit. …

There was, accordingly, no bar to the court granting an equitable remedy within its equitable jurisdiction on application by the assignee, notwithstanding the availability and adequacy of a remedy at common law.

(d) William Brandt's v Dunlops (1904)

Brandt's was decided in 1904. But even then, the rules as to how the court's common law and equitable jurisdictions might be invoked, remained unchanged. Had the plaintiff-assignee (Brandt's) sought to bring its claim against the defendant debtor (Dunlops) within the court's common law jurisdiction, this would have been difficult, if not impossible. Brandt's was not privy to the contract of sale between the assignor (Kramrisch) and the debtor. Neither had Brandt's provided consideration in support of that contract. Nor, from the facts, is it at all clear that Kramrisch had granted Brandt's any authority to bring proceedings at law against Dunlops. Though the facts suggest that Kramrisch had authorised Brandt's to inform Dunlops that it was to tender payment for the goods it had purchased to Brandt's, there is nothing in the facts, nor in the judgments, to suggest that Brandt's had been authorised (in a manner recognised at law) to bring the proceedings at law against Dunlops as Kramrisch's agent.

If Brandt's had not been authorised to bring such proceedings within the court's common law jurisdiction, then it must have brought the proceedings within the court's *equitable* jurisdiction seeking a suitable injunction to overcome the

problem. But having come within the court's equitable jurisdiction, so far as the facts before the court made it clear that the defendant had no defence to the claim at law or in equity, it having paid 'the wrong people'[34] by reason of its own internal mismanagement, it would conform entirely with principle for the court to make a final order within its equitable jurisdiction which would quiet the entire dispute between the parties, subject to the joinder of the assignor as a matter of *practice* as a precaution against the assignor subsequently bringing proceedings within the court's common law jurisdiction to re-litigate the issues, anew.

Though the debtor had been invited to do so, 'the Dunlops disclaimed any wish to have him [Kramrisch or their trustee in bankruptcy] present'.[35] So the party in whose interest the rule of practice requiring joinder of the assignor had been developed had indicated that it was prepared to run the risk of such re-litigation. Consequently, there was no reason for the House of Lords *not* to order Dunlops to pay the sums due on the contract for sale to Brandt's as assignees of the benefit of that contract within the court's *equitable* jurisdiction, Brandt's having come into that jurisdiction by reason of (we may infer) its not having already been authorised by the assignor to bring such proceedings at law.

If, pre-Judicature, this could be done (given *Pearce v Creswick*) when the courts of equity and common law were completely distinct administrative entities, the same would be true, *a fortiori*, post-Judicature when the separation between the court's equitable and common law jurisdiction had become entirely conceptual. So the power of the courts of equity to grant such remedy were transferred to and

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34 *William Brandt's* (n 12) 461.

35 ibid 462.

preserved within the Supreme Court of Judicature by ss 18 and 24(1), Judicature Act 1873. The effect of s 24(1) was then preserved pursuant to s 37, Supreme Court of Judicature (Consolidation) Act 1925. And, for the reasons mentioned previously,[36] such power is implicitly retained within s 49, Senior Courts Act 1981.

Brandt's was arguably a case where the court was *not* acting within its common law jurisdiction. It was, in a sense, the obverse of *Hammond v Messenger*, being a case where part of the dispute between assignee and obligor sufficed to bring the assignee within the court's equitable jurisdiction. And once within it, the assignee might seek not only such remedy against the obligee-assignor which was the true basis for accessing that equitable jurisdiction to begin with, the assignee might also seek an order of injunction against the obligor/debtor to compel it to pay the sum owed on the contract of sale to the assignee. Since the entirety of such proceedings would have been brought within the court's equitable jurisdiction without engaging its common law jurisdiction, it would follow that the common law's *substantive* need for joinder of the assignor (by reason of the assignor being neither privy to the contract, nor having provided consideration in respect of it) would not arise.

By way of answer to the question posed by the editors of *Meagher, Gummow and Lehane* as to: 'How a person not the legal owner can, the Judicature Act [1873] notwithstanding, prosecute what is, in effect, an action at common law is not explained[?]'[37] given the above, perhaps the assignee in *Brandt's* was not prosecuting an action at common law, at all.

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36 Chapter V, text to n 52.

37 Meagher, Gummow & Lehane (2015) para 6-520.

PART IV:

NOTICE

IX. NOTICE, THE RULE IN *DEARLE V HALL*, AND CONSTRUCTIVE TRUSTS

Neither what the obligor to a chose in action is duty-bound to do, nor to whom he is duty-bound to do it, changes when the obligee equitably assigns the chose. Notice of such assignment has no such effect, either.

Notice generates a new and additional *equitable* duty between the obligor and the assignee in which the obligor is duty-bound to the assignee not to dishonestly assist the assignor in breaching her equitable obligations to the assignee. Notice may also generate an equity pursuant to the rule in *Dearle v Hall*,[1] in that:[2]

> [u]nder the rule in *Dearle v Hall*, if the owner of an equitable interest[3] assigns it to [C_1], who gives no notice[4] of the assignment to the trustees or the debtor, and then for valuable consideration assigns it over again to [C_2] who, having had no notice of the prior assignment when he advanced his money, gives notice of his own assignment to the trustees or the debtor, [C_2] has priority over [C_1].

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1 *Dearle v Hall* (1828) 3 Russ 1, 38 ER 475.

2 Lewin (2015) para 33-029.

3 The rule in *Dearle v Hall* applies equally to cases where *legal* choses in action have been equitably assigned. See, eg, *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 Ch D 128 (CA) 132, 135; *Ward v Duncombe* [1893] AC 369 (HL) [1893] AC 369, 383; *BS Lyle v Rosher* [1959] 1 WLR 8 (HL) 16; *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150 (QB) 163. And if not for s 137(1), LPA1925, it would not apply to equitable assignments of equitable interests in realty: *Jones v Jones* (1837) 9 Sim 633, 59 ER 251.

4 Notice for *Dearle v Hall* purposes need not be in any particular form. But s 137(3), LPA1925 provides that non-written notice of an equitable assignment of an equitable interest in realty or personalty held by a trustee shall not affect the priorities of competing claims to that equitable interest.

1. Notice and unilateral variations of equitable obligations

There is a view that equitable assignment and notice of the same changes the obligor's obligations when the obligor receives notice of the equitable assignment. In 1884, Cotton LJ noted by way of *dicta* that:[5]

> Where there is an assignment, available only in equity, of an interest in personalty vested in a trustee, or of a debt due to the assignor, there notice is necessary, for until notice is given, the trustee can pay to his original cestui que trust, and the debtor may pay to his creditor. But after notice the trustee holds the fund in trust for the assignee, and the debtor cannot obtain a good discharge without the concurrence of the transferee. *In equity*, without any further act done by the assignor there is, as against the trustee or debtor, *a change of the person entitled to be considered the cestui que trust or creditor*, and disregard of the assignment will, *in equity*, make the trustee or the debtor liable.

Cotton LJ's dicta cannot be read literally to mean that the assignee is substituted for the assignor such that the obligor becomes obligated to the assignee instead of the assignor following notice of the assignment. Not only would such a result would be unprincipled, suggesting that equity countenances the possibility of a unilateral change in the obligee to legal or equitable choses in action, contrary to the rules of equity which recognise that voluntarily undertaken equitable obligations are just as much incapable of unilateral variation as voluntarily undertaken obligations at

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5 *Société Générale de Paris v Tramways Union Co* (1884-85) 14 QBD 424 (CA), 446 (emphasis added). Lindley LJ made broadly similar observations, also by way of *dicta*, suggesting that according to the rule in *Dearle v Hall*, 'the assignee of a trust fund or debt must, in order to protect himself, give notice to the trustee or debtor, as the case may be, *of the change that has taken place in the right to receive the fund or debt*.' (at 457), though he did not so clearly suggest that the change entailed an extinction of the original obligation between the trustee/debtor and the assignor, with a new one between the trustee/debtor and the assignee. Brett MR did not address the point. Though the decision of the Court of Appeal was upheld on appeal: *Société Générale de Paris v Walker* (1885) 11 App Cas 20 (HL), the House of Lords did not specifically address the point, either.

common law,[6] it is contradicted by the cases which have considered the operation of notice within the rule in *Dearle v Hall* when the obligation associated with the chose assigned is jointly owed by multiple obligors (eg, where a trust asset is held jointly by multiple trustees).

Example 9.1

Suppose T1, T2 and T3 jointly (but not severally) hold the legal title to 10,000 BCL shares on trust for A. A equitably assigns the benefit of her interest in T1's, T2's and T3's jointly held legal title in the shares to C1 for value. C1 then gives T1 notice of the assignment. T1 plans to inform T2 and T3 of the assignment to C1, but he dies before doing so. The legal title in the shares is thereafter held jointly by T2 and T3 as surviving trustees.

A then executes a deed of assignment, purporting to assign her equitable interest in the legal title in the shares now held by T2 and T3 to C2, after C2 had made inquiries of T2 and T3 as to whether they knew of any prior assignments or encumbrances of the same. T2 and T3 had replied that they knew of no prior assignments or encumbrances, following which C2 paid A £5,000 in exchange for the assignment to him. C2 then gave notice to T2 and T3 of this assignment.

Much later, C1 informs T2 andT3 of the prior assignment made by A.

If the notice given by C1 to T1 had the effect of unilaterally changing the obligation owed by T1, one might think that T1 would thereafter hold the legal title to the shares for C1's benefit, and not at all for A (A would have 'dropped out'). If so,

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6 As discussed in Chapter II.

since T1 held such legal title in the shares *jointly* with T2 and T3, their *jointly owed* duty would have been changed, also.

Accordingly, even though T1 had died without informing T2 or T3 of the assignment to C1, it would seem they would be bound to C1 from the time of such notice to T1, even though they had remained ignorant of it until after notice of C2's assignment had been effected. Consequently, if notice of assignment had the effect of unilaterally changing the *joint* duty of T1, T2 and T3, it would seem to follow that the assignment to C2 would be a nullity, as T2 and T3 would not have owed any duty to A of which A might equitably assign to anyone.

But that is not the law. In *Meux v Bell*, Wigram V-C held as follows:[7]

> In *Smith v Smith* the Court of Exchequer decided that notice to one trustee was sufficient, at least so long as that trustee lived, and the circumstances of the case remained unaltered. The reason why notice to one was held sufficient was because nothing less than inquiry of all the trustees would satisfy a prudent inquirer. … [I]n the altered circumstances which the death of the trustee, who alone had notice, would have introduced, inquiry of all the existing trustees would not have led the inquirer to a knowledge of the previous incumbrance, and the reasoning of the court in *Smith v Smith* would no longer apply. *Timson v Ramsbottom* supports this reasoning, and leaves *Smith v Smith* untouched. Lord Langdale did not there decide that, if the trustee or executor, who in that case had notice, had been living at the time when the second incumbrancer gave notice of his incumbrance, the notice which that trustee or executor had would not, in such circumstances, have been sufficient. He decided only that there was no sufficient notice of the first incumbrance at the time when notice of the second incumbrance was given; and undoubtedly, at that time there was no sufficient notice of the prior incumbrance, for inquiry of all the then existing trustees would have been unavailing. … In *Smith v Smith* inquiry would, in the circumstances of that case, have led to a knowledge of the prior incumbrance, and the notice was therefore, properly held sufficient. In *Timson v Ramsbottom* inquiry would not have led to a knowledge of the prior incumbrance, and the notice was

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7 (1841) 1 Hare 73, 96–98; 66 ER 955, 964.

> properly held to be insufficient. I entirely concur in the principle of both those decisions.

The above analysis of *Smith v Smith*[8] and *Timson v Ramsbottom*[9] was then explicitly approved by Lord Herschell LC (with whom Lord Hannen agreed) in *Ward v Duncombe*.[10]

Applying the principles set out in *Meux v Bell* to the facts in Example 9.1, we have the following. Because the assignment to C2 was effected *after* T1's death, and T1 had died before informing T2 or T3 of the assignment to C1, assuming T2 or T3 had not been given notice of that earlier assignment by other means, it would not have been possible for C2 to have discovered the prior assignment in favour of C1 even if he had (as prudence would have required him) made inquiries of all extant trustees at the time of the assignment to him as to their knowledge of any prior assignments or incumbrances, assuming they had responded to his inquiries. Therefore, C2 could not be treated as if he had taken A's assignment subject to the prior assignment to C1 since there was no possibility of his discovering it, even if he had made inquiries of all the extant trustees at that point in time. Accordingly, not only would C2's claim as assignee be perfectly valid, it would be unencumbered by C1's prior claim and the rule in *Dearle v Hall* would not apply for C2's benefit.

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8 (1833) 2 C & M 231, 149 ER 745.

9 (1837) 2 Keen 35, 48 ER 541. *Timson* was followed in *Re Phillips Trusts* [1903] 1 Ch 193 (Ch) (Kekewich J);

10 [1893] AC 369 (HL) 381–82. Lord Macnaghten expressed some doubt as to the authoritativeness of *Timson v Ramsbottom* (at 394–395), but it is clear that the majority, led by the Lord Chancellor, did not share them.

The rationale[11] for the rule in *Dearle v Hall* rests, most probably, in this: by giving notice to the obligor, an assignee takes steps to publicise his interest so as to give others who might subsequently be interested in acquiring an interest in the same subject-matter as had been assigned to the assignee some opportunity to discover such prior assignment,[12] and so, make an informed decision whether to proceed, or not. Hence, as Lord Lyndhurst LC held in *Foster v Cockerell*, if the rule in *Dearle v Hall* were otherwise:[13]

> it would enable a *cestui que trust* to commit a fraud, by enabling him to assign his interest, first to one, and then to a second incumbrancer, and perhaps, indeed to a great many more; and these later incumbrancers would have no opportunity of ascertaining, by any communication with the trustees, whether or not there had been a prior assignment of the interest, on the security of which they were relying for provision of their claims.

Where two assignees take assignments over the same chose in action without taking such steps to publicise their respective assignments, each is as bad as the other in their lack of concern for others who might subsequently deal with the assignor in

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11 Guest and Liew (2015) para 6-06.

12 T1 would be privileged against C2 to disclose the prior incumbrance had C2 made inquiries before taking the assignment from A. In *Low v Bouverie* [1891] 3 Ch 83 (CA) 99–100 Lindley LJ (with whom Bowen LJ substantially agreed) said: '[A] person who proposes to buy or lend money on [the beneficial interest of a *cestui que trust*] has no greater rights than the *cestui que trust* himself. There is no trust or other relation between a trustee and a stranger about to deal with a *cestui que trust*, and although probably such a person in making inquiries may be regarded as authorized by the *cestui que trust* to make them, this view of the stranger's position will not give him a right to information which the *cestui que trust* himself is not entitled to demand. The trustee, therefore, is … under no obligation to answer such an inquiry. He can refer the person making it to the *cestui que trust* himself.' See also *Hallows v Lloyd* (1888) 39 Ch D 686 (Liverpool District Registry); *Ward v Duncombe* (n 3) 394 (Lord Macnaghten). However, trustees holding legal title to realty on trust are not so privileged: s 137(9), LPA1925.

13 *Foster v Cockerell* (1835) 3 Cl & F 457, 475–76; 6 ER 1508, 1515–16.

respect of the same chose. And so, 'where the equities are equal, the first in time prevails'.[14] But where one assignee has given notice (thus giving others the benefit of such publicity as he might himself have hoped to enjoy) whereas the other has not (or has yet to do so), the equities between these two assignees would *not* be equal. The assignee who had given notice will have acted over and beyond what he might have been duty-bound to do, and so, had acquired a better equity, as compared with the other assignee. Consequently, in Example 9.1, notwithstanding that T2 and T3 would have had actual knowledge of C1's prior interest by February 2nd, 2016, payment of sums accruing due under the terms of the trust to C2 thereafter in accordance with the rule in *Dearle v Hall* would *not* be taken to be a wrongful act in equity.[15]

As explained in *Meux v Bell* and *Ward v Duncombe*, *Smith v Smith* and *Timson v Ramsbottom* tell us that the rule in *Dearle v Hall* does not operate on the basis that notice of an equitable assignment of an equitable chose in action effects a unilateral change in the obligation owed by the obligor(s) to that equitable chose, such that they are no longer duty-bound to the original assignor-obligee, but are duty-bound to the assignee of whom they had received notice, instead.

But suppose all the extant trustees had been given notice in Example 9.1. Might each of their obligations have been unilaterally varied given such notice? Again, this is doubtful.

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14 *Rice v Rice* (1854) 2 Drew 73; 61 ER 646.

15 *Quaere* whether notice acquired by the obligor independently of the assignee ought to give rise to a similar equity. It was assumed in *Lloyd v Banks* (1868) LR 3 Ch App 488 (Ch) that it would.

In *Re Wasdale*,[16] trustees of a trust fund were given notice of an assignment of a reversionary interest in that fund. They all subsequently retired, and new trustees were appointed in their place. Following the retirement of the original trustees, a subsequent assignment of the same reversionary interest was effected, and notice of the same was given to the new trustees. When the reversion fell in, both the first and second assignees applied for the reversion to be paid to them. In these circumstances, Stirling J held that the first in time rule would apply, and that the first assignees were to be paid the reversion in priority to the second assignees.

If the earlier notice to all of the original trustees had the effect of changing their duties, such that they were no longer duty-bound to the original beneficiaries under the terms of the trust, but were instead duty-bound to the first assignee, and such change was binding and effective in respect of *such* trustees as had knowledge of the assignment, it is difficult to explain why the *replacement* trustees might be so bound by a 'change' of which they had no knowledge, at all. So the proposition that the change only affects such trustees as know about the assignment is false. Indeed, if that were the rule, an unseemly and disorderly state of affairs would result. As Lord Mcnaghten observed in *Ward v Duncombe*:[17]

> Certainly, I can imagine nothing more inconvenient than that it should be possible to have a scramble for priorities on the appointment of new trustees. Nothing, I think, would be less likely to conduce to the security of equitable titles.

In light of the above, it must follow that Cotton LJ's statements as to how notice of an equitable assignment of an equitable chose effects a substitutive transfer

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16 [1899] 1 Ch 163 (Ch).

17 *Ward v Duncombe* (n 3) 395. Lord Herschell LC (with whom Lord Hannen agreed) came to much the same conclusion (at 382).

of that chose by substituting the assignee in place of the assignor-obligee as the party to whom the equitable obligor is thereafter obligated to should be rejected.

2. Notice and unilateral variations of common law obligations

What, then, of Cotton LJ's seeming suggestion that notice of an assignment of a legal chose might effect a change to such legal chose in action?

The answer is much the same. A literal reading of Cotton LJ's words is contradicted by the *ratio decidendi* in *Jones v Farrell* (a decision of the Court of Appeal in Chancery),[18] and in *Applin v Cates* (a decision of Wood V-C).[19] The proposition that notice has such effect has also been rejected by Simon Brown LJ in *Deposit Protection Board v Dalia*.[20] But seeing as how Simon Brown LJ was in the minority, it may be necessary to take a closer look at the other two cases.

(a) Jones v Farrell (1857)

In this case, a debtor (B) owed a debt jointly to certain creditors (A1 & A2). Despite receiving notice that the debt of had been equitably assigned to assignees (C), and despite having provided an undertaking that he would pay C whatever he owed A1 & A2, B tendered payment to A1 & A2, which they accepted.

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18 (1857) 1 De G & J 208, 44 ER 703.

19 *Applin v Cates* (1861) 30 LJ Chan 6 (Ch).

20 [1994] 2 AC 367 (CA) 382: 'Lord Irvine's argument at its most extreme is that once notice is given of an equitable assignment the debtor ceases to be liable to the assignor—his only liability from that time on is to the assignee. … This argument I reject. … [T]here remains a legal liability to the assignor albeit, true, one which the debtor meets only at his peril.' Admittedly, Simon Brown LJ was in the minority on this point. On appeal, though the House of Lords reversed the decision of the Court of Appeal, it did not address this particular point.

C then brought proceedings in equity against B, and A1 & A2. At first instance, C failed to obtain any decree ordering B to pay C, and only succeeded in obtaining a decree requiring A1 & A2 to pay C such sums as they had received from B.

On appeal to the Court of Appeal in Chancery, Lord Cranworth LC held as follows:[21]

> [B] not only had notice of the assignment, but he had (if that were necessary, which I do not say that it was) given a written undertaking that he would act upon that notice. Therefore I think the decree was wrong in absolving him from the payment. I think it was perfectly right in ordering the other parties [A1 & A2] who had received the money to pay. That they are, in truth, men of straw (one having since become bankrupt and the other gone out of the country) is unimportant. Whether they are solvent or not, though they are liable to pay, they are not the only parties liable to pay. [B], the original debtor, having had his debt assigned, remains also liable to pay, and therefore I conceive the decree ought to have made all the three [B] as well as [A1 & A2], responsible for this debt, and I think it ought to be varied to that extent.

The result, therefore, was that C had an order that A1 & A2 pay to him a sum of money equal to that they had received from B,[22] as well as an order that B was to pay C such sum as he had paid A1 & A2. Therefore, had A1 & A2 not been 'men of straw', C would have been paid twice over.

To begin with, it may be noted that Lord Cranworth *upheld* the order made below whereby the *original* creditors (A1 & A2) were ordered to pay C. What could the basis for such order be, if, as Cotton LJ suggested in *Société Générale de Paris v*

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21 ibid, at 1 De G & J 220, 44 ER 708.

22 Ie, a personal liability. A1 & A2 would also have held the traceable substitutes (if any) of the money received from B on trust for C (see *King v Victoria Insurance Company Limited* [1896] AC 250 (PC) 255–56).

Tramways Union Co (in the extract above), the obligation between debtor and creditor-assignor had been extinguished upon the debtor's receiving notice of the assignment, with the assignee taking the creditor-assignor's place?

If Cotton LJ's suggestion were taken literally, it would be obvious that the *debtor* (B) might bring proceedings to recover such sums as had been paid to A1 and A2, since it would have been paid in discharge of *no* obligation which B owed to them. It is not apparent, however, why A1 and A2 might then be ordered to pay anything to C in purported discharge of such non-existent obligation (if Cotton LJ's suggestion be correct).

Even if A1 and A2 (by reason of the trust effect) were duty-bound to C (as their assignee) to hand over any traceable substitutes of the benefit of the chose in action which they held for C's benefit, if notice of assignment had *changed* B's duty such that he was thereafter duty-bound *to C* and not to A1 and A2, how would B's transfer of his legal title in the monies which he paid over to A1 and A2 be the traceable substitute of the chose in action which A1 and A2 might, as assignors, be said to hold on trust for C? Surely, if Cotton LJ's analysis was literally true, the Court of Appeal should have reversed the decision below?

On the analysis in this thesis, the basis for upholding the decision and order granted at first instance is straightforward. Neither equitable assignment of the debt to C, nor notice thereof, could have the effect of unilaterally changing B's obligation *at law*. So B's tender of payment to A1 and A2, when accepted by them, *would* discharge his duty at common law by precise performance. But A1 and A2 would then hold the sums received on trust for C, being the traceable substitute of the benefit of the loan contract which they had equitable assigned to C, and which, by reason of

the 'trust effect', they held on bare trust for C's benefit. At the same time, A1 and A2 would be under a duty to preserve such traceable substitute, and to the extent that they might dissipate it leaving no traceable substitute, they would be jointly liable to make good such shortfall in the trust property out of such other assets as they might beneficially hold.[23] Hence the court below was perfectly justified in ordering them to pay C.

Having upheld the decision below, Lord Cranworth went on to make a further order, in effect, requiring B to pay C a sum equivalent to that which he had paid A1 & A2. This is extremely strange, for why should B be paid twice over for the same debt? The principled reason underlying this decision must be that the court was *not* ordering B to pay the same debt twice over, but that by tendering payment to A1 & A2 with the knowledge of C's equitable interest in the debt by reason of the assignment, which assignment B had not challenged (given his written undertaking to C), B had committed an equitable wrong for which he was liable to C. As Professor Stone noted:[24]

> [T]he double liability of the debtor cannot be predicated on any theory of property which came into his hands or legal right which remained with the assignor, but must rest on the fact that he, with knowledge of the assignee's right, has so acted as to interfere with the equitable protection which a court of equity throws about the power of attorney acquired by an assignee.

We should note that the payment to A1 & A2 in *Jones v Farrell* did not appear to have been made under threat of any real or substantial pressure of action by A1 &

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23 *Fortescue v Barnett* (1834) 3 My & K 36, 40 ER 14; *Re Patrick* [1891] 1 Ch 82 (CA) 87.

24 HF Stone, 'The Nature of the Rights of the Cestui Que Trust' (1917) 17 Columbia Law Review 467, 485. See also CH Tham, 'Notice of assignment and discharge by performance' [2010] LMCLQ 38, 52, fn 79; Trukhtanov (2010) 556, fn 49.

A2 (as Knight-Bruce LJ pointed out).[25] It would seem to follow, then, that B may well have acted unconscionably without any excuse.

Given the above, B was not being made to pay the same debt twice. Rather, by discharging his debt obligation *at law* when he tendered payment to A1 & A2, B had incurred an *additional* equitable liability to C, and was being made to pay C in equity in light of his unconscionable acts in tendering payment to A1 & A2.

(b) Applin v Cates (1861)

In *Applin v Cates*, Peters borrowed £1,185 from Cates. They executed a 'letter of licence' which provided that the debt was to be repaid with interest in yearly instalments of £100 per year for seven years and five months from May 9th, 1857, and thereafter, by monthly instalments of £8 6s 8d each. There was also express provision that if any instalment was not duly paid within a week of becoming due, Cates could revoke the 'letter of licence.'

By an indenture dated April 28th, 1855, in consideration for £215, Cates assigned[26] to Applin the balance of the debt still outstanding from Peters (being £641 13s 4d). *Inter alia*, the deed granted Applin a power of attorney to sue and give receipts in Cates' name.

Peters received notice of the assignment in July 1855, but continued to pay Cates. In July 1859, Applin served further notice on Peters, requiring him to tender

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25 *Jones v Farrell* (1857) 1 De G & J 208, 221–22; 44 ER 703, 709, in contrast with the debtor's position in *Applin v Cates* (n 19) which is discussed below.

26 Since the assignment was effected in 1855, it was necessarily equitable and could not be statutory.

payment of the loan instalments to Applin, or Applin's solicitor, henceforth. Peters replied that this notice of July 1859 could not legally justify his withholding payment from Cates.

On August 9th, 1859, a loan instalment became due. Applin requested Peters to tender it. Peters informed Applin that Cates had called earlier that day, and had accepted payment of the instalment. Although Peters told Cates about Applin's notice of the previous month, Cates warned that he intended to initiate proceedings against Applin for fraud, and threatened to terminate the instalment arrangement if Peters did not pay the outstanding instalments punctually to him. Under such circumstances, Peters told Applin that he had to continue to pay the instalments to Cates until Applin obtained an injunction.

Applin duly applied to the High Court of Chancery seeking an order for an account, an injunction for payment of the instalments that had accrued due on and since August 9th, 1859, and injunctions to restrain Peters from tendering payment to Cates, and to restrain Cates from accepting any such tenders of payment. Wood V-C granted the second and third injunctions prayed for, but not the first.

The report records that:[27]

> … in [Wood V-C's] opinion *the defendant Peters was not in default at all*. Having notice that Cates disputed the validity of the assignment, he could not with safety pay the instalments to the plaintiff, nor, having regard to the clause in the letter of licence enabling Cates to determine it on default in punctual payment, could he take the course of withholding payment until it was settled which party was entitled; for if he had done so, and it had been ultimately determined that the assignment to the plaintiff was invalid, he would have been at the mercy of Cates, who could in the mean time have determined the letter

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27 *Applin v Cates* (n 19) 8 (emphasis added).

> of licence and negotiated the bills. Under such circumstances, *Peters was justified in continuing to pay Cates until the plaintiff obtained an injunction*. Peters thus being in no default, there was no reason why he should not be reimbursed his own costs until the plaintiff [Applin] had been paid. He must, therefore, retain his costs in the first place, and pay the subsequent instalments to the plaintiff.

Wood V-C held that Peters was *justified* to pay Cates until the injunction was granted. This suggests that Peters' tender of payment to Cates in respect of the August instalment prior to the grant of such injunction, when accepted by Cates, validly discharged Peters' duty to pay that instalment which had fallen due at law, *and* did not expose Peters to any liability *in equity*.

The *ratio* in *Applin v Cates* cannot be explained if notice of equitable assignment extinguished the creditor-debtor claim-right/duty jural relation between Peters and Cates, and replaced it with a new creditor-debtor claim-right/duty jural relation between Applin and Cates, with Applin taking the place of Cates as Peters' creditor.[28] It can, however, be explained as an application of the principle that by such notice, a *new* equitable duty arose between Peters and Applin.

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[28] Indeed, if equitable assignment and notice thereof operated in that way, Eyre CJ in the Court of Common Pleas need not have concluded in *Legh v Legh* (1799) 1 Bos & Pul 447, 126 ER 1002 that the defendant-debtor in that case (who had tendered payment to his creditor and/or taken a release of the debt from his creditor, despite having had notice that the debt had been assigned to an assignee) was precluded from *pleading* such payment and/or release. Nor would Buller J in that case have needed to hold that the defendant had, 'in effect agreed not to plead payment …' (at 1 Bos & Pul 448, 126 ER 1003. If the debt had been 'transferred' to the assignee, such payment and/or release would have simply been ineffective to discharge such a transferred debt, and there would be no question of barring the pleading of such nullities. The soundness of this approach may then have been put on a more obviously better footing when by s 85, CLPA1854, the common law courts were granted the power to give effect to 'replication[s] on equitable grounds', meaning, it could take note of grounds on which a common injunction could have been granted in equity, and give effect to them without requiring the party seeking to rely on such equitable grounds to go to a court of equity: see,

We can infer that this duty was not strict, but took into account Peters' knowledge and state of mind. As Wood V-C held, Cates was not in default *at all.* Peters could not be said to have been in breach of his duty *at common law* since Peters had precisely performed his legal obligation. Neither was he held to be liable in *equity* even though by tendering payment to Cates, Peters had destroyed the chose in action which Cates, as assignor, was equitably duty-bound to Applin to preserve by reason of the 'trust effect'

Wood V-C's judgment noted that Peters was given to understand that the assignment's validity was disputed and that Cates would terminate the instalment payment arrangements should payment to him of any instalments be delayed. Presumably, given these facts, Wood V-C was not convinced that Peters had acted in a manner that was 'unconscionable' as would bring him within equity's jurisdiction.[29]

Applin v Cates shows that notice of equitable assignment does not cause the obligor to cease to be obligated at law to the obligee-assignor, and to become obligated instead to the assignee. Rather, it tells us that notice generates a new *equitable* obligation between the obligor to the chose assigned which, if breached, may expose the obligor to an equitable liability to pay equitable compensation. But

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eg, *De Pothonier v De Mattos* (1858) El Bl & El 461, 120 ER 581where the court of Queen's Bench relied on the power granted it by s 85 to preclude a debtor who had taken a release from his creditor, notwithstanding his having been notified that the debt had been assigned, to plead such release when the assignee brought an action at law against him for non-payment.

29 Further, even if Peters' dishonest state of mind had been established on the facts, the award of equitable compensation, as an equitable remedy, would still have been within the court's discretion. Given the uncertainty over the validity of the assignment (which Cates contested), and Cates' power to accelerate payment by terminating the 'letter of licence', one can see some grounds why the remedy of equitable compensation might well be withheld on discretionary grounds.

such liability is not strict. All this suggests that the kind of equitable wrongdoing Wood V-C had in mind was what we would term nowadays as 'dishonest assistance'. And this conception of the effect of notice is supported by clear statements in the House of Lords.

3. Notice, dishonest assistance, and constructive trusteeship

As Lord Cottenham LC observed in *Mangles v Dixon*:[30]

> … If there is one rule more perfectly established in a court of equity than another, it is, that whoever takes an assignment of a *chose* in action, which this charter-party was, for it is not assignable in law, although it is in equity, takes it subject to all the equities of the person who made the assignment. … No barrister would presume to deny in any court of equity, that at the time that assignment was taken, and down to the time when the notice was given, during all these months, the bankers took precisely the same interest, and were subject to the same liabilities … as were the Messrs Boyd themselves. ***If they had notice, it only introduced a new head of equity against Messrs Dixon*****,** which is, that they are bound by the notice which they have, for equity will not permit a man to shut his eyes to a fact of which he has been informed; and therefore, if he has notice, he is bound by the knowledge he has thus acquired. …

In addition to generating the equity recognised in the rule in *Dearle v Hall*, notice introduces a new head of (potential) equitable liability as between the obligor (whether an obligor at law by reason of, say, debt, or an obligor in equity by reason of a trust) and the assignee.[31] Where A lends B a sum of money, absent provision

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30 (1852) 3 HLC 702, 731–732; 10 ER 278, 290 (emphasis in bold italics added).

31 *Cf Deposit Protection Board v Dalia* [1994] 2 AC 367 (CA) 386F (Russell LJ, with whom Sir Michael Fox agreed), rejecting Simon Brown LJ's careful analysis (at 381B) that, '[i]n the case of an equitable assignment [of a legal chose in action], the assignor remains the legal owner of the relevant chose (here the part of the debt assigned) whilst the assignee becomes entitled to the equitable interest in it—the "creditor in equity" …'. The point was not addressed on appeal to the House of Lords. However, the majority's position in the Court of

otherwise, B would be duty-bound to A to Φ, where 'Φ' means 'repay A the loan'. If A equitably assigned the benefit of such loan contract to C, at common law, B would still be duty-bound to A to Φ, notwithstanding such assignment and notice thereof, and at common law, B would still be privileged against C to Φ. It was only a court of *equity* which might have a different view, recognising a (distinct) 'direct obligation' arising between the obligor and the assignee.[32]

Payment to the original creditor despite notice of assignment *does* discharge the debt *at law*, as Turner LJ recognised in *Stocks v Dobson*:[33]

> The debtor is liable, at law, to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right and can only sue in the assignor's name. How can he sue if the debt has been paid?
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> If a Court of Equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment, it would be impossible for a debtor safely to pay a debt to his creditor. The law of the Court has therefore required notice to be given to the debtor of the assignment, in order to perfect the title of the assignee.

Notice, therefore, allows the debtor to be treated as though she were a trustee for the assignee so far as such notice generates a new equitable duty between the debtor and the assignee : the assignee's interest is 'perfected' by the generation of this

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Appeal has been endorsed in Chitty (2015) para 19-021, and at fn 85, it is suggested that Simon Brown LJ's reasoning on the point was incorrect.

32 See also *Row v Dawson* (1749) 1 Ves Sen 331, 333; 27 ER 1064, 1065, where Lord Hardwicke LC held that the debtor of a creditor who was made bankrupt became liable to the bankrupt's assignees-in-bankruptcy when he tendered payment to the creditor, with notice of the assignment. Obviously, such liability would have to be equitable, and not legal.

33 (1853) 4 De G M & G 11, 15–16; 43 ER 411, 413.

duty as arises between him and the debtor, following notice, such that the debtor becomes liable as a constructive trustee.[34]

We must be careful when reading statements like those of Cotton LJ in *Tramways Union Co*[35] suggesting that notice 'perfects' the interest of an assignee, and how notice 'converts' the obligor (being trustee for the assignor) into a trustee for the assignee, Such statements should not to be taken literally, as Lord Macnaghten pointed out in 1893 in *Ward v Duncombe*:[36]

> [I]t has been said that notice 'converts' the trustee of the fund into a trustee for the person who gives the notice. But that, again, is hardly accurate. The trustee of the fund is trustee for the persons entitled to the fund, whether he knows their names or not. The notice, no doubt, places him under a *direct responsibility to the person who gives the notice.*[37] If he disregards the notice, he does so at his peril. But before notice given he is just as much a trustee for the persons rightfully entitled as he is after he receives the notice, though of course, in the absence of notice, he would be safe in paying away the fund to those who appear by the instrument constituting the trust, or by title properly deduced from them, to be the true owners.

Notice of an equitable assignment of a chose cannot, in itself, lead to the obligor to that chose being constituted an express trustee for the benefit of the

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34 Thus, '[she] isn't [a trustee], but has to be treated as if [she] were' because '[p]rima facie, the beneficiary of a trust cannot sue anyone except [her] trustee': Lionel D Smith, 'Constructive Trusts and Constructive Trustees' (1999) 58 Cambridge Law Journal 294, 299.

35 *Société Générale de Paris v Tramways Union Co (CA)* (n 5).

36 [1893] AC 369 (HL) 392 (emphasis added).

37 Here, Lord Macnaghten assumed that the notice of assignment would, as it often is, be given to the equitable obligor by the assignee. But notice need not be given by the assignee: it may be given by the assignor, and may even be derived from independent sources (eg, *Lloyd v Banks* (1868) LR 3 Ch App 488 (Ch)). The 'direct responsibility' generated by receipt of the notice, therefore, is not owed to the party giving the notice, but to the assignee who has been identified in the notice.

assignee: the office of trustee may always be disclaimed.[38] So Lord Macnaghten's reference to the trustee being placed under a 'direct responsibility' must be understood, not as leading to the constitution of any express trusts, but as referring to the imposition of equitable duties and liabilities on such obligors *like* those equitable duties and liabilities undertaken by express trustee, in particular, the liability imposed on third parties to trusts who breach the equitable duty *not* to intermeddle with trust property.

Echoing a point made almost a century earlier by Dean Ames,[39] Professor Lionel Smith has noted:[40]

> It is wrong to get in the way of the performance of other people's obligations. Every system goes that far; they only differ on how generously to protect those who are owed obligations against interference by third parties.

As a matter of English law, this general duty arises in equity, and at law, as Ames noted:[41]

> From the nature of the case such a tort must be of rare occurrence. But instances may be put. [A], a *cestui que trust*, assigns his trust to [C], and afterwards, before the trustee is informed of the assignment, releases the trust to the trustee, as in *Newman v Newman*[42] .... [C]'s right against the trustee is destroyed. Again, suppose that [S], a stranger had maliciously incited B to make the release. [C]'s claim

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38 *Robinson v Pett* (1734) 3 P Wms 249, 251; 24 ER 1049, 1050 (Lord Talbot LC).

39 Ames (1913) 262.

40 LD Smith, 'Philosophical Foundations of Proprietary Remedies' in Robert Chambers, Charles Mitchell and JE Penner (eds), *Philosophical Foundations of The Law of Unjust Enrichment* (OUP 2009), 292.

41 Ames (1913) 262.

42 (1885) 28 Ch D 674 (Ch).

> against [A] and [S] would be for compensation[43] for a purely equitable tort. Compare *Lumley v Gye*[44] ...; *Bowen v Hall*[45]....

In the context of a legal chose in action such as a debt arising when money is lent by a creditor to her debtor, should the debtor come to know of an equitable assignment by his creditor of her legal chose in action against him to an assignee, that notice cannot alter what the debtor is obligated *at law* to do to discharge that legal chose in action by precise performance, or to whom he is so obligated.[46]

In the context of an *equitable* chose in action such as arises between a trustee who holds property on trust for a trust beneficiary, that which that trustee is obligated to do *in equity* to fully execute the trust and bring it to an end, and to whom he is so obligated, too, does not change merely by virtue of that trustee receiving notice of an equitable assignment by his trust beneficiary of her equitable chose in action against him to an assignee.[47] So whether the chose assigned be legal or equitable, in both cases, the significance of notice of assignment is not that it *changes* the associated legal or equitable obligations by effecting a substitution of the assignee in place of the original obligee. Rather, such notice is a necessary (though not sufficient) factor

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43 Restitutionary liability as to any gains or profits made by reason of the accessory's acts of assistance appears also to be available, so far as the dishonest assister is held to be liable as a constructive *trustee*: see, *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499. [93]. Such a remedy was granted against a dishonest assister in *Nanus Asia Co Inc v Standard Chartered Bank* [1990] 1 HKLR 396 (HC, Hong Kong). This point is further discussed in Chapter XII, Section 2.

44 (1853) 2 El & Bl 216, 118 ER 749.

45 (1881) 6 QBD 333 (CA).

46 As explained in Chapter II, Section 6.

47 As explained in Chapter II, Section 7.

which exposes the obligor(s) to the chose assigned to liability in the equitable wrong of 'dishonest assistance.'[48]

The proposition above that notice of assignment of a debt does not preclude discharge at common law if the debtor tenders payment to the creditor is iconoclastic. For example, Tolhurst,[49] Guest and Liew,[50] and editors of *Salinger on Factoring*,[51] *The law of security and title-based financing*,[52] and *Treitel on Contract*,[53] appear to suggest that payment to the creditor following notice of equitable assignment of the debt does *not* discharge the debt at common law.[54] But with respect, none of these views addresses the points made in this Chapter, and more broadly, in this thesis, in particular, the question how any equitable doctrine can change a common law obligation.

Accepting that notice does not effect a unilateral change to jural relations between the assignor-obligee and her obligor, but instead creates a new head of equitable obligation as between obligor and assignee not to become a dishonest accessory to a breach of duty by the assignor to her assignee, the question becomes

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48 Admittedly, this is odd: how may a lawful act (so far as the common law is concerned) lead to the commission of an equitable wrong? This is explored in Chapter X.

49 Tolhurst (2016) para 8.06, 394; and also para 4.20, 78; para 4.24, 85. The point has been repeated in Tolhurst and Carter (2014) 430.

50 Guest and Liew (2015) 144, para 3-62.

51 Salinger (2006) para 8.09.

52 HG Beale and others, *The law of security and title-based financing* (2nd edn, OUP 2012) para 7.96.

53 Edwin Peel, *The law of contract* (14th edn, Sweet & Maxwell 2015) para 15-022.

54 See also Chitty (2015) para 19-021.

one of ascertaining whether the obligor had such knowledge as would render his subsequent actions to be ‘dishonest’, and, perhaps, whether such equitable liability might arise notwithstanding that the obligor’s actions were in discharge of his duties to the assignor. These will be discussed in the following Chapter.

X. ASSISTANCE, DISHONESTY, AND DEFENCES

In the preceding Chapter, it was explained that notice triggers the formation of new jural relations whereby the obligor becomes duty-bound to the assignee not to act in such a manner as would amount to the equitable wrong of dishonest assistance. This Chapter will flesh out the obligor's liability as a constructive trustee by reason of such dishonest assistance. But to do that, it will be useful to consider the following Example.

Example 10.1

On February 1st, 2015, B borrows £10,000 from A on terms that B is to repay £10,000 on January 1st, 2016 to A.

On September 1st, 2015, A equitably assigns the debt to C.

On October 1st, 2015, C gives B notice of the assignment, and asks B to tender payment on January 1st, 2016, to him, instead of to A.

On January 1st, 2016, despite C's notice of assignment and request of October 1st, B tenders £10,000 to A. A accepts the tender, even though C had not authorised her to do so. She then absconds from the country to parts unknown with the money received from B.

On the above facts, B's tender of payment to A would discharge B's duty at common law arising from the loan of money from A. However, there is a separate question whether B might be held to have breached his *equitable* duty to C not to dishonestly assist A in committing any breaches of her duties to C arising from the equitable assignment between them.

The question arises because:

(I) By reason of the 'trust effect' underpinning equitable assignment, A was duty-bound to C as assignor to preserve the subject-matter of the assignment. This would mean that A would have been duty-bound to C to invoke her power to accept a conforming tender of payment for C's benefit and not for her own. Given A's actions, it seems clear enough that A had breached this equitable duty in invoking her power to accept a conforming tender of payment from B on January 1st, 2016 since she had not been authorized by C to accept any such tender, much less abscond with it.

(II) Without B's *assistance* by tendering payment to A, A could not have breached her duty to C not to invoke her power to accept a conforming tender of payment without C's authorization. B was, therefore, an accessory to A's breach of her equitable duties to C.[1]

(III) The question that remains, is whether B had breached his equitable duty to C not to *dishonestly* assist A in breaching her equitable duties to C. Since liability is not strict, B's liability to C would turn

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[1] It is not necessary to show a precise causal link between the dishonest assistance and the loss or damage to the equitable obligee: *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499, [103], citing with approval the positions set out in *Casio Computer Ltd v Sayo* [2001] EWCA Civ 661, [2001] ILPr 43, [15]; *Grupo Torras SA v Al-Sabah* [2001] CLC 221 (CA), [119] (approving Mance J's analysis on this point in [1999] CLC 1469 (Comm) 1667). The remedy is also discretionary: *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643 (Comm) 672; and *Novoship (UK) Ltd* [119].

on the state of B's mind when he tendered the payment to A on January 1st, 2016.

But what does dishonesty entail?

1. Dishonestly assisting in the breach of another's obligations

As has been made clear in *Royal Brunei Airlines v Tan*,[2] *Twinsectra v Yardley*,[3] and *Barlow Clowes International v Eurotrust International*,[4] liability for dishonest assistance requires two things:

(I) a breach of duty[5] by the primary wrongdoer (A); and

(II) knowledge: the assistant (B), must know or be taken to have known of such breach of duty to such an extent that his assistance may be said to have been rendered 'dishonestly'.

Given this, the reason for the significance of *notice* becomes plain: in Example 10.1, where B has received notice of an assignment by A to C of A's legal chose in action against B in respect of the loan, B may be found to have had actual or constructive knowledge that his actions would assist A's breach of her duties to C (namely, a

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2 [1995] 2 AC 378 (PC).

3 [2002] UKHL 12, [2002] 2 AC 164.

4 *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476.

5 For reasons of brevity, the discussion in this Chapter will focus on a breach of a common law obligation arising by way of contract. However, the principles involved apply equally to common law obligations arising by way of covenant, as well as to equitable obligations arising by way of trust.

breach by A of her duties to C not to accept a conforming tender of payment without C's authority to do so) as to render B liable to C as an accessory to such breach.[6]

The law on dishonest assistance was restated by Lord Nicholls as follows:[7]

> Drawing the threads together, their Lordships' overall conclusion is that dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient. A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly, though this will usually be so where the third party who is assisting him is acting dishonestly. …
>
> …
>
> From this statement of the principle it follows that this appeal succeeds. The money paid to B.L.T. [Borneo Leisure Travel Sdn Bhd] on the sale of tickets for the [claimant] airline was held by B.L.T. upon trust for the airline. *This trust, on its face, conferred no power on B.L.T. to use the money in the conduct of its business. The trust gave no authority to B.L.T. to relieve its cash flow problems by utilising for this purpose the rolling 30-day credit afforded by the airline*. Thus B.L.T. committed a breach of trust by using the money instead of simply deducting its commission and holding the money intact until it paid the airline. The defendant [Tan] accepted that he knowingly assisted in that breach of trust. *In other words, he caused or permitted his company to apply the money in a way he knew was not authorised by the trust of which the company was trustee. Set out in these bald terms, the defendant's conduct was dishonest*. By the same token, and for good measure, B.L.T. also acted dishonestly. The defendant was the company, and his state of mind is to be imputed to the company.

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6 It should not be open to B to argue that, as a layperson, he was unaware of the legal significance of an assignment – that by such assignment, A would have 'lost' her privilege to invoke each and every one of her entitlements associated with the chose in action as she pleased and would, instead, have become duty-bound in equity to C to invoke those entitlements in accordance with C's directions, given that, 'ignorance of the law is no excuse.'

7 *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378 (PC) (n 2) 392–93 (emphasis added).

It is unnecessary for present purposes to enter into the debate[8] whether the question of 'dishonesty' necessitates application of a subjective[9] or an objective[10] test. Accepting the proposition adopted in *Barlow Clowes* that the House of Lords in *Twinsectra* had not set out a statement of the English law on dishonest assistance which departed from Lord Nicholls's statement of the law of Brunei on the matter in *Royal Brunei*,[11] we may simply observe what Lord Nicholls held to be 'dishonesty' on the facts before the Privy Council in *Royal Brunei Airlines*.

Tan, the respondent, had conceded that he actually knew that B.L.T., the company of which he was the directing mind, had no authority from Royal Brunei Airlines to deal with the monies it had received on trust for Royal Brunei Airlines in

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8 See TM Yeo, 'Dishonest assistance: Restatement from the Privy Council' (2006) 122 LQR 171; and Sir Anthony Clarke MR, 'Claims against professionals: Negligence, dishonesty and fraud' [2006] Professional Negligence 70. It has been suggested that the subjective/objective dichotomy may well be a red herring: TM Yeo and H Tjio, 'Knowing What is Dishonesty' (2002) 118 LQR 502. See also *Attorney General of Zambia v Meer Care & Desai* [2007] EWHC 952 (Ch) [333]–[334], where Peter Smith J suggested that the distinction is an 'over-elaboration'.

9 See *Twinsectra Ltd v Yardley* (n 3) [27]–[35] (Lord Hutton); [19]–[20] (Lord Hoffmann); and with both of whom Lord Steyn agreed. The majority, therefore, rejected Lord Millett's contrary view (at [114]–[144]).

10 As was taken to be the case in the opinion of the Privy Council in *Barlow Clowes (PC)* (n 4) [15] and [18]. The English Court of Appeal has repeatedly adopted the analysis set out in *Barlow Clowes* as to the effect of *Twinsectra* on the 'objective' test set out in *Royal Brunei Airlines* (n 2): see *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492; [2007] 1 All ER (Comm) 827, and *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314. For a possible explanation why Lord Hoffmann took the position in *Barlow Clowes* that *Twinsectra* had not come to any conclusion that was different from that reached by the Privy Council in *Royal Brunei Airlines*, see Davies (2015) 118.

11 Which appears to have been presumed to be the same as that in England: no Bruneian case authority was cited in Privy Council's opinion.

the manner it did. In Hohfeldian terms, B.L.T. was not *privileged* against Royal Brunei Airlines to deal with the money in question as it had done without the Airlines' prior consent.

Given such knowledge of his company's lack of authority, Tan 'caused or permitted his company' to use the money in a manner which was not authorised and which it was not privileged to so use. In so doing, Tan's conduct was 'dishonest.'

Lord Nicholls's closing words in *Royal Brunei Airlines* reveals that the degree of turpitude associated with the label of 'dishonesty' in the context of dishonest assistance is relatively slight:[12] acts done in the knowledge that the trustee or fiduciary had no authority (ie, was not privileged) to act as the trustee/fiduciary had done may be enough to render those acts dishonest. Carelessness or inadvertence would not, therefore be enough: 'conscious impropriety' is required for one to act dishonestly or 'with a lack of probity'.[13]

Thus, a court is at liberty to find such dishonesty given the defendant's *knowledge* that the acts of the primary wrongdoer had been unauthorised – which is to say that the primary wrongdoer had not been *privileged* to do as she had done.[14] Or, to

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12 This is unsurprising, given the usage of 'fraud' in equity's exclusive jurisdiction. As Lord Haldane LC said in *Nocton v Lord Ashburton* [1914] AC 932 (HL) 954: 'But when fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved.'

13 *Royal Brunei Airlines v Tan* (n 2) 389C–E.

14 All of which is entirely consistent with Lord Hoffmann's explanation in *Barlow Clowes (PC)* (n 4) [15].

put it yet another way, 'the dishonest assistant must know that the person he is assisting is *not entitled* to do what he is doing.'[15]

2. 'Good and compelling reasons'

The finding that the assistant had *acted* 'dishonestly' arises from a process of inference. As Lord Nicholls put it:[16]

> Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries.

Where a person participates in a transaction, knowing it involves a misapplication of trust assets to the detriment of the beneficiaries, the court will infer that such participation which assisted in the misapplication was dishonest, unless there were good and compelling reasons to explain why that person assisted in the misapplication.

'Dishonesty' depends on the state of knowledge of the assistant. Reverting to the facts of Example 10.1, so far as B took no further steps to displace what he is deemed to know (having been notified of the assignment), that A would not, thereafter, be privileged to invoke her powers arising in connection with the debt without C's authorization, B's payment to A on January 1st, 2016, will have been performed *knowing* that she was not entitled or authorised to do so, and may therefore be taken to have been performed 'dishonestly.' But what if B had been misled?

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15 *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1504] (Lewison J, emphasis added).

16 *Royal Brunei Airlines v Tan* (n 2) 389.

Suppose A had forwarded B forged warrants of authority purportedly executed by C which authorised A to accept payment on January 1st, 2016. Or A had forwarded forged deeds indicating that C had re-assigned the benefit of the debt back to A. In such circumstances, if it were found that B had been genuinely misled by these assurances, and B had honestly believed that A had been entitled to act as she did, notwithstanding the prior assignment to C, it must surely be open to the court to conclude that B had not acted dishonestly, after all.

This appears to be so, even if B's honest mistake had resulted from his carelessness in failing to make further checks, perhaps by making direct contact with the assignee, C, to verify A's authority to accept a conforming tender. After all, as Lord Nicholls explained:[17]

> [H]onesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. …

And:[18]

> There may be cases where, in the light of the particular facts, a third party [dealing with trustees] will owe a duty of care to the beneficiaries [to check that a trustee is not misbehaving]. As a general proposition, however, beneficiaries cannot reasonably expect that all the world dealing with their trustees should owe them a duty to take care lest the trustees are behaving dishonestly.

Ordinarily, therefore, where the assistant had grounds to be reassured as to the primary obligor's entitlement to act as she did, notwithstanding indications otherwise by reason of the prior assignment to the assignee, mere carelessness on the assistant's part in not taking any further verificatory steps may well be non-actionable. Even a

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17 ibid 389.

18 Ibid 392.

careless assistant may have acted *honestly*, and so, would not be liable for having *dishonestly* assisted the primary obligor in breaching her equitable duties to her obligee.

There may also be situations where the assistant had rendered assistance under duress[19] and/or undue influence. If a negligent assistant may be taken to have made an honest mistake as to the primary obligor's entitlement to act as she did, the same may also be true where the assistance had been rendered under duress, and/or undue influence. If so, it may be that in such cases, it would not be appropriate to infer that the assistance in question had been rendered dishonestly, either, and so, such instances of assistance may also be excused – or, perhaps, to the extent the remedies in question are equitable and therefore discretionary, there are some grounds for the court to withhold them on such facts.

3. The dishonesty of the accessory's agents or employees

Dishonest assistance liability does not necessarily stop with the obligor who has dishonestly assisted the assignor-obligee's breach of duty with regards her assignee. As Lord Langdale MR said in *Attorney-General v Corporation of Leicester*:[20]

> [I]t cannot be disputed that the agent of a trustee, whether a corporate body or not, knowing that a breach of trust is being committed, interferes and assists in that breach of trust, he is personally answerable, although he may be employed as the agent of the person who directs him to commit that breach of trust.

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19 At the risk of anachronism, *Applin v Cates* (1861) 30 LJ Chan 6 (Ch) may well be an instance where *economic* duress was applied by the assignor-creditor on the debtor to tender payment to him, instead of the assignee, despite the debtor having received notice of the assignment. This aspect of the case is discussed below.

20 *Attorney-General v Corporation of Leicester* (1844) 7 Beav 176, 179; 49 ER 1031, 1032; cited with approval in *Royal Brunei Airlines v Tan* (n 2) 385.

And there is Lord Nicholls's own advice that, '[d]rawing the threads together, their Lordships' overall conclusion is that dishonesty is a necessary ingredient of accessory liability. It is also a *sufficient* ingredient.'[21]

The possibility arises, therefore, that an agent or an employee of an obligor who has been directed to act in such a way as assists the defaulting obligee-assignor in breaching her duties to her assignee may him- or herself be liable for dishonest assistance. Yet such liability rests on the requisite dishonest state of mind being made out: such agent or employee would only be liable for *dishonest* assistance if they actually knew of the assignment, or had such knowledge imputed to them by reason of the doctrine of constructive notice.

If B instructs his bank to debit his account and to credit the amount to A, and the bank does so, notwithstanding that the bank's actions as B's agent has enabled (and so assisted) A to breach her duties to C, it is unlikely that the bank may be said to have had any actual knowledge of the assignment to C; nor are there any facts as would put the bank on notice. So the bank may not be held to have breached its duty to C not to dishonestly assist A in breaching her equitable duties to C.

Similarly, if T (who holds 10,000 BCL shares on bare trust for A) instructs the BCL company secretary to make changes to the company share register by re-registering T's holdings in the name of X, and the company secretary does so, notwithstanding that T may have dishonestly assisted A to breach her duties to C (who A had equitably assigned her equitable interest to the shares held on trust by T) in doing so, given that T had been given notice of such assignment, the company

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21 *Royal Brunei Airlines v Tan* (n 2) 392 (emphasis added).

secretary will not be so liable if the company secretary had neither actual knowledge of the assignment, nor were there any grounds as to put him on notice. And this may be illustrated by cases like *Abou-Rahmah v Abacha*[22] where the entire focus of the decision was simply whether the defendant bank had sufficient knowledge of the fraudulent breach of trust perpetrated on the claimants by the defendant's customer who maintained a deposit account with the bank.

4. The defences of 'necessity', and/or 'justification'

This leads us to the final point to be addressed in this Chapter: whether there may be a defence of 'justification' *if* dishonest assistance liability has been established. Cases like *Abou-Ramah* suggest not, as in that case, no attempt was made to suggest that the defendant bank's act of allowing its customer to draw down on the deposit account (which was an act which the defendant bank was contractually duty-bound to allow, so far as the account was in credit) would have *excused* the defendant, if that act might have been found to have been an act of dishonest assistance. And the same again may be said of *Barlow Clowes*[23] itself – no heed was taken of the fact that one of the 'dishonest assistants' in that case was contractually obligated to the defaulting obligor in that case to act as it had done. This suggests that there is no such defence of 'justification'.[24]

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22 *Abou-Rahmah v Abacha* (n 10).

23 *Barlow Clowes (PC)* (n 4).

24 That said, if the duty which had to be discharged by the defendant assistant was of a 'higher' order than a 'mere' contractual duty, more might be said of the 'justificatory' effect of the assistant's carrying out of that duty (for example, perhaps, a duty pertaining to protection of fundamental human rights). That, however, remains speculation at this point in time as there appears to be no case on point, thus far.

It is admitted that the proposition that one may act dishonestly, and so commit an equitable wrong, even whilst discharging one's legal duty, seems odd. But such an outcome is not unknown even at common law.

For example, a tortfeasor who has trespassed on land is hardly ever permitted to excuse his trespass because it was committed in the course of his fulfilling a contractual duty to another. And even if such act could be justified by some conception of necessity,[25] and even if such defence of necessity could possibly be applied to the commission of an equitable wrong,[26] it is difficult to see how B's act of tendering payment to A could be justified by any conception of necessity when B could equally well have safeguarded his position (in most cases)[27] by initiating interpleader proceedings and paying the sum in question into court.[28]

Of greater concern in the present context is the nascent conception of 'justification' as a defence. This has been extensively discussed in Davies's *Accessory Liability*.[29]

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25 For a brief account of the defence of necessity in tort, see Clerk and Lindsell (2014) paras 3-133 to 3-142.

26 Which has been denied, given the different historical origins of tort as compared with equitable wrongs: see James Goudkamp, *Tort Law Defences* (Hart Publishing 2013 2013), 21–23. However, *cf* James Edelman, 'Equitable Torts' (2002) 10 Torts Law Journal 64.

27 *Applin v Cates* (n 19) illustrates a situation where an application for interpleader would not have completely safeguarded the obligor.

28 As the Lord Chancellor highlighted in *Jones v Farrell* (1857) 1 De G & J 208, 218–19; 44 ER 703, 707.

29 Davies (2015), Chapter VII, Section 2. For another, much briefer account, see Goudkamp (n 26) 119–21, chiefly on the question as to whether this is a defence at all, or whether it should be treated as an element of the tort itself. Dr Goudkamp ultimately agrees that it should be regarded as a defence to the tort.

This defence appears to qualify the liability of a third-party to a contract who would otherwise be determined to have committed the tort of inducement of breach of that contract. The question is whether such defence applies to qualify the equitable liability of a dishonest assistant.

Perhaps the clearest statement of this defence within the context of the tort of inducement of breach of contract is to be found in Darling J's judgment[30] in *Read v Friendly Society of Operative Stonemasons of England, Ireland and Wales*:[31]

> … I think the plaintiff has a cause of action against the defendants, unless the Court is satisfied that, when they interfered with the contractual rights of [the] plaintiff, the defendants had a sufficient justification for their interference—to use Lord Macnaghten's words.[32] This sufficient justification they may have had, and they may prove it … I think their sufficient justification for interference with [the] plaintiff's right must be an equal[33] or superior right in themselves, and that no one can legally excuse himself to a man, of whose contract he has procured the breach, on the ground that he acted

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30 With whom Channell J agreed. Lord Alverstone CJ did not comment on the question of justification.

31 [1902] 2 KB 88 (Divisional Court) 96, holding the Friendly Society to be liable to Read for having induced his employers to breach their contract of employment with him. The court's decision was affirmed on appeal on different grounds: *Read v The Friendly Society of Operative Stonemasons of England, Ireland and Wales* [1902] 2 KB 732 (CA).

32 Here, Darling J was referring to a passage from *Quinn v Leathem* [1901] AC 495 (HL, on appeal from the Irish Court of Appeal), where, at 510, Lord Macnaghten said: 'A violation of legal right committed knowingly is a cause of action, and … it is a violation of legal right to interfere with contractual relations recognized at law if there be no sufficient justification for the interference.'

33 The Australian position appears to be narrower, recognizing a defence of justification only so far as the defendant had been purporting to be justified by a *superior* right to the contractual right of the plaintiff which he had interfered with. See, eg, *Independent Oil Industries Ltd v Shell Co of Australia Ltd* (1937) 37 SR (NSW) 394 (CA, New South Wales), 416; cited with approval in *Zhu v Treasurer of New South Wales* [2004] HCA 56; (2004) 218 CLR 530, [139]. Davies argues that the broader English approach is preferable: Davies (2015) 232–33.

> on a wrong understanding of his own rights, or without malice, or bona fide, or in the best interests of himself, nor even that he acted as an altruist, seeking only the good of another and careless of his own advantage.

As with the defence of necessity, it is arguable whether a defendant-debtor who has paid his creditor may claim to have been acting in a manner that is *justified* in equity so far as that act of payment was in fulfilment of his common law duty, despite his having received notice of his creditor's assignment of the benefit of the debt to an assignee. This is difficult, because the defendant-debtor's position would have been equally well safeguarded (in most cases)[34] had he initiated interpleader proceedings and paid the sum in question into court.

But even without going into the rationale underpinning justification as a defence, Davies recognises that a different approach is applied where the defendant has interfered with equitable *fiduciary* obligations:[35]

> The situation is different where the claimant's contract creates a fiduciary relationship with the primary wrongdoer. In such circumstances, the beneficiary's equitable interest does trump the defendant's contractual rights and the defence of justification will not be available. …

Though no authority is cited in support for the proposition, and despite Davies's dissatisfaction with it, so far as the *common law* may recognise a defence of justification which would excuse a defendant from being held liable *at common law* for having wrongfully (tortiously) interfered with a common law contractual right, it is a different question altogether whether equity would recognise the same or similar defence when the defendant has wrongfully (dishonestly) interfered with an *equitable*

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34 *Applin v Cates* (n 19) provides a counterexample: see discussion in Chapter IX.

35 Davies (2015) 233.

right. Given the historical ordering of equitable and contractual rights,[36] there is no obvious reason to suppose that a *common law* defence, based on the defendant's fulfilment of his *common law* duty, would necessarily immunise him from proceedings brought against him in *equity*.

Certainly, there appears to be no authority to the contrary.

The editors of *Lewin on Trusts* refer to only three defences (apart from the defence of limitation) which may be generally available to a defendant found to have committed dishonest assistance, namely, concurrence, acquiescence and release.[37] The editors of *Lewin* also go on to suggest that the cases show how in certain limited circumstances, the defences of contributory negligence, *ex turpi causa*, and contribution under the Civil Liability (Contribution) Act 1978[38] might be available.[39] But there is no mention of any cases of 'justification'[40] by reason of the assistant's fulfilment of a duty he was already subject to as a defence.[41]

This is only to be expected. Though the defendant may well have been discharging some *other* duty when he acted as he did, the discharge of such duty does

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36 As enshrined in the maxim, 'where the rules of Equity and the common law diverge, Equity shall prevail'. The effect of this is best summarized in the notes to the extract of *The Earl of Oxford's Case* (1615) 1 Chan Rep 1, 21 ER 485 in FT White and OD Tudor, *White & Tudor's leading cases in equity: with notes* (EP Hewitt and JB Richardson eds, 9th edn, Sweet & Maxwell 1928 1928) 622. This position is preserved under s 49, Senior Courts Act 1981.

37 Lewin (2015) para 40-058.

38 Civil Liability (Contribution) Act 1978.

39 Lewin (2015) paras 40-058 to 40-061.

40 Or, for that matter, necessity.

41 Snell (2015) similarly makes no mention of either 'justification' (in the sense used in the main text) or 'necessity' as a defence to dishonest assistance.

not preclude his liability to a claimant when the defendant *knows* that acting as he had done would have the effect of *assisting* the breach of equitable duties owed to the claimant by an obligor, such knowledge therefore rendering the acts of assistance to be dishonest.

Admittedly, the defendant who has knowledge of facts which would lead a reasonable man to infer that certain acts on his part would aid the equitable obligor to breach her equitable duties to her equitable obligee is placed in a difficult position: he may have become subject to conflicting duties in equity and at law. But that is precisely the situation for interpleader or payment into court to be resorted to;[42] and in addition, express trustees who have actual or constructive knowledge of such wrongdoing may apply to court for directions, or seek relief under s 61, Trustee Act 1925. Last of all, since the remedy lies within equity, such remedy is discretionary.[43]

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42 Lewin (2015) para 3-011.

43 See n 1, above.

PART V:

THE STATUTE

XI. 'STATUTORY' ASSIGNMENTS

When a chose in action has been assigned in a manner recognised at common law or in equity, *and* the requirements in s 136(1) LPA1925[1] are satisfied, the specific entitlements spelt out in s 136(1)(a), (b) and (c) shall pass from the assignor and are transferred to the assignee. Thus, where an equitable assignment of a chose in action has 'become' a 'statutory' assignment, those entitlements are transferred to the assignee, and as to those entitlements, the trust and agency effects underpinning such equitable assignment are overridden.

But entitlements extraneous to these sub-sections are not so transferred. Hence any such entitlement arising in connection with a chose in action that had been equitably assigned will not be transferred to the assignee, and the trust and agency effects underpinning such equitable assignment will still apply to such entitlement.

'Statutory' assignments are, accordingly, 'parasitic': they build on and override the effects as would otherwise arise by reason of the legal or equitable assignment that has already been effected.

1. The provisions

We now turn to consider assignments of debts or things in action pursuant to s 136(1):

> 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 thing 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 claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice —

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[1] In this and the following Chapter, references to 's 136' and s 136(1) shall refer to s 136, LPA1925, and s 136(1), LPA1925, respectively, unless otherwise indicated.

(a) the legal right to such debt or thing in action;

(b) all legal and other remedies for the same; and

(c) the power to give a good discharge for the same without the concurrence of the assignor:

Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice—

(a) that the assignment is disputed by the assignor or any person claiming under him; or

(b) of any other opposing or conflicting claim to such debt or thing in action;

he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act 1925.

2. Misnomer

Although debts or things in action[2] are often said to have been 'statutorily assigned', the statute does not set out an independent mode of statutorily assigning a 'debt or thing in action.' It merely mandates certain effects when a debt or other legal[3] thing in action is 'absolutely assigned',[4] other than by way of charge;[5] in a signed writing;[6]

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2 Section 136(1) refers to assignments of 'things in action' instead of the Anglo-Norman 'chose in action'. The two phrases are synonymous. In this chapter, given its focus on the statute, the phrase 'thing in action' will be used in place of 'chose in action' as has been used in the other Chapters in this thesis.

3 'Legal', in this context, has been construed to refer to both legal *and* equitable choses in action: *Western Wagon and Property Company v West* [1892] 1 Ch 271 (Ch) [1892]; *Torkington v Magee* [1902] 2 KB 427 (KB) 430; *Re Pain* [1919] 1 Ch 38 (Ch) 44; *Harding v Harding* (1886) 17 QBD 442 (QB) 445; and *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 (Comm). Some commentators have suggested, however, that such a construction is in error. This will be discussed in Chapter XII.

4 An assignment that is contingent on the fulfillment of a condition precedent is not an 'absolute' assignment within the ambit of s 25(6) Judicature Act 1873: *Re Williams* [1917] 1 Ch 1 (Ch) 5 (Astbury J); affd [1917] 1 Ch 1 (CA) 6–9 on other grounds.

and when written notice[7] of such assignment is given[8] and been received by[9] the obligor.

Since the statute does not provide a definition,[10] an 'assignment' for s 136(1) purposes must be any form of assignment of a debt or thing in action as may otherwise be recognised at law or in equity. Thus:[11]

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5 Assignments by way of charge fall beyond s 136(1): *Jones v Humphreys* [1902] 1 KB 10 (KB), but an assignment by way of mortgage does not: *Raiffeisen Zentralbank Österriech AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825, [74].

6 It is unclear whether a writing signed by a duly authorised agent of the assignor on the assignor's behalf or in her name would satisfy the requirements of the statute, given that ss 40 and 53, LPA1925 expressly provide for it. In *Wilson v Wallani* (1880) 5 Ex D 155 (Exch), a reference in s 23 of the Bankruptcy Act 1869 to a disclaimer by the trustee 'by writing under his hand' was construed narrowly, such that a disclaimer signed by the solicitor to trustees was held to fall outside the ambit of the provision.

7 Written notice under s 25(6), Judicature Act 1873, is mandatory, even where the obligor is illiterate: *Hockley v Goldstein* (1920) 90 LJ KB 111 (KB) 112 (Bailhache J). Presumably, the same is true of s 136(1).

8 Notice may be given by the assignor, the assignee, or an authorised representative: eg, *Bateman v Hunt* [1904] 2 KB 530 (CA); *Ramsey v Hartley* [1977] 1 WLR 686 (CA). Further, no time-frame is legislatively stipulated. Thus, notice may be given even after the death of the assignor: *Walker v The Bradford Old Bank, Limited* (1884) 12 QBD 511 (QB); so long as it has been given before proceedings are commenced: *Re Westerton* [1919] 2 Ch 104 (Ch); *Compania Colombiana de Seguros v Pacific Steam Navigation Co* (n 3). However, in *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81 (CA), Scrutton LJ was prepared to accept that sufficient written notice might have been given so as to effect a statutory assignment through service of a pleading in which reference was made to the assignment (although Slesser LJ in the same case thought otherwise); and in *Weddell v JA Pearce & Major* [1988] Ch 26 (Ch) (Scott J appeared to accept that written notice given after proceedings had commenced was effective so as to create an effective statutory assignment.

9 The notice is effective 'from the date of such notice', meaning the assignment takes effect as a statutory assignment from the date the notice is received by or the obligor. Actual, physical receipt by the obligor is not necessary, and the notice is effective upon receipt at the obligor's place of business: *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 (KB) 6.

> [S]ection 136(1) … does not provide that a document which would not, independently of the sub-section or its predecessor …, have operated as an absolute assignment at law or in equity is to have the force of an absolute assignment for the purposes of the sub-section.

Hence, where a debt or thing in action has not been effectively equitably assigned in the first place, and where none of the mechanisms permitting its assignment at law apart from s 136(1) have been validly invoked, as was held in *Curran v Newpark Cinemas*, s 136(1) may not be invoked since there has been no 'assignment', in the first place.

Most debts and things in action will be assigned *inter vivos* in equity and not at law. Although things in action may be assigned at law by or to the Crown, and assignments at law are possible in respect of certain specified types of things in action (for example, certain types of intellectual property right as well as marine or life insurance policies) by reason of statute,[12] because there is no generally applicable doctrine allowing for *inter vivos* assignments at law, it is more likely than not that when one assigns a debt or thing in action, one would do so in equity.

By enacting s 25(6), Judicature Act 1873, and retaining its operation in s 136(1), Parliament did not, 'forbid or destroy equitable assignments or impair their efficacy in the slightest degree'.[13] Rather:[14]

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10 Section 205, LPA1925 is silent as to what amounts to an 'assignment' for the purposes of the Act.

11 *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295 (CA) 299H.

12 For an incomplete list of *inter vivos* assignments recognized at law, see Chapter I, nn 23–28.

13 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 (HL) 462, 462.

14 *Hockin v The Royal Bank of Scotland* [2016] EWHC 925 (Ch) [44] (Asplin J).

> [S]ection 136 of the Law of Property Act 1925 does not create a statutory right of assignment in itself as so much regulates the effects of assignments which have taken place.

A registrable charge under Part 25 of the Companies Act 2006 remains a charge, albeit one whose effects may be overridden by the statute (eg, by s 874 which overrides the effects of a registrable but unregistered charge as against certain categories of persons). Similarly, an equitable assignment which may be 'converted' into a statutory assignment remains an equitable assignment, albeit one whose effects have been overridden by the statute.

As authority, we may consider the decision in *Curran v Newpark Cinemas*.[15] In this case, the Associated British Film Distributors, Ltd ('B'), were indebted to Newpark Cinemas, Ltd ('A'). A, in turn, owed a judgment debt, and costs, to Curran ('X'). On 11th October, 1950, X obtained a garnishee order nisi in the county court against B in respect of sums it believed B owed A pursuant to a distribution agreement for the film, 'Meet the Duke'. And the garnishee order was subsequently made absolute against B.

On appeal, B argued that the garnishee order ought not to have been made absolute because on March 20th, 1950, it had been served with a direction and authority by A that, following 'arrangements for valuable consideration' it had made with the Barclays Bank, Ltd ('C'), A gave B, 'irrevocable directions, instructions and authority to pay to the said Barclays Bank, Ltd., [C] at their Moorgate branch, or as they may in writing direct, all moneys payable to [A] under the terms of the said [film

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15 *Curran v Newpark Cinemas* (n 11).

distribution] agreement …'.[16] This direction confirmed that receipt of such sums by C would be full and sufficient discharge, and that variation or cancellation was possible only by a document duly signed on C's behalf. B contended that this direction took effect as of March 20th, 1950 as a statutory assignment of the debt in C's favour. Thus, when X served its garnishee order nisi on B on 11th October, 1950, it was no longer indebted to A.

The Court of Appeal reasoned as follows:[17]

> The document here relied on is the direction and authority, which in point of form is not an assignment to the bank of the debt in question but merely a direction to the garnishees to pay the debt in question to the bank. On the footing that there had, in fact, been no prior agreement with the bank to give such a direction, and that the bank had not been notified of the fact that such a direction had been given, we think the result would follow that the direction and authority, though expressed to be irrevocable except with the consent of the bank, could in fact have been revoked by the judgment debtors at any time as amounting to no more than an arrangement between the judgment debtors and the garnishees in which they alone were concerned and which, in the absence of any such agreement or notification, conferred no interest in the debt on the bank.

However, the Court of Appeal took the view that 'the judgment debtors had agreed with the bank to give the direction and authority to the garnishees',[18] there was *prima facie* evidence that an assignment had been effected by A to C, and, absent proof of fraud, was then converted to a statutory assignment when B was given written notice of the same.[19] The Court of Appeal thus held that the court below ought

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16 Ibid 297H.

17 ibid 299H– 300A.

18 ibid 300C, given the direction's reference to 'arrangements for valuable consideration' having been reached between A and C.

19 ibid 300B–G.

not to have made the garnishee order absolute, but should have required C to appear to state its claim in accordance with the relevant County Court Rules, instead.[20] The Court of Appeal therefore remitted the matter to the County Court.

Significantly, for present purposes, the Court of Appeal accepted that where the transaction in question does not amount to an assignment as would be recognised under the general law *apart* from s 136(1), the question as to whether there had been a valid 'statutory' assignment would not arise. So accordingly, 'statutory' assignment is *not* a completely independent mode of assignment.

Unlike cases like *Walsh v Lonsdale*[21] where an equitable relationship results from non-compliance with legal forms, here, where the debt or thing in action had been equitably assigned to begin with, that equitable relationship is always present, and the material question is whether it has legal (ie statutory) effects superimposed upon it. That said, the language of 'statutory assignment of a debt' or 'statutory assignment of a thing in action' is endemic. But we should still take care to understand what it properly means.

3. The statutory effects

Where a debt or thing in action has been equitably assigned, if that equitable assignment was: (i) absolute (meaning, it was not conditional, nor was it by way of charge); (ii) in a written document signed by the assignor; and (iii) written notice of such assignment was given to the obligor, such equitable assignment exhibiting '[t]he

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20 ibid 300H–301C.

21 (1882) 21 Ch D 9 (CA).

sacred triangle of "writing, absolute, and notice"'[22] such equitable assignment no longer takes effect as a bare trust plus agency so far as the entitlements specified in s 136(1) are concerned.

Since these entitlements have been transferred *from* the assignor *to* the assignee, they are no longer the assignor's to assert or invoke. Neither will the assignor's authorisation of another to invoke entitlements she no longer has be effectual. Though the debt or thing in action may have been equitably assigned to begin with, once the requirements as to 'absolute, writing, and notice' in s 136(1) are satisfied, the entitlements specified in s 136(1) may be asserted and invoked *exclusively* by the 'statutory' assignee.

But though the statutory requirements in s 136(1) may have been met, extraneous entitlements falling beyond the section are not transferred to the assignee. As to them, the trust and agency effects that underpin the equitable assignment of the debt or thing in action will still apply.

One example[23] of such an extraneous entitlement would be the option to extend the validity of the recording contract encountered in *Warner Bros Records Inc v Rollgreen*.[24]

That power was certainly an entitlement as arose from the contractual thing in action that had been equitably assigned (to begin with). But it is difficult to

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22 Marshall (1950) 177.

23 Other examples might include the entitlements arising from: a contractual termination clause; an 'acceleration of payment' clause; an 'entire agreement' clause; a 'no-reliance' clause; a choice of jurisdiction clause; or an arbitration clause

24 [1976] 1 QB 430 (CA).

characterize such power to be, 'the legal right to such debt or thing in action', one of the 'legal and other remedies', or 'the power to give a good discharge for the same without the concurrence of the assignor', as would have been transferred under ss 136(1)(a), (b), or (c), respectively.[25]

Though the point is often missed,[26] the three categories of entitlements specified in s 136(1) are not exhaustive, and it is not the case that a statutory assignee steps into the shoes of the statutory assignor and takes her place as against the obligor in every possible respect. So statements like, '[s 136] transfers the obligation lock, stock and barrel to the assignee, [so] he—and he alone—can sue on it, *and erases the assignor from the picture*'[27] may slightly exaggerate its effect.

Admittedly, s 136(1)(a) has the effect of allowing the statutory assignee, *alone*, to sue. But that is not to say that the entirety of the *obligation* has been transferred to the assignee. That cannot be, since the burdens of an obligation may not pass by any form of assignment.[28] Consequently, a 'statutory' assignment of a contractual chose can never result in the assignee taking the obligee-assignor's place as a party to the contract so as to be brought into privity with the contractual counter-

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25 More detailed discussion of the construction of these phrases in s 136(1) follows, in Section 4, below.

26 See, eg, Tolhurst (2016) para 5.09; Snell (2015) para 3-010.

27 A Tettenborn, 'Equitable assignment and procedural quibbles' (1995) 54 Cambridge Law Journal 499, 501 (emphasis added).

28 In general, 'burdens' arising in connection with an obligation may not be effectively transferred to another by assignment. For exceptions and discussion as to how burdens may, in effect, be transmitted though not assigned, see Smith and Leslie (2013) Chapter 21.

party.[29] But even leaving burdens aside, it is not true that *all* 'benefits' arising from a contract are 'transferred' by s 136(1), either, since there may well be 'beneficial' entitlements extraneous to those specified in s 136(1)(a), (b) or (c).

4. Construction

Section 136(1) re-enacts s 25(6), Judicature Act 1873, save for the substitution of 'thing in action' in the 1925 Act in place of the Anglo-Norman 'chose in action' in the 1873 Act.

Although the *travaux préparatoires* leading to the passing of the Judicature Acts are voluminous,[30] and there is a substantial body of secondary material commenting on the process of law reform leading to their enactment,[31] neither set of resources provides any reliable indication of Parliament's intentions when it enacted s 25(6).[32] That provision appears to have attracted little comment as it proceeded through the Houses of Parliament: no substantial changes were made to Clause 26(6),

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29 For example, where the benefit of debts owed to a vendor by its customers is statutorily assigned to a factor, the factor is not brought into privity with the customers. See, eg, *Bibby Factors Northwest Limited v HFD Limited* [2016] EWCA Civ 1908 [50]: 'But Bibby [the factors] had no contract with the Customers.' Hence, any obligations owed by the vendor to its customers as to the quality or merchantability of the goods sold, etc, remain the vendor's responsibility.

30 See, eg: Great Britain. Judicature Commission, *First to fifth reports of the Commissioners on the Judicature: with minutes of evidence and appendices, 1868-74*, vol 13 (Irish University Press 1970), 13–14, reproducing pp 5-6 of the First Report of the Judicature Commissioners 1868-69 [4130] Vol XXV

31 See references cited in Meagher, Gummow & Lehane (2015) Chapter 2.

32 See HL Deb 13 February 1873, vol 214, cols 331–65 (First Reading of the Supreme Court of Judicature Bill). In particular, at cols 339–340 (Lord Selborne LC). However, no mention is made of that any matters pertaining to s 25(6). The Attorney-General's speech to the House of Commons (HC Deb 9 June 1873, vol 216, cols 644–45) is similarly silent.

Supreme Court of Judicature [HL] Bill (14)[33] (which ultimately became s 25(6) of the 1873 Act) as it progressed through Parliament.

Parliament's intentions remaining obscure, divination of its intent will rest on the words of the statute.

(a) Section 136(1)(a): 'the legal right to such debt or thing in action'

Section 136(1)(a) provides for certain effects to be superimposed on an 'absolute assignment' of 'any debt or other legal thing in action'. If, say, a debt or thing in action was equitably assigned, once the 'triangle' of 'writing, absolute, and notice' has been fulfilled, s 136(1)(a) provides that 'the legal right to such debt or thing in action' will 'pass' from the assignor and 'transfer' to the assignee.

Effect should be given to every word within s 136(1), and the word 'debt' in s 136(1) should be understood in light of the words that follow it because, '*noscitur a sociis*' – 'A thing is known by its associates'.[34]

If a 'thing' or 'chose in action' is, 'a known legal expression to describe all personal rights of property which can only be claimed or enforced by action, and not

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33 ibid. There appear to have been two amendments to the Bill after its Second Reading on March 11th, 1873 before it was enacted as s 25(6) in the 1873 Act. First, the words, 'or security', after the phrase, 'by way of charge', were deleted from the Bill. Second, the word, 'legal', in the phrase, 'to pass and transfer the legal right to such debt or chose in action' in s 25(6) as enacted, did not appear in the original Bill. See Supreme Court of Judicature [HL] Bill [as amended on report] (45), at p 15.

34 Sir Rupert Cross, *Statutory Interpretation* (John Bell and Sir George Engle eds, 3rd edn, Butterworths 1995) 138. See also Oliver Jones, *Bennion on statutory interpretation: A code* (6th edn, LexisNexis 2013) 1100–1105, Section 378 for a fuller account of this maxim.

by taking physical possession',[35] then 'debt', should be construed as a type of 'thing in action'. Accordingly, '*the legal right* to such debt or thing in action' in s 136(1)(a) should be construed as the Hohfeldian *claim-right* to the debt or thing in action that had been 'absolutely assigned.' This construction has some support in the caselaw.

'Legal right' as Hohfeldian 'claim-right'

In *Read v Brown*, the assignee of a debt arising from a sale contracted in Surrey sued the purchaser in the Mayor's Court in the City of London on grounds that the assignee's cause of action had arisen 'wholly or partly' in the City[36] because the assignment had been executed there.[37]

Manisty J agreed with Pollock B who held that the Mayor's Court had jurisdiction.[38] Their decision was upheld by the Court of Appeal. Lord Esher MR held:[39]

> [the words 'the legal right to the debt' in s 25(6)] transfer the legal right to the debt as well as the legal remedies for its recovery. …*The debt is transferred to the assignee and becomes as though it had been his from the beginning; it is no longer to be the debt of the assignor at all*, who cannot sue for it, the right to sue being taken from him; the assignee becomes the assignee of a legal debt and is not merely an assignee in equity, and the debt being his, he can sue for it, and sue for

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35 Using Channell J's working definition: *Torkington v Magee (KB)* (n 3). See also *Colonial Bank v Whinney* (1886) 11 App Cas 426 (HL) 440.

36 Mayor's Court of London Procedure Act 1857, s 12.

37 Written notice of the assignment had also been given, so this was a 'statutory' assignment under s 25(6), Judicature Act 1873.

38 (1888) 22 QBD 128 (CA) 130.

39 ibid 132 (Esher MR, with whom Fry LJ agreed) (emphasis added). At 133, Lopes LJ also agreed with Esher MR's construction of the section that the subject-matter of the first and second limbs of s 25(6) were distinct from each other: '[statutory] assignment passes to the assignee, not only the legal remedies for the debt, but the legal right to the debt itself.'

> it in his own name. We must give that meaning to the language of the subsection …

Rephrased in Hohfeldian terms, Esher MR held that the statutory assignment had transferred the assignor's *claim-right* against the debtor that the debtor pay such sums as were due to the assignor to the assignee. So, when the debtor breached its *duty* to the assignee to tender payment,[40] the resultant cause of action accrued in favour of the assignee, and not the assignor. The debt had become, 'as though it had been his [the assignee's] from the beginning.'

That s 136(1)(a) 'substitutively transfers' the assignor's claim-right to her assignee was also recognised by the Court of Appeal in *Offer-Hoar v Larkstore*.[41]

In that case, Starglade Ltd owned a parcel of land. It engaged Technotrade Ltd to prepare a soil inspection report for the said parcel to obtain planning permission to develop it. The contract between them contained an anti-assignment clause.

The soil inspection report indicated no substantial risk of subsidence, and planning permission was granted. Starglade then sold the parcel of land to Larkstore with the benefit of full planning and building control permissions, including all soil investigations. Larkstore subsequently obtained possession of the Technotrade report and relied on it for various purposes without seeking Technotrade's consent.

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[40] From the facts, it may be inferred that the defendant-debtor tendered payment to no one, not even the assignor.

[41] [2006] EWCA Civ 1079, [2006] 1 WLR 2926.

A landslip occurred in the course of developing the parcel of land, causing damage to the claimants' adjoining land. *Inter alia*, they sued Larkstore for negligence and nuisance.

It appeared that the soil inspection report might not have been prepared with the requisite degree of care. So on February 23rd, 2004, more than five years after acquisition of the land from Starglade, in consideration of £1 and its promise to share any sums recovered from Technotrade, Larkstore procured an assignment from Starglade of the benefit of Starglade's contract with Technotrade on the following terms:[42]

> Starglade with full title guarantee assigns to Larkstore the report together with all the benefit and interest and rights of Starglade in or under the report and the right to enforce the same TO HOLD [*sic*] to Larkstore absolutely.

The assignment further granted Technotrade the, 'right to sue in respect of breaches of Technotrade of its duties and obligations and to bring all such claims against Technotrade as are available at law.'[43] Written notice of the assignment was given to Technotrade, so there was a 'statutory' s 136(1) assignment.

The preliminary point on appeal was whether Larkstore was entitled to recover substantial damages from Technotrade as Starglade's 'statutory' assignee, and so, could seek an indemnity from Technotrade, even though Starglade (the assignor) had not suffered any damage at the time of the assignment as it no longer owned the subject land.

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42 ibid [15].

43 ibid.

The Court of Appeal upheld the decision below that substantial damages could be awarded. Mummery LJ held that substantial damages were available despite Starglade suffering no substantial loss at the time of the assignment:[44]

> What was assigned by Starglade to Larkstore was a cause of action for breach of contract against Technotrade and the legal remedies for it. It was not an assignment of 'a loss' … The assignment included the remedy in damages for the cause of action. …

The reference to Starglade having assigned a 'cause of action' is unfortunate, as that was not all that Starglade had assigned. Larkstore had acquired a contractual *cause* of action against Technotrade because, as the language of Starglade's assignment shows,[45] Starglade had assigned the entire benefit of its contract with Technotrade. That is, Starglade had assigned the benefit of its contractual *chose* in action against Technotrade arising from the contract.

Given Esher MR's observations in *Read v Brown* and re-framed in terms of Hohfeldian jural relations, Manning LJ may be understood to have held that Starglade had statutorily transferred to Larkstore its *primary claim-right* against Technotrade, that Technotrade was contractually duty-bound to prepare its report with due care.

Such 'transfer' operates retrospectively. Just as the debt in *Read v Brown* had been 'transferred' from the assignor such that it was *as if* the debt had always been owed to the assignee, the duty owed by Technotrade, the obligor in *Offer-Hoar v Larkstore*, was similarly 'transferred' from the assignor, Starglade, to the assignee, Larkstore, by s 136(1)(a). Hence, it was *as if* Technotrade's duty to provide a report with the requisite standard of care had always been owed to Larkstore. It was thus

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44 ibid [41], with whom Rix and Peter Smith LJJ agreed.

45 See wording reproduced at text to n 42, above.

immaterial that Starglade had sustained no loss at the time of the assignment. When Technotrade breached its contractual duty *which it owed to Larkstore* (given s 136(1)(a)) to prepare the report with reasonable care, the cause of action for such breach accrued to Larkstore (and not Starglade). Consequently, Technotrade came under a secondary duty to Larkstore to compensate Larkstore for *its* losses (and not Starglade's).

Mummery and Rix LJJ recognised, however, that as the obligor ought not to be exposed to any greater duty or liability by reason of such assignment, a ceiling should be set as to the damages awarded to the statutory assignee. They therefore agreed[46] with Staughton LJ's analysis in *Linden Gardens v Lenesta Sludge* that:[47]

> [I]t is said that in such a case [where a cause of action for damages has been assigned] the assignee can recover no more as damages than the assignor could have recovered.
>
> That proposition seems to me well founded. It stems from the principle already discussed, that the debtor is not to be put in any worse position by reason of the assignment. … But in a case such as the present one must elucidate the proposition slightly: the assignee can recover no more damages than the assignor could have recovered if there had been no assignment, *and if the building had not been transferred to the assignee*.

Given *Read v Brown* and *Offer-Hoar v Larkstore*, s 136(1)(a) effects a substitutive transfer of the assignor's Hohfeldian claim-right against the obligor to the debt or thing in action assigned.

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46 *Offer-Hoar v Larkstore Ltd* (n 41) [51]–[54] and [74]–[77], respectively.

47 (1992) 30 Con LR 1 (CA) 16–17 (emphasis in original). Nourse LJ and Sir Michael Kerr agreed with Staughton LJ on this point. The House of Lords did not address this part of the Court of Appeal's reasoning when the matter went on appeal before it: [1994] 1 AC 85 (HL).

Hohfeldian 'claim-rights' as arise from primary or secondary obligations

The analysis above has considered 'statutory' assignments of a *contractual* chose in action. The analysis is slightly different with regards assignments of accrued causes of action arising from breaches of tort duties.

Tort duties entail a primary claim-right/duty jural relation that the duty-bearing party not commit such act as is prohibited by the tort. The primary duty in such tort is then owed to such parties as defined by the said tort.

When the primary duty is breached, the tortfeasor will be subjected by operation of law to an additional secondary duty to pay the victim of such tort such damages as may be assessed to be payable by a court of competent jurisdiction.[48] But this secondary duty does not override and displace the original primary duty: where B is duty-bound to A not to act negligently, but has breached that duty on a certain day, that breach does not mean that B is no longer duty-bound to A not to act negligently. The primary duty continues to bind A and B – just that as at a particular point in time, B had breached it, thereby generating a secondary duty to pay damages to be assessed in respect of *that* breach of duty at *that* point in time.

Given this secondary duty which is imposed by operation of law, the tortfeasor will both be duty-bound to the victim of the tort to pay such damages, as well as be *liable* to such victim subjecting the tortfeasor to a liquidated liability to pay a fixed sum of money to the victim by way of damages should the victim successfully

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48 'The wrong generates a new right exigible only against the wrongdoer. …': Stevens (2007) 59.

prosecute her cause of action against the tortfeasor in a court of competent jurisdiction.

As Hohfeld noted in connection with the breach of the primary duties arising from a contract between A and X, if X breached his primary duties to A under that contract without valid excuse: [49]

> [A] new legal relation—a secondary, or remedial, obligation—arises between A and X. The latter, as a consequence of the breach of his primary duty, is now under a remedial duty to make *non-specific* reparation, that is a duty to pay to A damages ... and correspondingly, A has a remedial right. …
>
> If X fails to act under his remedial duty, A has *ab initio* the power, by action in the courts, to institute a process of compulsion against X. At this point, we reach, as the correlative of the power of A, the liability of X.

And the same may said in respect of breaches of primary duties arising in tort.

To the above, one clarification should be added. The secondary duty of the party-in-breach who has breached its primary duty (whether arising in contract or in tort), is inchoate: it is a duty to make 'non-specific' reparation. At common law, this takes the form of damages as assessed by the court. Consequently, this secondary duty cannot be discharged by performance *until* the assessment has been made.

This does not mean that there is no such duty before assessment. It only means that discharge of such duty is possible only *after* such assessment.[50] Thus, such

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[49] Hohfeld (1923) 202–03, reprinting WN Hohfeld, 'Nature of Stockholders' Individual Liability for Corporation Debts' (1909) 9 Columbia Law Review 285.

[50] *Cf* SA Smith, 'Why Courts Make Orders (And What This Tells us About Damages)' (2011) 64 Current Legal Problems 51, 71–85.

secondary duty cannot be breached until the assessment is made.[51] Consequently, 'pre-payments' to the victim who has sustained the breach of the primary duty cannot count as performance of such secondary duty.[52]

The subject-matter of an accrued cause of action where primary tort duties have been breached is distinct from the subject-matter which comprises those primary tort duties. A primary tort duty entails a claim-right/duty jural relation *not* to commit the acts defined by the tort. The secondary duty, however, entails a claim-right/duty jural relation to pay such damages as the court may assess. Thus, when one equitably assigns an accrued cause of action in tort, the subjects of such assignment are not the jural relations associated with the primary obligation, but the jural relations associated with the secondary obligation, which are distinct.

When the benefit of a contract has been equitably assigned, and where that equitable assignment satisfies the requirements of 'absolute, writing and notice' in s 136(1), s 136(1)(a) transfers the assignor's *primary* claim-right against the obligor to that contract to the assignee, such that it is *as if* the *primary* duty arising under that contract will have been owed to the assignee, from the outset.

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51 The nature of this secondary duty is not dissimilar from the nature of a primary contractual duty in a building contract where the client is to pay *such* sum as the Quantity Surveyor jointly appointed by the parties assesses to be due. There is no duty to pay anything *until* the Quantity Surveyor makes his assessment, and so, no breach of such duty until the assessment is made.

52 And thus, pre-payment of 'damages' ahead of the court's assessment does not discharge this secondary duty, rendering the party-in-breach to be liable to pay interest under s 35A(1), Senior Courts Act 1981: *Edmunds v Lloyds Italico & l'Ancora Compagnia di Assicurazione e Riassicurazione SpA* [1986] 1 WLR 492 (CA), 495–96; cited with approval in *Fast Ferries One SA v Ferries Australia Pty Ltd* [2000] 1 Lloyd's Rep 534 (Comm).

Such transfer of *primary* claim-right/duty jural relations is not permitted in respect of the primary obligations imposed as a matter of tort law. Hence we only speak of equitable assignments of accrued causes of action in tort. In respect of *such* assignments, if the requirements of s 136(1) are fulfilled, the effect is to transfer to the assignee the assignor's *secondary claim-right* against the obligor arising from the obligor's *secondary duty* to pay such damages as a court may assess. Thus, when assessing *such* damages, the court will necessarily look to the *assignor's* losses (including consequential loss, if any) from the point when her cause of action accrued, and ignore the assignee's loss[53] – in contrast with the position reached by the Court of Appeal in *Offer-Hoar v Larkstore.*

These divergent outcomes arise because of the difference in the subject-matter of the respective assignments. Since one may only equitably assign the secondary entitlements arising from the accrual of a tortious cause of action when the primary tort duty is breached, s 136(1)(a) transfers to the assignee the secondary claim-right that the obligor (who is in breach) pay damages to be assessed by the court, and not the primary claim-right not to commit the tort in question.

However, as in *Offer-Hoar v Larkstore*, where the subject-matter of the assignment was the benefit of a contract, the Court of Appeal appears to have taken the subject-matter of the assignment to have been the primary entitlements arising from the contract with Technotrade, and not merely the secondary entitlements arising

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[53] Hence, as in *King v Victoria Insurance Company Limited* [1897] AC 250 (PC), the assignee (an insurance company) was permitted to recover substantial damages quantified by reference to the loss sustained by the assignor (the assured) arising from the appellant's negligence leading to a collision with the assignor's vessel *in excess* of such sums it had paid to the assignor by way of satisfying its contractual duty to the assignor as his insurer.

from Technotrade's breach of contract. Thus the *primary* claim-right against the contractual obligor (Technotrade) was 'transferred' by s 136(1)(a), rendering it *as if* Technotrade's duty to prepare its report with due care had been owed to Larkstore, all along.

Accordingly, care needs to be taken when analysing equitable assignments of the benefit of a contract since one may assign *either* the primary entitlements of the contractual obligor *or* his secondary entitlements as arise when a cause of action for breach of contract has accrued, and the precise wording of the assignment may need close scrutiny to determine which was intended.

(b) Section 136(1)(b): 'all legal and other remedies for the same'

If s 136(1)(a) provides for the transfer of the assignor's Hohfeldian claim-right against the obligor to the debt or thing in action assigned, what does it mean for a statutory assignment to 'transfer and pass' the 'legal or other *remedies*' set out in s 136(1)(b)? What is a 'remedy' for s 136(1)(b) purposes?

The word 'remedy' is ambiguous, as Dr Zakrzewski has pointed out.[54]

One extremely broad functional definition of remedy within the legal context is that it is 'some means provided by the law for redressing a grievance'.[55] And within that very broad definition, Zakrzewski identifies five narrower usages of 'remedy', each of which entails judicial involvement, namely:

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54 See also Peter Birks, 'Rights, Wrongs and Remedies' (2000) 10 OJLS 1, 9–17.

55 Zakrzewski (2005) 11. '[A]nything that makes a bad situation better can be called a remedy. (p 43).

(1) an action or cause of action;[56]

(2) a substantive right that exists prior to the commencement of legal proceedings and the making of an order or pronouncement of a court in those proceedings;[57]

(3) a court order as a remedy;[58]

(4) the means of enforcing a court order as a remedy;[59] or

(5) the final outcome as a remedy, meaning 'the actual act, thing, or occurrence that effects or amounts to the redress or relief that the claimant obtains.'[60]

Zakrzewski also notes a sixth usage, namely, the 'self-help' remedy:[61]

> What is usually referred to as a self-help remedy is a privilege or immunity which permits the aggrieved person to act in a particular way. A self-help 'remedy' enables the claimant to realize his or her rights through his or her own acts.

'Other remedies': Self-help 'remedies'

The law provides for and recognises both legal remedies in the form of judicial orders and self-help 'remedies'. The former arise by reason of court order, following the

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56 ibid 11. Zakrzewski suggests that this usage originates from the forms of action (p 12), and that it is, 'a hangover [*sic*] from the time when forms of action were thought to be remedies in themselves …' (p 50).

57 ibid 13.

58 ibid 17.

59 ibid 18.

60 ibid 21.

61 ibid 47.

successful prosecution of a claim. Key examples of these would be the equitable remedy of specific performance and the common law remedy of damages. The law also recognises that a wronged party may, in some cases, 'help himself' to make good the wrong suffered without need for prior judicial sanction (though acting upon a supposed self-help remedy where the grounds upon which such remedy are absent may itself be a wrongful act). An example of a self-help remedy (in the present context)[62] would be the contractual promisee's power to discharge a contract by 'accepting' the promisor's anticipatory repudiatory breach, or the promisor's actual breach of a condition or of an innominate term which has the effect of depriving the promisee of substantially the whole of the benefit of the contract.[63]

It is suggested that the language in s 136(1)(b) as to the transfer of 'other remedies' is straightforward. By these words, the statute 'transfers' from obligee-assignor to the assignee of such remedial entitlements as the obligee/assignor may invoke or assert against the obligor in connection with the chose in action assigned by

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62 The self-help remedy of rescission at common law in respect of fraudulent misrepresentation provides another example; but that is not pertinent to the present discussion. Yet another key example would be the common law remedy of recaption; but that remedy is most aptly applied in connection with wrongs arising in connection with the loss of possession of tangible chattels.

63 See, eg, *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2006] FCAFC 40; [2007] 230 ALR 56 (Federal Court of Australia (Full Court)), [55], in which a majority of the Full Court suggested that had s 12 of the Conveyancing Act 1919 (NSW) (which is *in pari materia* with s 136(1)) been applied to an assignment of an 'entire chose' arising from a contract, it would place, '… the assignees in the same position in relation to repudiatory conduct as [the assignors] would have been had it retained the chose. Accordingly, we consider the assignees would have had available to them by way of remedy (inter alia) the right to claim damages for non-performance of [the obligors'] primary obligation and the power to elect to put an end to all primary obligations of both parties that remained unperformed.'

way of self-help. That is, the 'other remedies' referred to in s 136(1)(b) denotes all *remedial* entitlements of the assignor as would arise *without* judicial order. So, by reason of s 136(1)(b), it is open to a statutory assignee (but not the assignor) to invoke or assert those self-help 'remedies' so far as the statute would have transferred such 'non-judicial' remedial entitlements of the assignor to the assignee.

Judicial remedies

If the 'other remedies' mentioned in s 136(1)(b) refer to the assignor's self-help remedies, it would seem to follow that the 'legal remedies' mentioned therein must refer to remedies as entail judicial involvement.

This Section suggests that, for the purposes of s 136(1)(b), 'legal remedies' denotes 'any means provided by the law for redressing a grievance entailing a judicial order'. That is, 'legal remedies' in s 136(1)(b) may be broadly construed to encompass any and all of the five more discrete usages identified by Zakrzewski. Therefore, the 'legal remedies' referred to in s 136(1)(b) denote all *remedial* entitlements of the assignor as would arise on judicial order.

If so, post-assignment, the assignee may invoke or assert these 'legal remedies' by reason of s 136(1)(b) so far as the statute would have transferred such 'judicially ordered' remedial entitlements of the assignor to the assignee. For example, where the benefit of a contract has been statutorily assigned to an assignee, if the formation of that contract was tainted by equitable wrongdoing such as misrepresentation, the statutory assignment of such contract would transfer the assignor's 'legal (ie, judicial) remedy' to seek an order for rescission in equity to the assignee. It would be for the assignee to apply to the court for such an order of

rescission, and not the assignor, as such 'legal remedy' would have been transferred from the assignor to the assignee.

(c) Section 136(1)(c): 'the power to give a good discharge'

Section 136(1)(c) says what it does, and does what it says. Insofar as the assignor had (prior to the assignment) *the* power to 'give' a good discharge, post-assignment, that power would be transferred to the assignee.

But *which* power will have been transferred under this sub-section?

As suggested above, s 136(1)(b) transfers to the assignor the assignee's remedial entitlements. Some remedial entitlements entail Hohfeldian powers (eg, the self-help power of an obligee to accept a repudiatory breach of contract and so discharge the contract). So all remedial powers would be 'transferred' by reason of s 136(1)(b).

However, not all powers held by an obligee against an obligor are 'remedial'. For example, in practically all instances of voluntarily undertaken obligations, the obligee has the power to 'give' a good discharge by waiving precise performance by the obligor to the debt or thing in action assigned. Such power of discharge is seldom, if ever, viewed to be 'remedial'. And there are others.

For example, precise performance as would discharge contracts for sale and delivery of goods or contracts for a loan of money often entails co-operation by the party to whom delivery or tender is to be made. Where goods are to be delivered, such delivery must be accepted before the contract is fully performed. And the same is true of the duty to repay money borrowed by way of loan. So, if tender or delivery is to be made to the obligee, the obligee will have the power to effect discharge by *accepting*

the tendered goods or money. Such power of acceptance is hardly 'remedial': it is simply a power to effect discharge.

Then, in an employment contract, there is invariably provision for a contractual termination clause by which the contract may be terminated by giving notice. Such power is, again, no 'remedy', though it does lead to discharge.

One could read the verb 'to give' to mean a unilateral act of grant without any requirement for a quid pro quo in exchange: ie, one could construe s 136(1)(c) as transferring the power to *give* a good discharge by waiving precise performance by the obligor to the debt or thing in action that had been assigned: that is, the power to *release* the obligor from his duty.[64] Alternatively, if one were to read the verb 'to give' more generously, one might take it to refer to the power to *give effect to* a discharge of a debt by accepting a conforming tender of payment, and the analogous power to *give effect to* a discharge of a thing in action such as a contract for sale and delivery of goods by accepting a conforming delivery of those goods.

But even without taking a definitive position on the matter,[65] we may note that s136(1)(c) only provides for the transfer of a single power. Consequently, if the particular thing in action assigned entails more than one (non-remedial) power which has the effect of discharging the obligor, since s 136(1)(c) only provides for the transfer of *one* such power, any other non-remedial powers having the effect of discharging the obligation cannot be 'transferred to the assignee by that sub-section.

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64 If executed by deed, such release is immediately effective: s 155, LPA1925.

65 But see Chapter XII, Section 1.

This substantiates the proposition made above: the list of entitlements in s 136(1)(a), (b) and (c) which is transferred by operation of statute is not exhaustive. The words used in s 136(1) are inapt for that purpose, and if what was intended was for *all* the entitlements arising from a debt or thing in action to be transferred to the assignee by operation of s 136(1), the words used in s 136(1) seem to fall short.

5. Comparison: Indian Transfer of Property Act 1882

An interesting comparison may be had with the different approach taken by the Parliamentary draftsman when analogous provisions for the transfer of debts and other 'actionable claims' were legislated for application in India in the Indian Transfer of Property Act 1882.[66]

First, after providing that 'a mere right to sue cannot be transferred',[67] and that '[p]roperty of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force',[68] s 8 of the 1882 Indian Act provides that:

> Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee *all* the interest which the transferor is then capable of passing in the property and in the legal incidents thereof.
>
> Such incidents include, when the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

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66 The text of the Transfer of Property Act 1882 (Act IV of 1882, India), as amended, may be retrieved from the website of the Indian Government's Department of Land Resources at http://dolr.nic.in/Acts&Rules%5CTransferOfPropertyAct(1882).htm (last accessed June 10th, 2016).

67 Transfer of Property Act 1882 (India) s 6(e) (emphasis added).

68 ibid s 6.

…

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.[69]

As to how property in respect of 'actionable claims' is to be transferred, s 130 says:

(1) The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, shall be complete and effectual upon the execution of such instruments, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

PROVIDED that every dealing with the debtor other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceeding and without making him a party thereto.

…

Section 131 then provides that a notice of transfer of an actionable claim shall be in a writing signed by the transferor or his duly-authorised agent, and s 132 stipulates that

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69 HS Gour, *The Law of Transfer in British India* (4th edn, Thacker, Spink and Co, 1916) states that s 8 of the 1882 Act was drawn from ss 6 and 63, Conveyancing and Law of Property Act 1881.

the transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject at the date of the transfer.[70]

Sections 130–132 of the Indian Act of 1882 do the work, and more, of s 25(6) of the 1873 Act. When read with s 8 of the 1882 Act, we see that the Act passes *all* the interest of the transferor in the property in question, and *all* the legal incidents arising in connection with that property, to the transferee. This may be contrasted with the considerably more elaborate (and restrained) language now found in s 136(1).

The Indian Transfer of Property Act 1882 came into force on July 1st, 1882,[71] seven years after the Judicature Act 1873 came into force, and the difference between the effects of the two Acts is striking, given that the 1873 Act has no equivalent to s 8 And although s 8 of the 1882 Act appears to have been drawn from s 63 of the Conveyancing and Law of Property Act 1881, and that section was re-enacted as s 63, LPA1925, both iterations of s 63 have only been applied to conveyances of estates in land, even though their wording, on their face, admit of a broader application.[72].

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70 The burdens owed by the transferor to the obligor are, accordingly, capable of being transferred under the Indian Transfer of Property Act 1882.

71 ibid s 1.

72 The Conveyancing and Law of Property Act 1881 was repealed by s 207 read with the 7th Schedule, LPA1925. Section 63 of the 1881 Act was re-enacted as s 63, LPA1925. Although 'property' in both the 1881 and 1925 Acts was defined to include real and personal property, and also any chose/thing in action (s 2(i), 1881 Act; s 205(1)(xx), LPA1925), the context within which s 63 of the 1881 Act and s 63, LPA1925 are to be read are dissimilar. It seems relatively clear that s 63, LPA1925 is to be read merely as dealing with conveyances of estates in land, given that practically all of the sections before and after it are concerned with such conveyances, and not conveyances of personalty such as things in action. No such limiting contextual clues are present with regards s 63 of the 1881 Act. But even so, s 63, LPA1925 is

Given the above, rather than contorting the plain meaning of the words in s 136(1), we should recognise their inherent limitations. Although we may say that the 'statutory' assignment provided by s 136(1) entails an extinction and a regrant, only those entitlements specified in s 136(1)(a), (b) and (c) are affected, and the statute does not transfer any extraneous entitlements to the assignee.

The statutory modifications now found in s 136(1) may therefore have a 'procedural' cast, since they 'merely' affect the assignor's power to bring a claim, all her legal and other remedies associated with the debt or thing in action assigned, and her power to give a good discharge in respect of such debt or thing in action assigned. Yet as with the Statutes of Set-off, these 'procedural' modifications effected substantive changes,[73] as they almost inevitably tend to do.[74] Therefore, s 136(1) should not be dismissed as 'mere machinery'.[75]

The above has suggested that statutory assignments are necessarily entwined with equitable assignments, so far as the debt or thing in question had been equitably

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usually taken to be a mere restatement of s 63 of the 1881 Act. If so, the latter provision might never have been understood to have any operation with respect to assurances of things in action. See *Halsbury's Laws* (5th edn, 2012) vol 32, para 441, fn 3.

73 And consequently, the concern as to whether statutory assignments entail merely procedural or substantive effects is, arguably, misplaced: statutory assignments arising where the s 136(1) requirements are met entail both, so far as the *procedural* changes effected by that section have *substantive* effects. *Cf* Tolhurst (2016) Ch 5.

74 'The law of procedure exists only for the sake of giving efficacy ('execution and effect') to substantive law. But in doing so it tends to impose *conditions* on the execution of substantive law. It follows that adjective [ie, procedural] law is both a necessary instrument of, and a potential obstacle to, the execution of substantive law.': Gerald J Postema, *Bentham and the common law tradition* (Clarendon Press 1986), 342.

75 *Marchant v Morton, Down & Co* [1901] 2 KB 829 (KB) 832 (Channell J); and *Torkington v Magee (KB)* (n 3) 435.

assigned in the first place. Properly understood, s 136(1) does not create an independent mode of assignment. Rather, assignments are effected in such manner as law or equity may otherwise permit, supplemented by the effects in s 136(1), where applicable. Hence, if the debt or thing in action had been equitably assigned, and if the requirements in s 136(1) are satisfied, the entitlements set out in s 136(1) are transferred to the assignee; no more, no less.

Some implications of this construction of s 136(1) will be examined in the following Chapter.

PART VI:

WHY IT MATTERS

XII. WHY IT MATTERS

This thesis has proposed that equitable assignment is a *sui generis* institution comprising two components: an express bare trust, and an atypical agency.

It has also suggested that 'statutory' assignment is a parasitic doctrine which does not provide for a distinct mode of assignment, but merely mandates certain effects spelt out in ss 136(1)(a), (b) and (c) when the requirements of 'absolute, writing and notice' are satisfied with regards a chose that had *otherwise* been validly assigned at law or in equity. Therefore, where a chose in action had been equitably assigned in circumstances where the requirements in s 136(1) were also met, the trust and agency effects which would otherwise apply would be overridden as to the entitlements set out in ss 136(1)(a), (b) and (c).

But does any of this matter?

1. Discharge by acceptance of performance, limitation, and restitutionary liability

The analysis in this thesis challenges the proposition that a debtor, B_P, who tenders payment to his creditor, despite having received notice that the creditor had equitably assigned the benefit of the debt to an assignee, has to pay the assignee a second time *because* the tender to the creditor-assignor does not discharge the debt at common law. Instead, it suggests that such payment discharges the debt at common law[1]

[1] See also Tham (2010) 360.

(unless otherwise provided by statute),[2] but such discharge generates a secondary, accessorial, liability to the assignee in equity.[3]

This has immediate consequences on questions of limitation, and also the remedies that are available to an equitable assignee.

If a debtor like B_P is liable to the assignee in equity for dishonest assistance, the limitation defence set out in s 5 read with s 6, or s 8 of the Limitation Act 1980[4] will be irrelevant. Those provisions apply to causes of action based on simple contract or specialty, respectively. But as to the *equitable* liability of B_P arising from his dishonest assistance, one looks to s 21(3) of the 1980 Act, as the House of Lords explained in *Williams v Central Bank of Nigeria.*[5]

Further, if B_P's liability derives from the equitable wrong of dishonest assistance, B_P may also be liable to make restitution for any gains which his assistance might have generated. Therefore, two distinct heads of equitable liability are open to the assignee in these cases.[6]

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2 Eg, s 141(1), LPA1925, which provides that the rent and benefit of a lessee's covenants arising under a lease of land arising prior to January 1st, 1996 shall be 'annexed and incident to and shall go with the reversionary estate'. See also Megarry & Wade (2012) para 20-068.

3 See Chapters IX and X.

4 Consequently, 'there is no room for the equitable doctrine of laches': *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 (HC) 115; affd on this point, *Re Pauling's Settlement Trusts* [1964] 1 Ch 303 (CA) 353.

5 [2014] UKSC 10, [2014] AC 1189, discussed in Stephen Watterson, 'Limitation of actions, dishonest assistance and knowing receipt' (2014) 73 Cambridge Law Journal 253.

6 See, eg *Nanus Asia Co Inc v Standard Chartered Bank* [1990] 1 HKLR 396 (HC, Hong Kong). The possibility was also recognized in *Fyffes Group Ltd v Templeman* [2000] 2

But what if the equitable assignment had 'become' a 'statutory' assignment?

In Chapter XI, it was suggested that s 136(1)(c) may be construed as transferring the power to accept a conforming tender of performance. This construction finds some support in *Liquidation Estates Purchase Company, Limited v Willoughby*.[7]

In that case, Walker contracted to purchase a partnership business, hoping to re-sell it at a profit. Together with two co-investors,[8] Kennedy placed £6,000 with Walker to finance the purchase, on Walker's promise to repay double the amount placed out of the proceeds of re-sale (ie, £12,000), such sum being secured by a charge over the re-sale proceeds.

Kennedy then mortgaged his interest arising under his agreement with Walker to Norton to secure a loan of £6,200.[9]

Lloyd's Rep 643 (Comm), 672 (Templeman J); *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1538]; and in *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499, [93] (permission to appeal to the Supreme Court refused on November 10th, 2014). In *Fyffes* and in *Novoship*, no restitutionary award was granted at least partially on grounds that the gains made by the accessories and their wrongdoing were insufficiently causally linked.

7 [1898] AC 321 (HL).

8 Namely Willoughby and Lord Paulet, who invested £9,000 and £10,000, respectively, on the same terms.

9 Though the judgments in the House of Lords often refer to Kennedy having 'charged' his interest to Norton, Norton's security interest was not a charge by way of hypothecation. As Lord Herschell noted (at [1898] AC 321 (HL), 331, emphasis added): 'The notion that Norton's rights could be affected because a payment was wrongfully made to his *mortgagor* [ie Kennedy] does not appear to me to rest on any sound foundation.' In addition, the facts in

Despite receiving written notice of the mortgage dated October 24th, 1888 from Norton's solicitors, in July 1889, Walker paid Kennedy £5,122 out of the proceeds of re-sale of the business; and in June 1890, Walker caused property worth £5,000 to be conveyed to Kennedy in part-satisfaction of the debt owed.

Meanwhile, Kennedy mortgaged his equity of redemption in his interest to Lord Windsor. Walker was also informed of this in 1891.

In 1893, Norton's and Lord Windsor's respective interests in Kennedy's interests against Walker were assigned to the Liquidation Estates Purchase Company.

In 1889, not having been paid anything, Willoughby, one of the co-investors, brought proceedings against Walker, naming Lord Paulet and Kennedy as co-defendants. In those proceedings, a considerable sum consisting of the proceeds of re-sale charged by Walker was paid into court, and it was ordered that it should be applied to satisfy Lord Paulet's and Willoughby's claims before anything should be paid in respect of Kennedy's share, on the assumption that Kennedy had already received part payment in advance of Lord Paulet and Willoughby by reason of Walker's actions in 1889 and 1890.

The Liquidation Estates Purchase Company, being assignee of both Norton's and Lord Windsor's respective interests in Kennedy's interests against Walker, brought the present proceedings against Willoughby, Kennedy, Lord Paulet's trustee

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the report of the Court of Appeal's decision refer to the security arrangement between Kennedy and Norton to be a mortgage: [1896] 1 Ch 726 (CA), 726; as does Kay LJ in his dissenting judgment: [1896] 1 Ch 726 (CA) 736.

in bankruptcy and some others claiming derivative beneficial interests in Lord Paulet's interest, Walker, and the purchasers of the partnership business.[10]

The plaintiff claimed an account of what was due to them under Kennedy's mortgage to Norton, and, 'as transferees of Lord Windsor's interest … to have the fund in court … applied towards payment of what should be found due to the [plaintiff], and other relief.'[11] The issue, therefore, was whether Walker's actions in 1889 and 1890 had reduced the sums due to Kennedy, as had been assumed in the earlier proceedings.

On appeal, the House of Lords concluded that:[12]

> Payment to Kennedy after that notice [from Norton's solicitors] was a payment which Norton, so long as he had an interest in the fund, was not bound to recognise. … [I]t was no payment at all.

Consequently, it held that the sum paid into court should be applied to Willoughby, Lord Paulet and the plaintiff without regard to Walker's actions in 1889 and 1890.

Though none of the judgments nor any of the arguments refer to it, it seems reasonably clear that the benefit of the contract (and of the charge) between Walker

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10 *Liquidation Estates Purchase Company v Willoughby* [1896] 1 Ch 726 (CA) 728.

11 *ibid*.

12 [1898] AC 321 (HL), 336 (Lord Macnaghten). Lord Herschell was of similar opinion (at 331): 'Kennedy having assigned his interest to Norton, and Norton having given notice of this assignment to Walker, any payment subsequently made by him to Kennedy could, as it seems to me, have no more effect as against Norton than if it had been made to a stranger.' And similarly, the Lord Chancellor held: 'Can it make any difference that Walker, in defiance of his duty, thought proper to divert a certain sum of money from the gross fund in favour of Kennedy at a time when to his knowledge Kennedy had no right to receive it?' (at 328).

and Kennedy had been 'statutorily' assigned to Norton as at October 24th, 1888, when Walker received written notice of the same.[13] Nowhere is it suggested that the mortgage was parol, and given the very substantial sums involved, it is inconceivable that Norton would have taken security other than by a written agreement in Kennedy's hand. Since an equitable assignment by way of mortgage *is* an absolute assignment for the purposes of 'statutory' assignment,[14] and written notice of the assignment had been given, this was an equitable assignment by way of mortgage which had 'become' a 'statutory' assignment.[15]

Although Kennedy *was* joined to the proceedings, the plaintiff appears to have brought the proceedings in its own right. There is no indication of the plaintiff seeking any order compelling Kennedy to permit it to bring the present proceedings against Kennedy's co-defendants as one would expect if the assignment had been merely equitable. Absent such order, if Kennedy had effected statutory assignments in favour of Norton and Lord Walton, and they had also effected statutory assignments in favour of the plaintiff,[16] since such statutory assignments would have transferred Kennedy's claim-rights against Walker to, ultimately, the plaintiffs, it would have been unremarkable for the plaintiffs to have brought the proceedings in their own name.

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13 ibid 322.

14 So far as an assignment by way of mortgage is an absolute assignment for the purposes of s 25(6), Judicature Act 1873, and now, s 136(1): see Chapter XI, n 5.

15 This reading of *Liquidation Estates* may be shared by Guest and Liew (2015) para 2-26, fn 171. But *Liquidation Estates* has been assumed in *Halsbury's Laws* (5th edn, 2009) vol 13, para 70, fn 3 to be a case of a mere equitable assignment.

16 Norton was not made party to the plaintiff's proceedings, so his assignment to the plaintiff must have been statutory.

Therefore, as in *Read v Brown*,[17] the effect of such 'statutory' assignment was to substitutively transfer Kennedy's claim-right against Walker to Norton such that it became *as if* Walker's duties had always been owed to Norton, and not to Kennedy (subject to Kennedy's equity of redemption which Kennedy subsequently mortgaged to Lord Walton). It would naturally follow that any payments or conveyances of other property to Kennedy by Walker in purported discharge of a duty he no longer owed to Kennedy but owed to Norton (to the extent Norton's loan was left unsatisfied) would be completely ineffectual.

Given the analysis of equitable assignment, and the effect of s 136(1)(c) when such equitable assignment 'becomes' a 'statutory' assignment, we need to distinguish between 'statutory' and non-statutory assignments of debts because a debtor who tenders payment to his creditor following notice of a 'statutory' assignment of the debt cannot claim to have discharged his debt obligation at common law.

Such payment is, in essence, a payment to a stranger to the debt contract because the assignor no longer has the power of acceptance to effect a discharge. Consequently, the debt remains unpaid, and furthermore, no equitable liability for dishonest assistance may arise, for on this view of s 136(1)(c), the assignor could owe her assignee no duties as to her exercise of a non-existent power

2. Anti-assignment clauses

The analysis in this thesis explains how anti-assignment clauses work, and why they do not prevent the constitution of trusts over the benefit of contractual choses in

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[17] (1888) 22 QBD 128 (CA).

action. It therefore supports the decision reached by the Court of Appeal in *Barbados Trust*.[18]

In *Linden Gardens*, Lord Browne-Wilkinson held as follows:[19]

> [T]he existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights. … If the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition, viz., to ensure that the original parties to the contract are not brought into direct contractual relations with third parties.

We should, however, note the limited extent to which assignments in breach of an anti-assignment clause were said by Lord Browne-Wilkinson to be ineffective:[20]

> [A] prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent a transfer of the chose in action: in the absence of the clearest words it cannot operate to invalidate the contract as between the assignor and the assignee and even then it may be ineffective on the grounds of public policy.

While an assignment in breach of an anti-assignment clause 'will be invalid against the debtor',[21] such breach may not ordinarily affect the validity of the assignment as between the assignor and the assignee. And even if it were drafted to have such third-party effects, there would be serious policy concerns why the burden of such a provision should have any effect on an assignee who remains a stranger to the agreement containing such provision.

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18 *Barbados Trust Company Ltd v Bank of Zambia* [2007] EWCA Civ 148, [2007] 1 Lloyd's Rep 495.

19 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL) 108F–G.

20 ibid 108C–D.

21 Chitty (2015) para 19-044.

An anti-assignment clause, therefore, merely precludes the assignee from having any direct dealings with the obligor, but does not *invalidate* the assignor-assignee relationship as created by the assignment between them. To better understand the import of this, it is helpful to consider the following homely example.

Example 12.1

A contracts for B to build a shed on A's land, completion within three months, with time to be of the essence, and payment in advance. However, as A is undecided as to the colour which B is to paint the shed, the agreement provides that one week before completion, A shall inform B of the paint colour to be used. The contract also incorporates a clause which provides, 'A shall not assign the benefit of this contract.'

Midway through the project, A sells that part of her land on which the shed sits to C, a neighbour. As part of the sale, A also equitably assigns the benefit of her contract with B to C.

Notice of the assignment is given to B, who is indignant at A's breach of the anti-assignment clause. But he perseveres with the building work.

One week before completion, he approaches A and asks to be told what paint should be used. A tells B to paint the shed black.

B then bumps into C and relays what A had told him to do. C insists he should ignore A, and instructs B to paint the shed bright blue.

What should B do?

Given the facts above, and given Lord Browne-Wilkinson's analysis of the operation of anti-assignment clauses, in principle, B may carry on to paint the shed black, as A had instructed, B being privileged to ignore C's instructions.

Applying the composite model of equitable assignment to the specific context in Example 12.1, if A intended to effect an equitable assignment of the benefit of her contract with B to C, it would follow that A would have bound herself to C to invoke her powers against B for C's benefit by reason of the 'trust effect'. A would also have authorised C to invoke her powers against B by reason of the 'agency effect': meaning that so far as A was concerned, C's acts (within such authority as C had been granted) would be A's acts. But that does not mean that C may invoke such of A's powers as had been delegated to C *effectively* in every circumstance.

In Example 12.1, B had stipulated that the benefit of A's contract with B was not to be equitably assigned. This manifests B's intention that he wished to deal with A, and only A. In particular, B had granted A a contractual power to decide what paint B was to use in order to fully discharge his part of the contractual bargain. He did not wish to complicate matters by countenancing the possibility of conflicting directions. So the anti-assignment clause would be effective in insulating him from the effect of C's directions. This is because the anti-assignment clause makes it plain that B had granted A the power to nominate a paint colour as part of their contractual agreement on a non-delegable basis: this power was granted to A, and *only A* was to exercise it. So, in Lord Browne-Wilkinson's words:[22]

> The reason for including the contractual prohibition [against assignment of the benefit of the contract] viewed from the contractor's

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22 *Linden Gardens (HL)* (n 19) 105E.

> point of view must be that the contractor wishes to ensure that he deals, and deals only, with the particular employer with whom he has chosen to enter into a contract.

Yet the effect of the anti-assignment clause is not to invalidate the equitable assignment. It insulates the obligor such that he is not obligated to the assignee: it provides B with an immunity against C in that C is disabled from effectively invoking A's power to stipulate the colour to be used by B to fully perform his duties under the contract.

That said, in Example 12.1, B could *choose* to comply with C's direction, and paint the shed blue and not black. If he did, he would *not* be in breach of his duties under his contract with A. A's equitable assignment of the benefit of her contract with B to C is not rendered void by the anti-assignment clause.[23] So A would have effectively constituted herself bare trustee of the benefit of such contract for C, *and* would have validly constituted C her agent, with the authority to invoke A's powers against B as C pleased. Therefore, A would not be entitled to deny that C's directions were, in effect, her own. And thus, so far as A might implicitly be taken to have the power to revoke an earlier direction and substitute it with a different one, C would have been delegated such powers, and A could not deny that that was so.

The anti-assignment clause does not, however, preclude A from encumbering her privilege against all persons other than herself (ie, all 'non-A') to invoke her powers against B as she pleases: A's ability to modify her privilege/no-right jural relations against third parties such as C is unaffected. Consequently, an anti-

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[23] Guest and Liew (2015) para 4-03 suggests that an assignment in breach of a 'prohibition' against assignment 'are normally considered to render the assignment *void* or inoperative' (emphasis added). No authority is cited for this proposition.

assignment clause would not preclude A from constituting herself to be trustee of the benefit of the legal chose with B for the benefit of C; which is precisely the conclusion reached in *Barbados Trust*.[24]

The analysis above suggests that an anti-assignment clause like that in Example 12.1 has effects beyond A merely *warranting* that she would not effect an assignment.[25] The clause tempers the effectiveness of any assignments effected by A by maintaining B's immunity against third-party assignees invoking powers delegated them by A.

Conversely, though B would be insulated from the effects of the assignment, it cannot be said that A's assignment to C was a nullity. As Lord Browne-Wilkinson took pains to emphasise, ordinarily, the assignment *would* be effective, at least as between A and C (though if A had also *promised* C (expressly or implicitly) that B would be obligated to comply with C's directions, or had made any representations to C that that would be the case, such contractual breaches or misrepresentations may

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24 *Barbados Trust Company Ltd v Bank of Zambia* (n 18) esp [88] (Rix LJ).

25 The proposition that an anti-assignment clause may be construed to be a contractual promise not to effect an assignment was, it appears, first made in print by Goode (1979) 554. For others making a similar point, see, eg, G Tolhurst, 'The Efficacy of Contractual Provisions Prohibiting Assignment' (2004) 26 Sydney Law Review 161, at text to fn 86; CH Tham, 'The Nature of Equitable Assignment and Anti-Assignment Clauses' in Jason W Neyers, Richard Bronaugh and Stephen G A Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 309; Tolhurst and Carter (2014) 406. It would be possible, therefore, for an obligor who realized that his obligee was preparing to effect an assignment in breach of such promise to seek to enjoin the obligee from doing so. However, the argument in the main text suggests that if no injunction was obtained in time to prevent the breach, so far as the anti-assignment clause had the effect of insulating the obligor from having to deal with anyone other than the obligee, breach of the promise would entail no substantial loss to the obligor, and any damages for such breach by the obligee would be nominal.

raise the possibility of the contract being discharged for breach, or rescinded for misrepresentation).

Ordinarily, the possibility that powers granted to an obligee may be exercised by a representative of such obligee is taken to have been assented to. But the law recognises that one may depart from this and may provide that one is only willing to deal with a particular person, and no other – not even a duly authorised representative.

Circumstances where this will typically be the case, will be where that person is to exercise *his* judgment, *his* discretion, and/or *his* particular and unique skills. If so, such 'personal' entitlements may only be invoked by that person; or one could provide for this via an anti-assignment clause, as in Example 12.1, which rendered A's power to make decisions concerning the paint to be used 'personal' to A, such that B is not obligated to comply with the directions of anyone *other than A*. Such preferences should not be dismissed as mere idle whim. As Professor Tettenborn has pointed out, 'With whom must he or she negotiate to cancel or reduce exposure?'[26]

Where parties to a contract have agreed to an anti-assignment clause, the 'agency effect' so far as it may be applied to third parties to that agency relation cannot operate because the presumption of assent will have been rebutted. Thus, obligors who are strangers to the agency relation are privileged to decline to treat the agent's acts as if they were the principal's, so far as such acts might affect their own

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[26] A Tettenborn, 'Assignments, Trusts, Property and Obligations' in JW Neyers, R Bronaugh and SGA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 281. See also *Explora Group Plc and Hesco Bastion Ltd v The Trading Force Ltd* [2005] EWCA Civ 646, [96].

jural relations with the principal.[27] But that is not to deny validity to the agent-principal relationship *inter se*, nor, for that matter, does it deny validity to the parallel beneficiary-trustee relationship *inter se.* And so, an anti-assignment clause does not render an equitable assignment effected in breach of its terms to be completely null and void.

How, then, might an anti-assignment clause affect 'statutory' assignments?

'Statutory' assignments rest on there having been an absolute 'assignment' as would be recognised at law or in equity apart from the provisions of s 136(1), itself. It is suggested that equitable assignments whose effects have been curtailed by reason of an anti-assignment clause are not completely effective because the obligor in whose favour the anti-assignment clause operated would have an immunity against an assignee's invocations of such powers as had been delegated to him by his assignor in 'breach' of an anti-assignment clause. Such equitable assignments which are only partially effective are, it is suggested, not 'absolute' assignments – and if so, they would fall outside the ambit of s 136(1).[28]

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27 *Cf* Bridge (2016), who analyses equitable assignments as entailing the implication of a suitable contractual term in the contractual chose assigned. As noted in Chapter III, n 1, that analysis cannot explain how equitable assignment works with regards equitable choses in action, or tortious causes of action.

28 This result would be consistent with the result reached in the first of the two conjoined appeals heard by the House of Lords in *Linden Gardens (HL)* (n 19), it being improbable that the parties would not have complied with s 136(1) to take advantage of its effects.

3. Assignment of *parts* of a chose in action

This thesis suggests that where a chose in action may be seen to be made up of discrete claim-right/duty and power/liability jural relations between the obligee and obligor to the chose, the 'assignment' of such a chose by the obligee to an assignee entails modifying the privilege/no-right and immunity/disability jural relations between obligee-assignor and assignee in respect of the claim-right/duty and power/liability jural relations between the obligee-assignor and the obligor. By conceptualising equitable assignments to operate by means of a trust as well as an agency effect, this thesis has shown that the same mechanisms underpin equitable assignments of legal and equitable choses in action, alike.

This entails rejection of the 'substitutive transfer' model, which is important, because the substitutive transfer model cannot explain how or why *parts* of a debt may be effectively equitably assigned.

As was recognised in *Re Steel Wing Company, Ltd*,[29] it is not possible to invoke s 136(1) successfully when a fraction of a debt is supposed to have been assigned. This is because such assignment of part of a debt is not 'absolute' for the purposes of s 136(1).[30]

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29 [1921] 1 Ch 349 (Ch).

30 See, eg: *Durham Brothers v Robertson* 774 (Chitty LJ); *Forster v Baker* [1910] 2 KB 636 (KB) 640–41 (Bray J, affd on appeal to the Court of Appeal: [1910] 2 KB 641–42); *Raiffeisen Zentralbank Österriech AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825, [75].

But even so:[31]

> The assignment of part of a debt however operates in equity to transfer the part assigned, and consequently in my judgment constitutes the assignee a creditor in equity of the company in respect of that part.

Though the language of 'transfer' is not entirely apt, given the analysis in this thesis, the sense of what PO Lawrence J was implying is tolerably clear. As was held in *Hunter v Moss*,[32] an express trust may be validly constituted over 50 out of 950 shares registered in the name of the settlor. Though the specific shares have not been identified, such a trust does not fail for want of certainty of subject-matter. As Briggs J explained:[33]

> A trust of part of a fungible mass without the appropriation of any specific part of it for the beneficiary does not fail for uncertainty of subject matter, provided that the mass itself is sufficiently identified and provided also that the beneficiary's proportionate share of it is not itself uncertain.

And for Briggs J, though he acknowledges that there remains some uncertainty as to the operation of such a trust, the most persuasive analysis of such a trust was that it operated:[34]

> by creating a beneficial co-ownership share in the identified fund, rather than in the conceptually much more difficult notion of seeking

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31 *Re Steel Wing Company, Ltd* (n 29) 355.

32 [1994] 1 WLR 452 (CA); leave to appeal refused.

33 *Re Lehman Brothers International (Europe)* [2010] EWHC 2914 (Ch) [225] (Briggs J); affd *Re Lehman Brothers International (Europe) (in administration) (No 4)* [2011] EWCA Civ 1544; [2012] 2 BCLC 151 [73]–[77].

34 *Re Lehman Brothers International (Europe)* (n 33) [232] (Briggs J).

> to identify a particular part of that fund which the beneficiary owns outright.[35]

Once we recognise that an equitable assignment entails the constitution of a trust over the chose assigned, when one is assigning a fraction of a debt owed (say, 25% of the debt), such assignment entails equitable co-ownership.[36] That is, the trust which underpins such assignment may be conceived to be a trust for the benefit of the assignee *and* the assignor over the entirety of the debt as tenants-in-common in undivided shares in the ratio of 25/75.

Given this, if the debt was unpaid, the assignor would be duty-bound to the assignee by reason of such trust, above, to bring an action at law against the debtor in respect of the unpaid debt. If the assignor performed such duty, the sums realised by such action would then be overreached and be held by the assignor on the *same* trust as arose by reason of the equitable assignment, that is, she would hold the sums received on trust for her assignee and herself in the ratio of 25/75, and so far as the sums received might *then* be apportioned, the assignee could require the assignor to pay over her fractional share.[37]

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35 Citing with approval, the analysis in Goode (2003). A similar approach was adopted in a decision by Campbell J sitting in the Equity Division of the Supreme Court of New South Wales in *White v Shortall* [2006] NSWSC 1379, 60 ACSR 654, [210]–[212]. In so doing, Briggs J implicitly rejected the criticisms of *Hunter v Moss* (n 32) as may be found in Eva Micheler, *Property in securities: a comparative study* (Cambridge University Press 2007) 130; Erica Johansson, *Property rights in investment securities and the doctrine of specificity* (Springer 2009) 94–99, 167–171.

36 See, eg, Goode (2003) 385; Bridge (2013) para 23-027.

37 'There is no good reason why it should be impossible for a settlor to declare himself a trustee of 50 out of 950 of his indistinguishable shares, when he could clearly declare himself a trustee of all of them, or as to an unappropriated 900 for himself and as to an unappropriated

The analysis in this thesis is that the composite trust plus agency model of equitable assignment applies to assignments of legal and equitable choses, alike. So the same analysis may also be applied to 'partial' assignments of an equitable chose which is entire and indivisible (as, for example, an equitable interest in a single company share).

By way of contrast, the 'partial' trust put forward by some others would appear to deny that an equitable assignment of an equitable chose entails the constitution of a trust over such chose. To that extent, they appear to accept that such assignments operate by means of a 'substitutive transfer.' But since such substitutive transfer cannot explain the validity of equitable assignments of fractional parts of legal choses in action which are entire and indivisible, it cannot explain how equitable choses in action which are similarly entire and indivisible may be assigned 'in part', either.

4. The rule in *Dearle v Hall*

(a) As applied to equitable charges by way of hypothecation

There is a view that the rule in *Dearle v Hall* may apply to instances of priority conflicts between the holders of fixed or floating charges over the same chose in action, and also to priority conflicts between equitable assignees of a chose in action and holders of fixed or floating charges over the same chose in action. The analysis in this thesis suggests that this should be reconsidered.

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50 for another beneficiary, who could clearly insist on a distribution of 50—it would not matter which.': Lewin (2015) para 3-007.

In an appeal from the New Zealand Court of Appeal, Lord Hoffmann observed as follows:[38]

> If the policy is effected in the name of the mortgagee, he is entitled in law to payment of the proceeds. But his interest remains by way of *charge* to secure the mortgage debt and he will be accountable to subsequent mortgagees or the mortgagor for any surplus. If the policy is effected in the name of the mortgagor, the mortgagee still has an interest by way of *charge* in the proceeds. How as a matter of legal analysis does this interest take effect? Necessarily by way of assignment. A *charge* on a fund belonging at law to someone else operates as a partial equitable assignment (see *Durham Brothers v Robertson* [1898] 1 QB 765 at p 769]. It is subject to the rule in *Dearle v Hall* (1828) 3 Russ 1 as to notice to the debtor in the same way as any other equitable assignment.

The passage above has been taken as authority by some for the proposition that the rule in *Dearle v Hall*, 'applies to competing assignments by way of charge and not only to outright assignments';[39] and:[40]

> (3) If the floating charge crystallises automatically on the attempted creation of a subsequent specific equitable charge, the floating chargee takes priority in equity on grounds of time.
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> …
>
> (5) Priority under proposition (3) could be reversed in the case of book or other debts, including credit bank accounts, if the subsequent specific chargee or absolute purchaser gives first notice to the debtor under the rule in *Dearle v Hall*. …

These views have been applied in Hong Kong,[41] but it is arguable that they fail to fully appreciate the different contexts in which the noun 'charge' is used, and

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38 *Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd* [1995] 1 WLR 1142 (PC) 1144.

39 *Palmer's company law* (Geoffrey Morse (Principal editor) ed, 25th edn, Sweet & Maxwell 1992) fn 7 to para 13.151 (Palmer R.123: November 2009). This is assumed to be the case in Oditah (2009) 351.

40 William James Gough, *Company charges* (2nd edn, Butterworths, 1996) 254. The point is repeated at p 276.

that whereas *some* types of 'charge' entail an equitable assignment, other types of 'charge' do not. In consequence, any application of the rule in *Dearle v Hall* to the latter type of charge would be improper, particularly given the doubts one may have as to its derivation, and also the caselaw which has held that the rule in *Dearle v Hall* is not to be extended.[42]

As Turner has pointed out, the cases use the noun 'charge' in multiple senses:[43]

> Numerous cases use the terms 'mortgage', 'charge' and 'assignment' to a degree interchangeably. However, the only parity of the terms 'legal charge' and 'equitable charge' is where 'charge' means mortgage. A mortgage can be legal or equitable because it has life in each jurisdiction. The two stand together because the equitable mortgage arises when the legal owner of the property constituting the security does some act for value which, though insufficient to create a legal mortgage, demonstrates a binding intention to create a security in favour of the mortgagee. A charge in the strict sense is different. It is based on purely equitable responses to contractual construction. … It has, statute apart, no 'legal' counterpart. No case records a legal 'charge' in substance truly not a mortgage or other security or created by statute.

And, as Millett J (as he then was) observed in *Re Charge Card Services Ltd*:[44]

> …[The essence of an equitable charge [ie, a charge by way of hypothecation] is that, without any conveyance or assignment to the chargee, specific property of the chargor is expressly or constructively appropriated to or made answerable for payment o a debt, and the chargee is given the right to resort to the property for the purpose of having it realised and applied in or towards payment of the debt. The availability of equitable remedies has the effect of giving the chargee a proprietary interest by way of security in the property charged.

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41 *ABN AMRO Bank NV v Chiyu Banking Corp Ltd* [2000] HKCFI 373; [2001] 2 HKLRD 175 (Court of First Instance, High Court of the Hong Kong Special Administrative Region) [60].

42 *Ward v Duncombe* [1893] AC 369 (HL) 391; *Hill v Peters* [1918] 2 Ch 273 (Ch) 279.

43 PG Turner, 'Assignments by way of charge' (2004) 24 Australian Bar Review 280, 290.

44 [1987] 1 Ch 150 (Ch) 176.

> It is true, therefore, that no conveyance or assignment is involved in the creation of an equitable charge …[45]

It seems unlikely that when Lord Hoffmann spoke of the 'charges' in *Colonial Mutual General Insurance Co* as operating by means of a form of equitable assignment of the benefit of the insurance policy, he was referring to *equitable* charges operating by means of hypothecation over that policy. That would make little sense since hypothecation entails no form of equitable assignment at all.

Lord Hoffmann might be better understood as referring to 'legal' charges which, outside of charges arising by reason of statute, could only mean an equitable *mortgage* over the benefit of the policy entailing a *promise* to effect an equitable assignment of such policy which, when given for value, would be specifically enforceable against the promisor-mortgagor. If so, there would be no problem, for such a 'legal charge' would operate by means of equitable assignment, albeit 'partially' as a *promise* to effect an equitable assignment that was supported by consideration.

Lord Hoffmann's references to the bank as mortgagee is telling, given the subject-matter of the dispute. The bank was not merely mortgagee of the house over which the policy had been effected: it was *also* the mortgagee of the benefit of that policy by reason of the covenants which had been implied into the mortgage executed in relation to the mortgage over the house by operation of the New Zealand Property

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45 Millett J went on to observe, controversially, that 'the benefit of a debt can no more be appropriated or made to the debtor than it can be conveyed or assigned to him … [because] once any assignment or appropriation to the debtor becomes unconditional, the debt is wholly or partially released.': ibid 176. This dicta was ultimately disapproved by the House of Lords in *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214 (HL) 225–28 (Lord Hoffmann). But that does not affect the analysis in the main text.

Law Act 1952. In effect, Lord Hoffmann held that these covenants entailed a specifically enforceable *promise* by Mr Wallis (the granter of the security) that he would transfer to the bank the benefit of the policy when such benefit matured (ie, when the insured property was destroyed by fire, and the contingency on which an award under the policy might become due and payable, was satisfied). Since such promise to the bank was given for value, it was specifically enforceable, and for that reason, equity deeming as done that which ought to be done, once the benefit matured, it would be *as if* Mr Wallis *had* equitably assigned that benefit to the bank, albeit by way of security. Consequently, *Colonial Mutual General Insurance* involved not a *mere* equitable charge by way of hypothecation. Rather, 'the charge was accompanied by an assignment.'[46]

On this reading of Lord Hoffmann's opinion, there would be nothing contentious in the proposition that in a competition between *such* 'legal' charges operating by means of equitable assignment, the rule in *Dearle v Hall* would apply, since such 'legal' charges would entail a form of equitable assignment. But *Colonial Mutual General Insurance Co* should not be read as authority for the broader proposition that the rule in *Dearle v Hall* applies to determine the priorities between *equitable* charges operating by means of hypothecation, or between equitable assignees and such *equitable* chargees.[47] Accordingly, statements in the secondary

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46 Goode (2013) para 1-56, fn 247.

47 It has been suggested that an appropriately drafted anti-assignment clause could have the effect of invalidating fixed or crystallized floating charges: Beale, Gullifer and Paterson (2016) 215; and also Salinger (2006) para 13.12. This was assumed to be so in *Foamcrete (UK) Ltd v Thrust Engineering Ltd* [2000] EWCA Civ 351, [2002] BCC 221; and also in *Re Turner Corp Ltd (in liq)* (1995) 17 ACSR 76 (Federal Court, Australia). On the analysis in

literature to the contrary should be taken with care,[48] restricting their operation *only* to such 'legal' charges twinned with an assignment, meaning, a *mortgage*.[49]

The rule in *Dearle v Hall* may thus be avoided if the party takes security by way of *equitable* charge (ie, as a hypothecation), and not a 'legal' charge by way of mortgage.[50] The position of such a security-taker would then be analogous to that of the holder of a beneficial interest arising from the constitution of an express trust over a chose in action that was then equitably assigned to a subsequent assignee. Since such dealings would *not* involve any competition between equitable assignments, the rule in *Dearle v Hall* would not apply, either,[51] and thus the usual rule that the 'first in time, prevails' would apply.

(b) As applied to equitable assignments that have become 'statutory'

The analysis in Chapter XI suggests an additional complication to the conundrum whether the rule in *Dearle v Hall* applies where two equitable assignments have been effected over the same chose in action, but where the later equitable assignment

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this Section, anti-assignment clauses cannot have such effect so far as equitable charges, whether fixed or floating, are concerned.

48 See, eg, Guest and Liew (2015) paras 6-57 to 6-60; , *Palmer's company law* (n 39) para 13.151; Gough (n 40) 254; Goode (2013) para 5-52; Bridge (2013) para 36-027.

49 '[A] mortgage is a right of appropriation (ie a charge) plus a transfer of ownership, at law or in equity, as security for payment Since a mortgage is a broader security and includes a charge it is often referred to as a charge, and this is unobjectionable so long as it is borne in mind that the converse is not true.': Goode (2013) 37, para 1-56.

50 Had the prior security on the facts of *Compaq Computer Ltd v Abercorn Group Ltd* [1991] BCC 484 (Ch) been held to be an equitable charge by way of hypothecation, on the analysis in this thesis, the rule in *Dearle v Hall* would not have applied as to displace the ordinary 'first in time' rule.

51 *Hill v Peters* (n 42) 279; *BS Lyle v Rosher* [1959] 1 WLR 8 (HL) 22–23 (Lord Reid).

satisfies the requirements under s 136(1), whereas the prior one did not, or only did so at a later date.

If the phrase, 'statutory assignment of a debt or thing in action', is a misnomer, the proposition that the rule in *Dearle v Hall* might have no application at all to cases where the statutory requirements in s 136(1) have been fulfilled needs to be qualified. The issue is not just that those statutory requirements have been fulfilled, but whether the effects set out in s 136(1)(a), (b) or (c) operate so as to render the rule in *Dearle v Hall* otiose.

As has been explained in Chapter XI, the effects in s 136(1)(a), (b) and (c) are confined to the particular entitlements spelt out therein. Hence, the rule in *Dearle v Hall* may still be relevant in cases where entitlements falling *beyond* the scope of those sub-sections are in issue.

This gloss appears not to have been appreciated in the debate on the issue, thus far.

On the one hand, Dr Oditah has suggested that a statutory assignee should have priority as against an equitable assignee, regardless of the sequence by which notice had been given, and without any qualification as to the limited subject-matter to which s 136(1) pertains.[52]

But:[53]

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52 Oditah (1989) 527–32; Oditah (1991) para 6.18. See also Oditah (2009) 351–53.

53 Smith and Leslie (2013) para 27.95. The same position is adopted in Salinger (2006) paras 8-04 to 8-06; and in Guest and Liew (2015) paras 6-26 to 6-30.

> Despite some powerful arguments to the contrary,[54] it is now clear that the rule [of *Dearle v Hall*] applies to legal (ie s 136) assignments as much as it does to equitable assignments.

Smith and Leslie suggest that the rule in *Dearle v Hall* applies to govern priority disputes without regard to whether the particular priority conflict in question relates to competing invocations of the entitlements set out in s 136(1)(a), (b) or (c), relying on the authority of Phillips J's judgment in *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd*.[55]

In that case, the plaintiff sold wine to Springfield Wine Importers Ltd ('Springfield'). The sale agreement incorporated a retention of title clause. The wine was re-sold on credit terms to various of its customers. Springfield then entered into a factoring agreement by which it agreed to assign to the defendant absolutely debts owed to it by its customers, whilst warranting that 'no reservation of title by any third party' applied to all or any part of the wine that had been sold. Assignments to the defendant company were made in accordance with the agreement, and written notice given to the sub-purchasers. Given such notice, Springfield's customers paid the sums owing on the wine purchased from Springfield to the defendant.

The 'triangle' of 'absolute, writing and notice' required by s 136(1) having been complied with, the defendant factors were statutory assignees. Springfield failed, however, to pay what was due to the plaintiff for the wine it had supplied. Relying on its retention of title clause, the plaintiff brought proceedings, claiming to be the

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54 Namely, that put forward in Oditah (1989). Smith and Leslie (2013) acknowledge that, '[T]he position was, for a long time, unclear' (para 27.95), and in opposition to Dr Oditah's views, they refer to the views set out in Goode (1976) 555, and McLauchlan (1980) 93–4.

55 [1988] 1 WLR 150 (QB).

beneficial owner of the proceeds of each sub-sale which had been paid to and received by the defendant, and that the defendant's entitlement to such proceeds as assignee was subject to the plaintiff's prior equitable claim.

Phillips J held that the restraint of trade clause in the sale agreement:[56]

> constitute[d] an agreement by Springfield to assign to the plaintiff future choses in action, namely future debts owed by sub-purchasers to Springfield up to the amount of any outstanding indebtedness on the part of Springfield to the plaintiff. … The agreement was plainly by way of security, and the assignments under it were capable of being redeemed by payment by Springfield of the outstanding indebtedness.

Although the defendant conceded that the plaintiff might have an equitable interest in the debts owed to Springfield by the sub-purchasers of the wine, and that that interest had arisen prior to the defendant's interest in those debts by way of the statutory assignment to the defendant, it contended that its interest had priority over that of the plaintiff because, *inter alia*, if the defendant was to be treated for priority purposes as though the assignment had been equitable and not statutory, then the rule in *Dearle v Hall* ought to be applied. And if so, priority would be determined by the order by which notice of the assignments had been received by the respective debtors. On the facts, since the defendant had given notice first, it thus had priority over the plaintiff.[57]

Phillips J agreed.[58] However, his attention had not been drawn to Goff J's *obiter* observations in *Ellerman Lines Ltd v Lancaster Maritime Co Ltd ('The Lancaster')* which suggested quite the opposite, that a statutory assignee would

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56 ibid 161.

57 ibid.

58 ibid 163.

always be accorded priority over an equitable assignee,[59] observations which Dr Oditah has taken to support the proposition that the rule in *Dearle v Hall* has no application to priority conflicts involving a statutory assignment, *at all*.[60]

The conflict between the two positions was considered by Mummery J in *Compaq Computers Ltd v Abercorn Group Ltd.*[61] As to Phillips J's observations in *E Pfeiffer* that, 'even if there is a legal assignment for value without notice of a prior equity, priorities fall to be determined as if the assignment had been effected in equity',[62] Mummery J was unconvinced that it had been reached in error:[63]

> Section 136(1) provides that the assignment is 'subject to equities' having priority over the right of the assignee'. The effect of those words is to create, in the case of a statutory assignment of a chose in action, an exception to the general rule that an equity will not prevail against a bona fide purchaser of a legal estate for value without notice of the prior equity.

Mummery J's reasoning echoes that put forward by Professor McLauchlan who had suggested that:[64]

> … there appears to be no reason why the term "equities" [in s 136(1)] should not bear its common meaning as a compendious phrase for equitable remedies and rights, personal and proprietary, and thus include equitable interests held by third parties. On this interpretation an assignment complying with section 136 becomes equitable for priority purposes.'

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59 [1980] 2 Lloyd's Rep 497 (Comm) 503.

60 Oditah (1989) 530.

61 *Compaq Computer Ltd v Abercorn Group Ltd* (n 50).

62 *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* (n 55) 162F.

63 *Compaq Computer Ltd v Abercorn Group Ltd* (n 50) 502.

64 McLauchlan (1980) 92.

Unfortunately, as Dr Oditah has pointed out, such analysis resting on the provision pertaining to 'equities':[65]

> … involves a massive *petitio principii.* ... A legal assignee takes only *subject to equities having priority over the right of the assignee.* What these equities are, the subsection does not say. Even if one were to assume ... that 'equities' includes 'equitable assignments', yet, it is only those equitable assignments which, independently of section 136(1), prevail over a legal assignment, that will be preserved. These will not necessarily cover all equitable assignments of which notice is given to the debtor before notice of the legal assignment is received. In short, it is impermissible to use *Dearle v Hall* to subordinate a subsequent legal assignment to a prior equitable assignment for that is to assume that independently of section 136(1) equitable assignments prevail over a subsequent legal assignment if the equitable assignees give first notice to the debtor. Put in another way, section 136(1) subordinates a legal assignment only to those equities having priority over it, not necessarily to all equities. Since the subsection is silent on the equities it contemplates, recourse must be had to the general law. It is settled law that every assignment must now take effect subject to the debtor's right of set off.[66] ***But it is not law that a prior equitable assignment prevails over a later legal assignment by reason only that notice of it was given to the debtor before he received notice of the legal assignment.*** …

To date, there does not appear to be any judicial consideration of the precise point made by Dr Oditah. Clarification of the point will certainly be welcome. But whichever way the point may ultimately be clarified, it is suggested that neither Dr Oditah's position, nor the 'orthodox' position set out by Smith and Leslie presents a complete picture of the problem.

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65 Oditah (1989) 516–17 (emphasis in italics in original, emphasis in bold italics added). The point is repeated Oditah (1991) para 6.15.

66 It is also settled that an assignee takes subject to 'equities' such as any powers of rescission as the obligor may have against the assignee in respect of the obligation between them, or any other 'defences' that may impeach the existence or enforceability of the obligation to which the chose in action assigned pertains. For a discussion of the 'equities' to which an assignee is subject, see, eg Guest and Liew (2015) Ch 7.

If we focus on what s 136(1) does and does not say, the proposition that it effects some sort of 'transfer' of the '*legal title* in a chose in action' must fall away. Section 136(1) does *not* have that effect. It simply provides that where there has been an assignment of a debt or other legal chose in action, certain *statutorily-mandated* effects are to arise when the triangle of 'absolute, writing and notice' is satisfied in that certain entitlements (but not any others) are 'transferred' as a result of s 136(1)(a), (b) or (c).

We cannot say that such an assignment has the effect of passing the 'legal title' to such chose,[67] if this means that it passes and transfers to the assignee the *entirety* of the assignor's common law entitlements associated with the chose, because that is not what ss 136(1)(a), (b) and (c) say. While those three sub-sections may well deal in most cases with all, or practically all, of the assignor's entitlements arising out of most forms of chose in action, they are not exhaustive, and as has already been pointed out,[68] one good example of an entitlement which falls beyond the ambit of s 136(1) is the power arising out of a contractual option.[69]

It is not, therefore, possible to ignore the operation of the rule in *Dearle v Hall* just because at least one of two competing equitable assignments has fulfilled the requirements in s 136(1) and may have triggered the effects in s 136(1)(a), (b) or (c).

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67 See also: Richard Calnan, *Taking Security* (3rd edn, Jordan Publishing 2013) paras 3.210–3.220.

68 In Chapter XI, Section 3, text to n 24.

69 Other examples would include the entitlements arising from: a contractual termination clause; an 'entire agreement' clause; a 'no-reliance' clause; an 'acceleration of payment' clase; arbitration clauses; and jurisdiction clauses (exclusive or non-exclusive).

We should also consider whether that which had been statutorily transferred is relevant to the dispute, and if not, the rule in *Dearle v Hall* may still be significant.

To illustrate a situation where the rule in *Dearle v Hall* may be applicable notwithstanding satisfaction of s 136(1), it is helpful to consider the following.

Example 12.2

B makes and sells widgets.

A has been buying B's widgets for some time. As B's prices fluctuate depending on the price of his raw materials, A would like to 'lock-in' B's prices. To that end, A enters into a 'promotional contract' with B in which B agrees that, in consideration for a fee of £1,000, for the following year, in respect of orders placed by A: (i) B will charge £1 per widget in respect of the first 1,000 widgets ordered; and (ii) in respect of any orders beyond that, B will charge £1.50 per widget.

The contract contains no anti-assignment clause.

The following week, in a signed writing, A equitably assigns the benefit her promotional contract with B to C_1. Oral notice of this assignment to C_1 is given to B.

A few days later, A equitably assigns the benefit of her contract with B a second time in a signed writing to C_2. Written notice of this second assignment is given by C_2 to B. Section 136(1) would, accordingly, be triggered in respect of the later assignment to C_2.

Six months pass and no orders have yet been placed under the promotional contract.

At this time, C_1 writes a letter to place an order for 1,000 widgets. He leaves the letter with B's receptionist at B's business premises.

Coincidentally, C_2 is meeting with B at the same time. At the meeting, C_2 informs B that he wishes to place an order for 2,000 widgets.

B has the capacity to perform both sets of orders. But who is to be charged what?

If priority was given to C_1's order, B would be entitled to charge C_1 £1 per widget for the whole of C_1's order (ie, £1,000), and C_2 £1.50 per widget for the whole of C_2's order (ie, £3,000).

But if priority were given to C_2's order, B would be entitled to charge C_2 £1 per widget for the first 1,000 widgets of his order (ie, £1,000) plus a further £1.50 per widget for the remaining 1,000 widgets (ie, £1,500), and to charge C_1 £1.50 per widget for all 1,000 widgets ordered by C_1 (ie, £1,500).

Though the total amount B would be entitled to charge would be the same (£4,000), the amount payable by C_1 and C_2 would be different, depending on whether priority was given to C_1's order, or C_2's order, given the terms of the promotional contract. So on these facts, whose order should be given priority?

On the analysis in this thesis, s 136(1) has no application in respect of C_1's and C_2's invocation of the power contained in the promotional contract to place orders for B's widgets. This power is, in essence, a power arising from a 'sell' option: B had bound himself to 'sell' widgets at a price of £1 per widget for the first 1,000 widgets ordered under the promotional contract, and thereafter, at a price of £1.50 per widget, for a period of a year.

This power arising from the option is not (i) *the* legal right to the debt or thing in action that had been equitably assigned; (ii) any legal or other *remedy* for the same; nor (iii) *the* power to give a good discharge without concurrence of the assignor. This power is extraneous to s 136(1). So the statutory transfers mandated by s 136(1) would not apply.

Accordingly, in lieu of anything else, it is suggested that the rule in *Dearle v Hall* would continue to be salient. Applying that rule, C_1, having given notice to B first (albeit orally), would have priority over C_2.[70] Therefore, B is entitled to charge C_1 £1,000 for C_1's order of 1,000 widgets, and C_2 £3,000 for C_2's order of 2,000 widgets, under the terms of the promotional contract he had entered into with A. On these facts, it would be going beyond the provisions of the statute to hold that priority ought to be given to C_2's order simply because C_2's assignment had become 'statutory' whereas C_1's remained purely equitable.

The point in this Section, therefore, does not resolve the dispute as to whether the rule in *Dearle v Hall* is rendered otiose when there is 'competition' between equitable assignments, one of which has 'become' a 'statutory' assignment ahead of the other. That question remains open, given the circularity of the reasoning employed in *Compaq Computer*. But even if Dr Oditah's analysis were accepted, this Section suggests that where the particular entitlements in dispute are extraneous to s 136(1),

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70 As an aside, had the notices of assignment been received on the same day, they would be regarded as having been received simultaneously: *Calisher v Forbes* (1871) LR 7 Ch App 109. (Ch) In such circumstances, the rule in *Dearle v Hall* cannot be applied, and in such a case, priority would be determined by the order in which the assignments had been created: *Re de Groot* [2001] 2 Qd R 359 (Supreme Court of Queensland).

then so far as its 'transfer' effects would not have been engaged, the rule in *Dearle v Hall* would continue to be relevant.

5. 'Statutory' assignments

(a) Of equitable choses in action

Section 136(1) provides that it applies to 'assignments of debts and other *legal* things in action', suggesting that a distinction is to be drawn between 'legal' and 'equitable' choses in action, with equitable choses in action falling beyond the ambit of the statute. But this construction has been rejected in the cases, and there is certainly substantial academic support favouring that construction.

Of the cases,[71] perhaps the most well-known is Channell J's judgment in *Torkington v Magee*:[72]

> I think the words 'debt or other legal chose in action' mean 'debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a court of equity deals with as being assignable.

Considerable academic commentary[73] supports Channell J's statement of the law.

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71 See, eg, *Harding v Harding* (1886) 17 QBD 442 (QB); *Torkington v Magee* [1902] 2 KB 427 (KB); *Re Pain* [1919] 1 Ch 38 (Ch). In addition, in *King v Victoria Insurance Company Limited* [1896] AC 250 (PC) 254 and 255, the Privy Council was content to adopt the analysis of the Supreme Court of Queensland that the term 'legal chose in action' in s 5(6) of the Queensland Judicature Act, 40 Vict c 86 (which is *in pari materia* with s 25(6), Judicature Act 1873) included 'all rights the assignment of which a Court of Law or Equity would before the Act have considered lawful.' This construction has been applied to the equivalent wording in s 25(6), Judicature Act 1873: *Manchester Brewery Company v Coombs* [1901] 2 Ch 608 (Ch) 619 (Farwell J); and *Re Pain*, 44 (per Younger J).

72 *Torkington v Magee (KB)* (n 71) 430–31.

Holdsworth points out that '[u]ses, trusts, and other equitable interests in property, though regarded by equity as conferring proprietary rights analogous to the rights recognized by law in hereditaments or in chattels, were regarded by the common law as being merely choses in action.'[74] And:[75]

> At the beginning of the eighteenth century, it was quite settled that equity would recognize the validity of the assignment both of debts and of other things *recognized by the common law as choses in action*.

The phrase 'debt or other *legal* chose in action' should, therefore, be construed to denote not legal (as opposed to equitable) choses in action, but those choses in action which were recognized as such at common law, that is to say, choses enforceable by action at common law, as well as choses enforceable by suit in equity.[76]

The analysis in this and the preceding Chapter supports and is consistent with this proposition. Since a 'statutory assignment' is *not* a distinct type of assignment, but is parasitic on *such* assignments as may be recognised at law or in equity, so far as an equitable assignment may be effected of an equitable chose, the effects of s 136(1)

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73 See, eg: Guest and Liew (2015) para 2-13; Bridge (2013) para 27-056; Duncan Sheehan, *The principles of personal property law* (Hart Publishing 2011) 89; J Crossley Vaines, *Crossley Vaines' Personal Property* (ELG Tyler and NE Palmer eds, 5th edn, Butterworths 1973) 265; EP Wolstenholme and Sir BL Cherry, *Wolstenholme and Cherry's Conveyancing Statutes* (JT Farrand ed, 13th edn, Oyez 1972) Vol 1, p 245; WR Warren, *The law relating to choses in action* (Sweet & Maxwell 1899) 162.

74 Holdsworth (1925) 516.

75 Holdsworth (1925) 536. This construction was accepted (albeit in *dicta*) in *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440 (HCA), 447 (*per* Barwick CJ, and Stephen, Mason and Wilson JJ). See also Marshall (1950) 166–68; Tudsbery (1912) 10–12.

76 Holdsworth does recognize, however, the awkwardness of such a construction: 'the phrase "legal chose in action" is not a very happy one to express "a thing regarded by the common law as a chose in action.": Holdsworth (1925) 536, fn 3.

may be applied in respect of a validly assigned equitable chose. There is, accordingly, no reason why one might not 'statutorily' assign either legal *or* equitable choses in action.

Yet some remain unconvinced.[77]

For example, Smith and Leslie say:[78]

> [T]he 'mischief' that s 136 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 136 to cure, so far as equitable choses in action are concerned. The better view, it is therefore suggested, is that s 136 extends only to *legal* choses in action.

This objection[79] to the construction of s 136(1) favoured by the caselaw is easily countered as it fails to appreciate that s 136(1) goes beyond obviating the need for joinder.

Equitable assignments of legal or equitable choses alike entail a trust coupled with an agency. Hence, whether the chose assigned be equitable or legal, an equitable assignor must necessarily retain all her entitlements against the obligor so she may be duty-bound to her assignee as to her invocation of those entitlements. Further, if the equitable assignor lost those entitlements, she would no longer be in a position to delegate invocation of such entitlements to her assignee. So both the trust and agency

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77 See, eg: Smith and Leslie (2013) paras 16.08–16.12; Tolhurst (2016) paras 5.08–5.15; GW Keeton and LA Sheridan, *Equity* (3rd edn, Kluwer Law Publishers 1987) 249; Marshall (1950) 166.

78 Smith and Leslie (2013) para 16.12 (emphasis in original).

79 The same point is made in Tolhurst (2016) para 5.14.

effects conceived in this thesis to underpin equitable assignment *require* the assignor's entitlements against her obligor to remain wholly and completely intact.

This means, however, that where the equitable assignment *remains* a 'mere' equitable assignment, absent the 'transfer' effects mandated by s 136(1), an equitable assignor can still change her obligor's jural relations by invoking her powers against her obligor: they remain *her* powers, and she may invoke them, whether in compliance with her duties to her assignee, or not. Though she could be enjoined from invoking them, invocation of such powers in breach of her duties to her assignee does not render such invocation to be a nullity.

Hence, conceived as a composite of trust *plus* agency, equitable assignments do not strip assignors of their powers against their obligors. As Dean Ames observed:[80]

> The assignee of an equitable chose in action, eg, a trust, of course sues in his own name without the aid of a statute. But here, too, there is no novation. If the Hibernicism may be pardoned, the assignee of a trust, like an attorney, stands in the place of his assignor, but does not displace him. A release from the assignor to the innocent trustee frees the latter's legal title from the equitable incumbrance. *Newman v Newman.*[81]

But when the statutory requirements in s 136(1) are satisfied, those powers and claim-rights set out in ss 136(1)(a), (b) and (c) are transferred to the assignee. So following such transfer, the statutory assignor is barred from invoking them. Accordingly, the assignee would be entitled to assert or invoke such entitlements *to*

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80 Ames (1909) 585–86, fn 3.

81 (1885) 28 Ch D 674 (Ch).

the exclusion of the assignor: the assignor will no longer have these entitlements following the 'statutory' assignment to the assignee.[82]

Notwithstanding that an equitable assignee of an equitable chose will not need to rely on s 136(1)(a) to entitle him to bring proceedings in equity against the equitable obligor in his own name, s 136(1) is hardly irrelevant to such assignee since it also extinguishes the assignor's claim-right against the obligor, removes all her remedial entitlements against the obligor, and also extinguishes her power to give the obligor a discharge. The relevance of s 136(1) to an assignee of an equitable chose is, therefore, that it precludes the assignor from invoking such entitlements as had been transferred by the statute. Such acts by the assignor would simply be ineffectual, and the assignee would be absolved from the need to seek equitable relief to enjoin such acts to protect his interests. Therefore, statutory assignment of an equitable chose is far from being an unnecessary exercise in redundancy as some appear to suggest.

(b) Of future choses in action

If a statutory assignment operated entirely distinctly from an equitable assignment, one might be prepared to accept that, so far as a statutory assignment may take effect without the need for consideration, it might be possible to statutorily assign a *future* chose in action without consideration. The analysis in Chapter XI tells us, however, that that view cannot be correct.

First, a future chose in action may be validly assigned in equity if the assignment is supported by consideration.[83] Thus, so far as the statutory effects

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[82] See discussion in Chapter XI, Section 4.

mandated by s 136(1) may be applied to a valid equitable assignment, where the chose assigned is a future chose, those statutory effects would only arise so far as such future chose had been validly assigned in equity, meaning, an assignment that was supported by consideration. Without such consideration, there could be no effective equitable assignment of such future chose, and nothing for s 136(1) to bite on.

Secondly, an equitable assignment 'becomes' a statutory assignment only at such time when the 'triangle' of 'absolute, writing *and notice*' is fulfilled. Consequently, it is impossible for there to be a state of affairs where the effects mandated by s 136(1) are applied in relation to an equitable assignment of future choses in action at such point in time as when those future choses have yet to arise.

Where an attempt is made to 'statutorily assign', say, future book debts, each trade debtor must be given written notice of the same. Yet such notice may only be given at or after the point in time when the debtor-creditor relationship is created, and not before. This follows from the express wording of s 136(1) itself,[84] stipulating that written notice is to be given to, 'the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action'.

One only becomes a 'debtor', 'trustee' or relevant 'other person' when the debt, trust or other relevant chose in action has arisen, and not before. So it would seem that to effect a valid *statutory* assignment of a future chose in action such as a

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83 *Meek v Kettlewell* (1842) 1 Hare 464, 66 ER 1114; *Re Tilt* (1896) 74 LT 163 (Ch) 543 (Chitty J); *Re Ellenborough* [1903] 1 Ch 697 (Ch).

84 The same point appears to have been made in Salinger (2006) para 8-08 at text to fn 11.

future book debt, written notice must be given *after* the book debt had arisen.[85] But by then, the book debt would be 'future' no more – it would have become a *present* book debt. And if written notice is given *then*, it would not be written notice pertaining to a *future* book debt. Thus:[86]

> [E]ffective notice cannot be given until there is both a receivable and a debtor by whom it is owed and to whom notice can be given.
>
> Accordingly, the required notice cannot be anticipated or carried out prospectively.

This echoes the position set out in *Goode on Legal Problems of Credit and Security* which states:[87]

> Security may be given over existing debts, future debts or both. The difference between existing and future debts is legally material in that a mortgage of the latter can take effect only in equity, whereas a present debt can be assigned under s 136 of the Law of Property Act 1925 so as to take effect at law.

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85 An analogy may also be drawn with cases which have shown how the rule in *Dearle v Hall* may be applied to cases of multiple assignments of the same future chose in action where notices were given by the assignees before and after the said chose in action came into being: notices given whilst the chose in action had yet to come into being are simply ineffective. See: *Buller v Plunkett* (1860) 1 J & H 441, 70 ER 819; *Webster v Webster* (1862) 31 Beav 393, 54 ER 1191; *Somerset v Cox* (1865) 33 Beav 634, 55 ER 514 (Ch); *Boss v Hopkinson* (1870) 18 WR 725 (Ch); *Calisher v Forbes* (n 70); *Addison v Cox* (1872) LR 8 Ch App 76 (Ch); *Johnstone v Cox* (1880) 16 Ch D 571 (Ch), affd (1881) 19 Ch D 17 (CA); *Re Dallas* [1904] 2 Ch 385 (CA).

86 Oditah (2009) 352–53.

87 Goode (2013) para 3-11. See also Roy Goode, 'Some Aspects of Factoring Law - I: The Acquisition of Rights in the Receivables' [1982] Journal of Business Law 240, 242: 'An assignment of future receivables takes effect only in equity …'. No authority was provided for this proposition, either.

Unfortunately, no authority is cited for this proposition, whereas there *is* some (admittedly scant) judicial support for the contrary. These will now be briefly examined.

In *Jones v Humphreys*, Lord Alverstone CJ thought that:[88]

> … there is no doubt that an absolute assignment of future debts may be a good assignment for the purposes of the section [ie s 25(6), Judicature Act 1873, which is *in pari materia* with s 136(1)] …

Further indirect support for the proposition that one may effect a valid statutory assignment of a future chose in action may be found in Fletcher Moulton LJ's judgment in *Glegg v Bromley* in which the Court of Appeal had to consider whether the 'fruits of an action' had been effectively assigned. Fletcher Moulton LJ's judgment contains the following, rather cryptic, passage:[89]

> [Counsel] claim that this was an assignment of future property. In olden times before the Judicature Act [1873] such an assignment would not be recognized in law. The parties would have had to go to equity to get it enforced, and equity would not enforce such an assignment if it was voluntary. Therefore prior to the Judicature Act you must have shewn that there was some good consideration for it before it would have had any practical operation, and they claim that the same effect must be given to it now. I am not disposed to disagree with them in their view of the law. I think that an assignment of future property does require to be something more than a mere voluntary assignment, a gift, *in order that it may have legal operation*. …

This passage suggests that Fletcher Moulton LJ considered that there was something in the proposition that a statutory assignment of a future chose in action or expectancy

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88 [1902] 1 KB 10 (KB) 13. This was, however, *obiter*, as Lord Alverstone held, in any event, that the 'assignment' had been effected by way of charge, and would have fallen out of the statute for that reason (at 13–14). And although Darling and Channell JJ agreed with Lord Alverstone on this point, they did not express a view on the other parts of his decision.

89 [1912] 3 KB 474 (CA) 486 (emphasis added).

could be validly made, such that one could assign future property in such a way as would enable that assignment to have 'legal operation', though he inclined towards thinking otherwise: there had to be more than a 'mere voluntary assignment', notwithstanding the wording of the statute.

The clearest authority contradicting the position suggested in *Goode on Legal Problems of Credit and Security* and which supports the proposition that statutory assignment of future choses in action is possible without any need for consideration is possible, is to be found in the decision of the High Court in *Walker v The Bradford Old Bank*.[90]

In this case, Reynolds purported to assign to Walker the credit balance outstanding in a deposit account he maintained with the defendant bank *as at the time of his death*.[91] At the time of the assignment, Reynolds had a credit balance of £48 with the defendant bank. When he died, the account with the defendant bank had a credit balance of about £217. After Reynolds' death, Walker gave the defendant bank notice of the assignment and demanded to be paid such sums as stood to Reynolds' credit. When the defendant bank declined to do so, Walker successfully sued the defendant bank.

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90 (1884) 12 QBD 511 (QB).

91 The assignment was in furtherance of a voluntary settlement: Walker was to hold the subject-matter of the assignment on various trusts for the benefit of Reynolds and Reynolds' two daughters.

The High Court accepted that the assignment was an effective statutory assignment pursuant to s 25(6), Judicature Act 1873.[92] It therefore ordered the sum in the account in credit be paid to Walker on his receipt alone.

This decision is interesting because the subject-matter of Reynolds' assignment to Walker was, necessarily, a *future* chose in action since at no point was Reynolds barred from drawing down on the account, or adding to it, while he lived: it was an assignment of *such* sum as stood in credit in the account at a future in point in time.[93]

The fact of the matter was that there was, as at the date of the assignment to Walker, a present debt owed by the bank to Reynolds of £48 which was repayable on demand, and that debt was extinguished with every intervening deposit into and withdrawal from the account. So when the account balance came up to £217 on Reynolds' death, that was, in essence, a *different* debt from the one which existed at the time of the assignment: it was a chose in action which did not exist at the time of

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92 As to whether the assignment to Walker was an effective equitable assignment of a future chose, notwithstanding the lack of consideration in support, Smith J (with whom Williams J agreed) held that it was not open to the defendant bank 'to attempt to impeach the settlement' on this ground: *Walker v The Bradford Old Bank, Limited* (n 90) 516.

93 Specifically, the assignment provided that, 'all moneys now *or hereafter* to be standing to the credit of the said Robert Vincent Reynolds in the books of or at the said bank …'were 'hereby assigned, together with power to the said William Walker … to sue and give receipts for all sums of money now due …': ibid 512.

that assignment: it was a *future* chose in action. This was, therefore, a case where a *future* chose in action had been assigned.[94]

This was recognised in *Skipper & Tucker v Holloway and Howard*, leading Darling J to observe as follows:[95]

> A future debt does not exist at the time of the assignment, and therefore it is not necessary that there shall be a present debt of an exact amount in order that it may be validly assigned. *Walker v [The]Bradford Old Bank* is an authority for the proposition that there can be a legal [i.e., statutory] assignment of a future debt …

And in the 3rd edition of *Halsbury's*,[96] it was said that one may statutorily assign a:

> specified future debt … as, for example, [1] the balance standing at any time after the date of the assignment to the credit of the assignor at a bank, [2] or future rents, or [3] a retention fund under a building contract.

Significantly, the first of these three examples was drawn from *Walker v The Bradford Old Bank*.

With respect, *Walker* provides only very glancing support for the proposition that a statutory assignment of a future chose in action is possible. It did not consider the two constraints noted above, namely:

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94 Without addressing the point in the main text, Guest and Liew (2015) para 2-12 suggests that this was an assignment of a present chose on the basis that this was a case of an *accruing* debt arising out of an existing contract.

95 [1910] 2 KB 630 (KB), 634.

96 *Halsbury's Laws* (3rd edn, 1953) vol 4, para 1003; cited with approval by McCarthy J in *Mcleay v Commissioner of Inland Revenue* [1963] NZLR 711 (Supreme Court of New Zealand) 718; and by Menzies J in *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 (HCA) 21.

(I) Section 136(1) sets out no independent conception of assignment, but is parasitic on the notions of assignment as are already recognized at law or in equity; and

(II) a statutory assignment only takes effect upon receipt of the notice of assignment by the relevant obligor, and such notice may not be effectively given ahead of time before the obligation had arisen.

Given the constraints noted above, it seems *Walker v The Bradford Old Bank* may have been wrongly decided, insofar as it rests on the premise that it is possible to statutorily assign a future chose in action. Should commercial necessity require future choses to be made capable of being assigned without need for consideration, it will need plainer words that those in s 136(1) to achieve such an effect.

6. Concluding remarks

If the purpose of law reform is to reduce incoherence in the law, the analysis in this thesis suggests that the need to reform the law of assignment is less pressing than initial appearances would suggest. The law on equitable assignment is admittedly complex; and it is confusing if we fail to pay close attention to the historical interaction between the courts at common law and in equity. But the law on equitable assignment is not incoherent.

What needs reform, therefore, is not the law as it stands, but our understanding of it. And if targeted law reform to simplify the law on assignment be thought desirable, it is as well to be clear as to what one is reforming.

The robustness[97] of the English law of assignment, both in its equitable and statutory guises, is striking. Without much significant theorising, practitioners of law and equity worked out a pragmatic, practical and generally effective means of allowing intangible assets in the form of choses in action to be treated *like* property, whilst respecting the liberties afforded to a legal person to determine what obligations he would be bound to do, and to whom he would be bound by. But perhaps because it works so well, comparatively little effort has been expended to explain *how* equitable and statutory assignment do what they do.

As Professor Birks observed:[98]

> The role of the academic branch of the profession has been transformed. One of its main tasks is to make explicit the principles on which the courts are operating, and thus to safeguard the formal rationality of the law, something Gaius took for granted as his duty.

This thesis has attempted to contribute to the work of the community of scholars who have sought to illuminate the cumulation of judicial pronouncement and practice of several centuries. Certainly, none of the work in this thesis would have been possible but for the paths that have been previously trodden.

Though the composite model of assignment put forward in this thesis entails more complexity than any of the prevailing models of assignment that have been proposed thus far, it arguably yields more powerful explanations of the phenomena we observe in the cases, phenomena which the alternative, simpler models struggle to

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97 In the sense of it being 'anti-fragile'.

98 Peter Birks, 'Fictions, Ancient and Modern' in Neil MacCormick and Peter Birks (eds), *The legal mind: essays for Tony Honoré* (Clarendon Press 1986) 101.

explain. That, perhaps, is as good a reason as any in support of its adoption as the universe of intangible assets continues to grow and multiply.

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