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# **The Assignment of Contractual Rights**

A study in the legal concept of transfer and its application to the assignment of contractual rights

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**a thesis submitted in fulfillment  
of the requirements of the degree of  
Doctor of Philosophy  
University of New South Wales  
May 2003**

**PLEASE TYPE****THE UNIVERSITY OF NEW SOUTH WALES  
Thesis/Project Report Sheet**

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Abbreviation for degree as given in the University calendar: PhD

School: Law

Faculty: Law

Title: The Assignment of Contractual Rights

**Abstract 350 words maximum: (PLEASE TYPE)**

This dissertation reviews the rules governing the assignment of contractual rights. These rules, although well known, are problematic as they are ambiguous and overlap. The rules have evolved through case law and no detailed study has been carried out to determine what legal principles inform these rules. The dissertation seeks to explain the existence and meaning of these rules.

The starting point for the review is the accepted legal position that an assignment involves a transfer. The legal concept of transfer is investigated and a determination is made as to whether it is sensible to speak of an assignment as involving a transfer and whether the legal concept of transfer that is distilled in the dissertation is, in fact, reflected in case law. It is concluded that an assignment may legitimately be said to involve a transfer and the legal concept of transfer is reflected in case law.

From this position it is then possible to build on the analysis by elucidating the hallmark of all legal transfers, namely, that they are governed by the *nemo dat* rule. This rule of transfer is then applied to the rules governing the assignment of contractual rights.

The review concludes that where the rules governing the assignment of contractual rights are focused on the actual assignment, that is, when they are concerned with the relationship between the assignor and assignee, then the principle of transfer explains the existence and meaning of those rules in every case. Where the rules focus on the obligor/assignee relationship, the principle of transfer cannot explain the existence or operation of these rules and it is necessary to recognise that a formal legal relationship exists between the obligor and assignee which is policed to prevent unconscionable conduct. This, it is concluded, explains those rules that are not explicable by the principle of transfer.

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## ***Abstract***

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This dissertation seeks to explain the existence and meaning of the rules governing the assignment of contractual rights. It attempts to reveal the underlying 'first principles' which inform those rules. Its starting point is the accepted legal position that an assignment involves a transfer. This prompts the first part of the investigation which is to elucidate the legal concept of 'transfer'. In Chapter Three, after an investigation into how rights are affected upon the alienation of 'property', it is suggested that not only is it sensible to speak of the transfer of title to a contractual right but also the actual transfer of the right to performance. Moreover, it is concluded that the principal feature of all legal transfers is that they are governed by the *nemo dat* rule. From this the transfer thesis is derived, that is, that all assignments are transfers and must be governed by the legal principle of transfer.

The next step in proving that the legal principle of transfer governs the assignment of contractual rights, is to determine whether or not it is a principle that is applied to the assignment of choses in action of which the assignment of contractual rights forms a part. Chapters Four and Five seek to determine whether the law applies 'the principle of transfer' to both equitable and legal assignments of choses in action. It is concluded that both cases yield to the transfer thesis.

Chapters Six and Eight are the other two substantive chapters so far as the transfer thesis is concerned. Here, the rules governing the assignment of contractual rights are investigated to see whether or not they reflect the principle of transfer so that a determination can be made to the effect that these rules owe their existence to the principle of transfer and therefore their meaning and application must be informed by the principle of transfer. It is concluded that in the majority of cases the rules yield to the transfer thesis so that it can be concluded that the principle of transfer is the most important legal idea underlying and explaining these rules.

The research also concludes that the law recognises a formal legal relationship between the assignee and obligor. Some aspects of the rules governing the assignment of contractual rights focus on this relationship ensuring that neither party engages in unconscionable conduct. It is here, that is, where the law focuses on this relationship

rather than the relationship between the assignor and assignee that the rules governing the assignment of contractual rights no longer yield to the transfer thesis. In short, the principle of transfer governs the assignment, which concerns the relationship between the assignor and assignee.



## ***Acknowledgements***

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This dissertation could not have been prepared without the guidance and encouragement of my supervisors, Professor Chris Rossiter and Denis Harley. I am very grateful for their learned advice, patience and kindness over the last few years.

I would also like to thank Dr Simon Evans for graciously commenting on a draft of this dissertation.

I would also like to acknowledge the unfailing support from my family and friends without whom I would not have completed this work. In particular, I am most grateful to Elisabeth for her love and support.

I hereby declare that this submission is my own work and to the best of my knowledge it contains no material previously published or written by another person, nor material which to a substantial extent has been accepted for the award of any other degree or diploma at UNSW or any other education institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis.

I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.

(signed)

*To Lise and my boys*

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# **PART 1**

## **INTRODUCTION**

# **1. Introduction**

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## **(a) Introduction**

**[1.1] Purpose of part.** This Part consists of two chapters. Its primary purpose is to introduce the thesis and to trace the evolution of the assignment of contractual rights to provide a context in which the discussion that follows can take place.

**[1.2] Purpose of chapter.** This Chapter introduces the thesis and justifies the choice of subject matter.

## **(b) Introduction to Thesis**

**[1.3] Purpose of dissertation.** This dissertation adopts the position that the essence of assignment is 'transfer'. It seeks to elucidate the legal concept of 'transfer' and use that concept to explain the *existence* and *meaning* of the rules regulating the assignment of contractual rights in Anglo-Australian law. It is principally concerned with the inter-vivos assignment of legal rights otherwise than by operation of law.

**[1.4] Justification for choice of subject matter.** The assignment of contractual rights is an area of law that has not been the subject of any detailed analysis.<sup>1</sup> Despite its crucial importance to commerce it was recently described as being 'undeveloped'.<sup>2</sup> Given this dearth of research, there are perhaps four principal areas that call out for review. The first is an explanation of the present ambiguous rules governing such assignments – these are set out below. Second, current law, reflecting the history of this area, views

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<sup>1</sup> This is despite statements such as, 'modern capitalism begins with the assignment and negotiability of contracts', see Commons *Legal Foundations of Capitalism* (1924) at 253. It has also been said: 'If we were asked - Who made the discovery which has most deeply affected the fortunes of the human race? We think, after full consideration, we might safely answer - The man who first discovered that a Debt is a Saleable Commodity', see Macleod *The Theory and Practice of Banking* (5<sup>th</sup> ed, 1892) Vol 1 at 200.

<sup>2</sup> *Don King Productions Inc v Warren* [2000] Ch 291 at 318 per Lightman J (affirmed [2000] Ch 291).

assignment as involving the transfer of a proprietary right, an investigation is warranted to determine whether this should continue to be the case. Third, to a large extent, the present law determines the assignability of contractual rights by reference to the intention of the parties and there is a need to investigate whether, for reasons of public policy, the law should foster greater assignability by allowing for assignment regardless of party intention where there is no good objective reason for limiting assignment. Fourth, it may be questioned to what extent it is necessary to maintain both an equitable and legal system of assignment.

This dissertation concentrates on the first of these areas and is analytical in its methodology. It is hoped that it lays some groundwork for the other three areas. Nevertheless, it is impossible to completely ignore these other three areas and certain issues raised in them are noted throughout the dissertation.

**[1.5] Current status of analytical research.** Most of the analytical research that has been carried out has dealt with the more general topic of the assignment of choses in action.<sup>3</sup> That research has been mainly concerned with outlining the differing approaches of the common law and equity to the assignment of choses in action. Moreover, although ostensibly concerned with choses in action, in practice its focus has almost entirely been concerned with the assignment of debts. There has therefore been no analysis on the more specific topic of the assignment of contractual rights. In the result, the assignment of contractual rights is made up of a number of rules which overlap, make little sense as statements in their own right and appear to lack any general underlying and unifying principle. These rules are as follows:

1. The assignor can assign no greater right than it has nor can an assignee obtain a right greater than that held by the assignor.

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<sup>3</sup> See generally Warren *The Law Relating to Choses in Action* (1899); Tudsbery *The Nature, Requisites and Operation of Equitable Assignments* (1912); Marshall *The Assignment of Choses in Action* (1950); Starke *Assignment of Choses in Action in Australia* (1972). See also Ames *Lectures on Legal History* (1913) at 210; Bailey 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1931) 47 *LQR* 516, (1932) 48 *LQR* 248, 547; Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 (reprinted in Holdsworth *A History of English Law* Vol 7 at 515).

2. Only non-personal contractual rights may be assigned.
3. It is not possible by assignment to increase or vary the obligations or burdens of the obligor.
4. It is only possible to assign rights and not obligations.
5. After receiving notice of the assignment, the obligor may not do anything to diminish the rights of the assignee.
6. The assignee can be in no better position than the assignor was prior to the assignment.
7. The obligor should be no worse off by virtue of the assignment.
8. The assignee takes subject to the equities.

**[1.6] Brief statement of thesis.** This dissertation seeks to explain the above rules by proving two points. First, that the existence and application of most of these rules can be explained by reference to what is termed (in this dissertation) 'the principle of transfer'. Case law dictates that an assignment involves a transfer of rights. However, what is meant by 'transfer' here has never been fully articulated. This prompts an investigation into the legal concept of transfer. It is shown that the principal *effect* of a legal transfer flows from the fact that it is governed by the *nemo dat* rule. This rule forms the basis of 'the principle of transfer'. Moreover, it is suggested that the principle of transfer (the transfer thesis) holds the key to understanding the rules governing the assignment of contractual rights as it is the fundamental principle governing such assignments. Most of the 'rules' are merely different ways of expressing this principle. The reason for having different expressions of the one principle is that each rule attempts to express the operation of the principle of transfer at different stages of an assignment. Therefore, the principle of transfer explains the existence, meaning and effect of these rules. In short, an assignment does not merely involve a transfer, assignment *is* transfer.

Second, in investigating the case law to prove its adherence to the transfer thesis, it will be seen that there are, at times, some deviations from the thesis. Those deviations, it will be suggested, are explicable by recognising that a formal legal relationship exists between the assignee and obligor which is policed by equity to prevent unconscionable conduct. It will be suggested that the content of rules five and eight, to the extent that they focus on the obligor/assignee relationship rather than the assignor/assignee relationship, are explicable on this basis rather than the principle of transfer.

Finally, it should be mentioned that because the assignment of contractual rights has not been the subject of any detailed research, it is necessary at some points throughout the dissertation to discuss in some detail certain aspects of contract law, the nature of contractual rights and how the intention of the parties to a contract may impact on the nature of contractual rights as choses in action. At times these discussions are necessary in order to take a view on how the transfer thesis operates and at other times the discussion is necessary to simply complete the picture.

**[1.7] Structure of dissertation.** It was noted above that each of the rules governing the assignment of contractual rights reflects a different stage of an assignment. Such a transaction may be broken down into the following steps, (1) assignability, (2) formalities, (3) characterisation of the right vested in assignee, (4) position of the assignor, assignee and obligor as regards enforcement and remedies. Rather than deal with each rule in a separate chapter, (which would not work as they overlap to such a large extent) this dissertation is structured to investigate each rule within the context of such a transaction. Generally, rules 1,2 and 4 (and to some extent 3) are concerned with assignability.<sup>4</sup> Rule 3 also concerns characterisation. Rules, 5, 6, 7 and 8 (and again to some extent rule 3) concern the position of the parties. The formalities for an assignment, although important to any transaction, are not explained by the 'rules' governing the assignment of contractual rights and therefore fall outside this dissertation.

The dissertation has three principal Parts. Part Two investigates the legal concept of transfer. The major propositions flowing from this Part are that it is only sensible to speak of a transfer in the context of assignment if the assignee becomes the owner of the subject right and that such a transfer is governed by the *nemo dat* rule. The Part then goes on to investigate whether the principle of transfer as derived earlier in this Part is reflected in the law governing equitable and legal assignments. The Part also considers some problematic aspects of equitable and legal assignments which it is necessary to take a view on for the analysis that follows.

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<sup>4</sup> Rule 3 has been placed before rule 4 because of the structure adopted in Chapter Six.

Part Three is concerned with the process of assigning contractual rights and investigates the rules most relevant to this aspect of a transaction. It will show that the existence and meaning of these rules is explicable by the principle of transfer.

Part Four is concerned with the relationships between the assignor, assignee and obligor and investigates the rules most relevant to these relationships. It will again be shown that the existence and meaning of these rules yields to the principle of transfer. However, in this Part it is also necessary to introduce the notion of a formal relationship existing between the assignee and obligor to explain some of the content of the rules.

**[1.8] Main limits of dissertation.** The above mentioned 'task' sets some important limitations on this dissertation. First, this dissertation attempts to *explain* the law of assignment of contractual rights and therefore seeks to work within the case law. That is, the aim is to explain as many of the important authorities as possible while keeping suggestions that leading cases should be overruled to a minimum. Second, because the methodology is analytical, the current property model of assignment is simply adopted without question.<sup>5</sup> The concern is how contractual rights are integrated within that system. Third, there is no attempt here to push back any barriers and argue for greater assignability. Market and empirical analysis must, in part, drive such a dissertation.

**[1.9] Other limits of dissertation.** The focus of this dissertation is on the assignment of contractual rights to receive performance. It does not seek to provide a complete rationale for the assignment of debts. There are a number of reasons for this. First, to the extent that any research has been carried out in the area of the assignment of contractual rights, that research has concentrated on debts and can be found in general works on the assignment of choses in action<sup>6</sup> and specialised works on factoring and receivables

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<sup>5</sup> It is unlikely that this model will be jettisoned any time soon and is adopted in the United Nations Convention on Assignment of Receivables in International Trade, see UNCITRAL *Analytical Commentary on the Draft Convention on Assignment of Receivables in International Trade*, A/CN. 9/489 paras 85, 127.

<sup>6</sup> See above note 3.



financing.<sup>7</sup> Nevertheless, often the performance of a contract will require a payment to be made and some important and difficult contractual issues concern the assignment of conditional, contingent and future 'debts' and these issues are covered in the dissertation. Second, a debt does not require a contract for its existence and historically debts have been considered to be distinct proprietary rights. Thus, the assignment of debts is wider in scope than the assignment of contractual rights.<sup>8</sup> Third, because the availability of credit is of special importance to market economies, the assignability of debts is more likely to be overtly driven by economic and policy concerns than the assignment of contractual rights to receive performance.<sup>9</sup> This is evidenced by two attempts at the international level to develop uniform laws for factoring and the assignment of receivables.<sup>10</sup> Thus, any dissertation dealing with the assignment of debts could not adopt an entirely analytical approach.

In addition, this dissertation does not deal separately with priorities, maintenance and champerty or conflict of law rules. Moreover, this dissertation does not deal with

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<sup>7</sup> See Oditah *Legal Aspects of Receivables Financing* (1991); Salinger *Factoring: The Law and Practice of Invoice Finance* (3rd ed, 1999); Biscoe *Credit Factoring* (1975). See also Melville *Precedents on Industrial Property and Commercial Choses in Action* (1965).

<sup>8</sup> Moreover, the assignment of some debts, such as an amount due under a trust fund would be an equitable chose in action and this dissertation is generally concerned with legal choses in action.

<sup>9</sup> One commentator has suggested that debts should be treated as negotiable rather than merely transferable, see Atiyah *The Rise and Fall of Freedom of Contract* (1979) at 135.

<sup>10</sup> See UNIDROIT Convention on International Factoring 1988 and United Nations Convention on the Assignment on Receivables in International Trade.

particular issues that arise in assignments by way of security which are in addition to matters that arise in outright assignments.<sup>11</sup> Finally, no detailed treatment of the issues that arise upon the insolvency of the assignor, assignee or obligor is attempted as this is a more specialised area and has been covered by other commentators.<sup>12</sup>

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<sup>11</sup> In practice it can be a fine line between characterising an assignment as outright or by way of security, see Odith *Legal Aspects of Receivables Financing* (1991) para 4.2.

<sup>12</sup> Eg Derham *Set-Off* (2<sup>nd</sup> ed, 1996) paras 13.2.9, 13.2.10, 13.2.11.

## 2. A Brief History of Assignment

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### (a) Introduction

**[2.1] Purpose of chapter.** The purpose of this Chapter is to help set the scene for what follows. However, this historical section is brief as the ultimate concern of the dissertation is with the assignment of contractual rights and not the broader topic of the assignment of choses in action. The Chapter begins with a look at the meaning of 'choses in action'.

### (b) Choses in Action

**[2.2] Meaning of 'choses in action'.<sup>1</sup>** Today a chose in action is considered a personal right of property.<sup>2</sup> However, (although the matter is not entirely free from doubt), perhaps originally, the term 'chose in action' was recognised at common law as an expression used to describe a right to sue for the purposes of recovery and was generally used to describe a personal right to sue for a debt or damages.<sup>3</sup> Thus the phrase was originally used to describe a right that could only be asserted by action and not by

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<sup>1</sup> For examples of judicial descriptions of choses in action see *Halsbury's Laws of England* (4<sup>th</sup> ed, 1991) Vol 6 para 1; Marshall *The Assignment of Choses in Action* (1950) at 5-8; Warren *The Law Relating to Choses in Action* (1899) at 1-8. A statute may provide its own meaning, see Starke *Assignment of Choses in Action in Australia* (1972) at 3.

<sup>2</sup> [2.3]

<sup>3</sup> See *Colonial Bank v Whinney* (1885) 30 Ch D 261 at 282 per Lindley LJ, cf at 286 per Fry LJ and *Colonial Bank v Whinney* (1886) 11 App Cas 426 at 439 per Lord Blackburn. See also Sweet 'Choses in Action' (1894) 10 *LQR* 303 at 304; Warren *The Law Relating to Choses in Action* (1899) at 1; Marshall *The Assignment of Choses in Action* (1950) at 36-45. Such a description meant that the only obligations to pay that fell into the category were debts that were payable or at least payable at a certain date. It was only much later that it can be conclusively said that conditional or contingent obligations to pay were included in the class of 'choses in action' and the class of 'assignable choses in action', see *Brice v Bannister* (1878) 3 QBD 569; *Walker v The Bradford Old Bank Ltd* (1884) 12 QBD 511. See also *Re Huggins* (1882) 21 Ch D 85 at 91 per Jessel MR.

taking possession.<sup>4</sup> Although medieval lawyers had no problem with the concept of incorporeal property, these rights were considered personal.<sup>5</sup> In time, the phrase was extended to include rights of action that did not involve the recovery of money.<sup>6</sup> Early descriptions can be found which, on their face, appear to go so far as to capture rights of action in respect of tangible objects where the claimant did not have possession of the object.<sup>7</sup> For example, Blackstone wrote:<sup>8</sup>

Having thus considered the several divisions of property in possession, which subsists there only, where a man hath both the right and also the occupation of the thing, we will proceed next to take a short view of the nature of property in action, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law: from whence the thing so recoverable is called a thing or chose in action.<sup>9</sup>

Generally, in relation to tangible personal property, 'ownership' was used to describe rights of enjoyment that were not rights of action.<sup>10</sup> The inclusion of rights of action in respect of such assets within the class of choses in action may have, in part, flowed from the merger of choses in action real<sup>11</sup> with choses in action personal. Although originally a distinction was drawn between these with the former readily lending itself to the inclusion of rights to recover assets, at some point these groups were merged and simply

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<sup>4</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 998 (reprinted in Holdsworth *A History of English Law* Vol 7, 515 at 517).

<sup>5</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1000, 1012 (reprinted in Holdsworth *A History of English Law* Vol 7, 515 at 518, 528); Orth 'Contract and the Common Law' in Scheiber (ed) *The State and Freedom of Contract* (1998) 44 at 45-46.

<sup>6</sup> Sweet 'Choses in Action' (1894) 10 *LQR* 303 at 304.

<sup>7</sup> See Elphinstone 'What is a Chose in Action?' (1893) 9 *LQR* 311; Sweet 'Choses in Action' (1894) 10 *LQR* 303 at 304; Brodhurst 'Is Copyright a Chose in Action?' (1895) 11 *LQR* 64 at 69; Sweet 'Choses in Action' (1895) 11 *LQR* 238. See also Marshall *The Assignment of Choses in Action* (1950) at 8-27.

<sup>8</sup> Blackstone *Commentaries on the Laws of England* Vol 2 at 396.

<sup>9</sup> See further Brodhurst 'Is Copyright a Chose in Action?' (1895) 11 *LQR* 64 at 66.

<sup>10</sup> Elphinstone 'What is a Chose in Action?' (1893) 9 *LQR* 311 at 313. See also Marshall *The Assignment of Choses in Action* (1950) at 8-27.

<sup>11</sup> This class emerged around the sixteenth century.

entitled 'choses in action'.<sup>12</sup> The expression 'chose in action real' fell into disuse.<sup>13</sup> This merger appears to have coincided with a growing concern over maintenance and champerty.<sup>14</sup> Perhaps the major reason for the inclusion of such rights in the class was the view that anything not assignable was a chose in action.<sup>15</sup> However, the inclusion of rights of possession into the class was viewed by some as narrowing the field of choses in action. For example, in *May v Lane*,<sup>16</sup> Rigby LJ said that a 'legal chose in action is something which is not in possession, but which must be sued for in order to recover possession of it.' On this view, it could not include a right to recover damages for breach of contract.

**[2.2.1]** Some inclusions in the class of choses in action appear to have simply followed from others. For example, in the sixteenth century the class was extended to include documents that evidenced a right to bring an action, such as a bond.<sup>17</sup> In later centuries, and partly because of this inclusion, the class was extended to include such things as negotiable instruments, shares, insurance policies and bills of lading.<sup>18</sup>

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<sup>12</sup> Sweet 'Choses in Action' (1894) 10 *LQR* 303 at 305; Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1002 (reprinted in Holdsworth *A History of English Law* Vol 7, 515 at 520). See also *Re McLean (deceased)* [1904] 23 NZLR 504.

<sup>13</sup> Sweet 'Choses in Action' (1894) 10 *LQR* 303 at 308.

<sup>14</sup> Another reason why rights of action to recover tangible assets were sometimes expressed as choses in action may have been due to the fact that historically an action in debt, which was readily accepted as a chose in action, was viewed as an action to recover particular coins or chattels. It would not have been illogical for this notion to be extended to other rights of action in respect of tangible assets. See [2.4.1].

<sup>15</sup> Marshall *The Assignment of Choses in Action* (1950) at 16-17.

<sup>16</sup> (1895) 64 LJQB 236 at 238. Cf *Dawson v Great Northern and City Railway Co* [1905] 1 KB 260 at 270.

<sup>17</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 997-998 and 1011 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 516, 527).

<sup>18</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 997-998, 1011 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 516, 527).

[2.2.2] It was also in the sixteenth century, Holdsworth writes, that common lawyers 'had no hesitation in asserting that at common law an equitable trust, consisted only "in privity", [and] was unassignable on account of the risk of encouraging maintenance, and was therefore in the nature of a chose in action'.<sup>19</sup> Today a distinction is still drawn between legal and equitable choses in action. A legal chose in action is a right created by the common law and which is enforceable at common law, such as a debt. An equitable chose in action is a right created by equity and enforced in equity, for example, an interest in a partnership or an interest under a trust.

[2.2.3] In the seventeenth century, much weight was placed on the distinction between choses in possession and choses in action. This classification was not new,<sup>20</sup> but it was now suggested that all personal things must be either choses in possession or choses in action and there was no middle ground.<sup>21</sup> This view, together with the notion that choses in action were not transferable, made it much easier to increase the class of choses in action or at least more readily accept some inclusions that had crept into the class, which was now clearly not limited to rights to sue for debt or damages.<sup>22</sup> By this time it was beyond doubt that the class included rights that were clearly linked to tangible property as well as rights that did not depend on enforcement for their enjoyment and rights that were not capable of enforcement.<sup>23</sup> It was also readily accepted that the class

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<sup>19</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1015 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 531).

<sup>20</sup> Williams 'Is a Right of Action in Tort a Chose in Action?' (1894) 10 *LQR* 143 at 143-144; Warren *The Law Relating to Choses in Action* (1899) at 9.

<sup>21</sup> See *Colonial Bank v Whinney* (1885) 30 Ch D 261 at 285 per Fry LJ. Fry LJ's dissenting opinion was upheld on appeal, see (1886) 11 App Cas 426 esp at 439 per Lord Blackburn. However, it would appear from early times that not only was there acceptance of a middle ground but also a mixed ground, see Marshall *The Assignment of Choses in Action* (1950) at 2.

<sup>22</sup> Marshall *The Assignment of Choses in Action* (1950) at 3; Brodhurst 'Is Copyright a Chose in Action?' (1895) 11 *LQR* 64 at 68. See further Williams 'Property, Things in Action and Copyright' (1895) 11 *LQR* 223.

<sup>23</sup> Warren *The Law Relating to Choses in Action* (1899) at 8-18 and Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 997-998, 1011, 1013 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 516, 527, 529). See also Marshall *The Assignment of Choses in Action* (1950) at 21-22, 28-32. Cf *Re Huggins* (1882) 21 Ch D 85 at 90-91 per Jessel MR.

included conditional and contingent obligations to pay.<sup>24</sup> Descriptions of 'choses in action' at the time appear to reflect this broad categorisation. For example, Williams said:<sup>25</sup>

A thing in action, then is properly the benefit of an obligation arising from the breach of an antecedent duty. It would also appear to be the benefit of some real, mixed or personal action, that is, of an action brought for the realisation of some right, which is valuable as tending to result in the ownership of land, goods or money....[These are] not included in property in the strict sense of the word, because that is confined to the ownership with possession of tangible things, but comprehended in property in its widest sense, because valuable as being possibilities of property in the narrow sense.

The term chose in action has, however, been extended to other things arising from some cause of action. Thus it has been applied to the benefit of an obligation arising from contract ... [even though] no action can be maintainable before breach of the obligation.... [In this] extended sense of the word, [it] would seem to be a thing which, if wrongfully withheld, you must bring an action to realise; a thing which you cannot take but must go to law to secure.

The classification of personal things into choses in possession and choses in action perhaps had both positive and negative aspects. On the positive side it meant it was even more acceptable to include in the class rights that did not depend on enforcement for their enjoyment. This remains the case today.<sup>26</sup> This was important because if the assignment of contractual rights were to be governed eventually by the rules governing the assignment of choses in action it was necessary that contractual rights to performance were securely positioned in the class of choses in action. Clearly they were

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<sup>24</sup> Elphinstone suggested that it was easier to bring contract rights and debts within the term 'choses in action' because although they were capable of enjoyment without action, and only gave rise to actionable rights upon infringement, they consisted of rights against other persons rather than being rights in respect of a thing. Moreover, they were capable of enforcement, see Elphinstone 'What is a Chose in Action?' (1893) 9 *LQR* 311 at 313.

<sup>25</sup> Williams 'Property, Things in Action and Copyright' (1895) 11 *LQR* 223 at 230-231, 232.

<sup>26</sup> See further *Torkington v Magee* [1902] 2 KB 427 at 431 per Channell J (reversed on another point [1903] 1 KB 644) (but compare the definition of 'chose in action' he used which is set out below). See also *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 915 per Lord Hoffmann. Cf *Simmons v Harvey* [1965] Tas SR 84 at 94 per Neasey J.

considered choses in action prior to this strict classification but the classification put the issue beyond doubt.<sup>27</sup>

On the negative side, this classification required the law to fit within one of the categories subject matter that did not fit easily into either. Most notably were the developing intellectual property rights such as patents, copyrights and trademarks. Today, the law readily accepts the existence of *sui generis* interests.<sup>28</sup>

**[2.3] Choses in action as property.** It is difficult to determine exactly when lawyers began to think of choses in action as being property. Certainly, as noted, the notion that they were personal and non-transferable played an important role when the class was being expanded and the strict demarcation between choses in action and choses in possession did not occur until the mid 1800s. The 'propertisation' of choses in action must clearly have been occurring before then. By this time equity had long considered legal choses in action as property for the purposes of transfer.<sup>29</sup> Moreover, although the expansion of the class may have been fuelled by notions that choses in action were non-transferable, the mass of inclusions that resulted probably made it impossible to maintain the position that it only consisted of personal rights. In addition, the common law did not see any inconsistency in adopting the view that something could be considered property and yet consist of merely personal rights.<sup>30</sup>

Perhaps one of the final steps in recognising choses in action as property flowed from statutory provisions, most notably bankruptcy legislation. Under the now repealed reputed ownership provisions, certain goods which were in the reputed ownership of the bankrupt assignor vested in the trustee in bankruptcy. 'Goods' included certain debts, but expressly excluded choses in action.<sup>31</sup> Generally, however, from the times of James I, 'goods and chattels' in bankruptcy legislation included choses in action.<sup>32</sup> It was this (together with some examples of other legislation) that led Lindley LJ in *Colonial Bank*

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<sup>27</sup> *Colonial Bank v Whinney* (1885) 30 Ch D 261 at 286-287 per Fry LJ.

<sup>28</sup> *Eg Rolls-Royce Ltd v Jeffrey* [1962] 1 All ER 801.

<sup>29</sup> [2.6].

<sup>30</sup> [2.3.1].

<sup>31</sup> Warren *The Law Relating to Choses in Action* (1899) at 297-302.

<sup>32</sup> *Colonial Bank v Whinney* (1885) 30 Ch D 261 at 280, 283 per Lindley LJ.



*v Whinney*<sup>33</sup> to conclude that 'whatever its original meaning may have been, [the term 'chose in action' had] come to be used as denoting a certain class of property.' Lindley LJ, writing in 1885, took the view that the law had come to recognise the existence of incorporeal personal property and having no term to describe such property simply extended the meaning of 'choses in action' to denote it.<sup>34</sup> Today, the term 'chose in action' appears to be solely used to describe certain property rights, that is 'personal property of an incorporeal nature'.<sup>35</sup> There appears today to be no separate class of personal choses in action.<sup>36</sup> Modern judicial descriptions all appear to agree on this

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<sup>33</sup> (1885) 30 Ch D 261 at 283 (in this case the majority of the Court of Appeal, Lindley LJ being in that majority, held that shares did not fall within the expression 'choses in action' as used in the reputed ownership provisions and therefore passed to the trustee in bankruptcy – this point was later overruled by the House of Lords, see *Colonial Bank v Whinney* (1886) 11 App Cas 426).

<sup>34</sup> (1885) 30 Ch D 261 at 283-284. Later in the House of Lords, Lord Blackburn ((1886) 11 App Cas 426 at 439), did not think this point was made out. He did not think that the term 'chose in action' once had a technical meaning that had been extended but rather, he was of the view that for a long time the class was determined by what could not fit into the notion of a chose in possession. Thus when new forms of property were created, like shares, they naturally fell into the chose in action class. The point Lindley LJ was making was that as choses in action were excluded from the reputed ownership provisions, it was necessary to determine whether that phrase, as used in the legislation, was being used in a narrow technical and historical sense or whether in a wide sense that would include shares.

<sup>35</sup> Elphinstone 'What is a Chose in Action?' (1893) 9 *LQR* 311 at 312 citing Williams *Personal Property* at 13. See also *Colonial Bank v Whinney* (1886) 11 App Cas 426 at 440 per Lord Blackburn. It has also been said that the principles of choses in action provide a set of legal norms that allow certain rights to be considered property. Once a right satisfies those norms it may be traded and it is these norms, for example, that dictate that a patent is property while an invention is not, see Braithwaite and Drahos *Global Business Regulation* (2000) at 40.

<sup>36</sup> One exception may be a bare right of action which is still referred to as a chose in action that is incapable of assignment (unless it comes within one of the exceptions to the prohibition on maintenance and champerty) because it is personal, see Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4<sup>th</sup> ed, 2002) para 6.480. Occasional references can be found to the effect that a chose in action is a personal right which is assignable, eg *Goldsbrough Mort & Co Ltd v Tolson* (1910) 10 CLR 470 at 474 per Griffith CJ.

point. For example, in *Torkington v Magee*,<sup>37</sup> 'choses in action' were described by Channell J as:<sup>38</sup>

[A]ll personal rights of property which can only be claimed or enforced by action, and not by taking physical possession.

In *Loxton v Moir*,<sup>39</sup> Rich J said:<sup>40</sup>

The phrase 'chose in action' is used in different senses, but its primary sense is that of a right enforceable by an action. It may also be used to describe the rights of action itself, when considered as part of the property of the person entitled to sue. A right to sue for a sum of money is a chose in action, and it is a proprietary right.

Finally, and more recently, in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,<sup>41</sup> Lord Hoffmann said:<sup>42</sup>

[A] chose in action is property, something capable of being turned into money... [W]hat is assignable is the debt or other personal right of property. It is recoverable by action, but what is assigned is the chose, the thing, the debt or damages to which the assignor is entitled. The existence of a remedy or remedies is an essential condition for the existence of the chose in action but that does not mean that the remedies are property in themselves, capable of assignment separately from the chose.<sup>43</sup>

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<sup>37</sup> [1902] 2 KB 427 (reversed on another point [1903] 1 KB 644). See also *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 574 per Lord Goff and see *Smith v ANL Ltd* (2000) 204 CLR 493.

<sup>38</sup> [1902] 2 KB 427 at 430 per Channell J (reversed on another point [1903] 1 KB 644).

<sup>39</sup> (1914) 18 CLR 360.

<sup>40</sup> (1914) 18 CLR 360 at 379.

<sup>41</sup> [1998] 1 WLR 896.

<sup>42</sup> [1998] 1 WLR 896 at 915. See also *Swift v Dairywise Farms Ltd* [2000] 1 WLR 1177. Cf *Dear v Reeves* [2002] Ch 1 (right of pre-emption considered a property right and assignable without having a present value).

<sup>43</sup> The history of the common law's movement from limiting the idea of 'property' to tangibles to accepting a commercial meaning based on the 'price of things' is traced in, Commons *Legal Foundations of Capitalism* (1924) ch 7.

It should, however, be noted that the personal nature of a right may still impact upon the determination of whether it is, or is not, a chose in action, or at least an assignable chose in action.<sup>44</sup> For example, certain rights may be held too personal to be considered choses in action on public policy grounds, such as a promise to marry.<sup>45</sup>

[2.3.1] What remains unclear is the extent to which the commercial need to recognise the assignment of choses in action figured in the movement of choses in action from personal to proprietary. Although today it is clearly not necessary for something to be seen as property before its transfer can be recognised,<sup>46</sup> this was once an obstacle to the common law.<sup>47</sup> Strictly, assignability is properly viewed as a possible effect of something being considered property rather than a test for property itself.<sup>48</sup> However, it is doubtful that this point was always appreciated. As noted earlier,<sup>49</sup> and reflected in Lord Hoffmann's description of choses in action in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,<sup>50</sup> a chose in action may be considered property if property is given the wide meaning of something of value, that is, something capable of being measured in money terms.<sup>51</sup> Although this alone cannot explain the inclusion of some rights into the class of choses in action, if one recognises the transferability of a

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<sup>44</sup> Clearly, it is possible for a right to be considered property without it being considered a chose in action, but query whether it is now possible to limit the term 'chose in action' to property rights that have the characteristic of being transferable, cf *Re Huggins* (1882) 21 Ch D 85 at 91 per Jessel MR. See further Marshall *The Assignment of Choses in Action* (1950) at 25-26.

<sup>45</sup> Marshall *The Assignment of Choses in Action* (1950) at 25.

<sup>46</sup> Arguably it is only necessary for something to be considered a commodity to be alienable and this is something less than (but includes) property, see Trebilcock *The Limits of Freedom of Contract* (1993) ch 2. For some purposes a contractual right may be considered an asset which may be disposed of without it necessarily having a market value thus making it unassignable, see *O'Brien v Benson's Hosiery (Holdings) Ltd* [1980] AC 562.

<sup>47</sup> Cf [2.4.1].

<sup>48</sup> See *Commissioner of Stamp Duties (NSW) v Yeend* (1929) 43 CLR 235 at 245 per Isaacs J; *Reg v Toohey*; *Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342-3 per Mason J; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 166 per Brennan J. Cf *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1247-8 per Lord Wilberforce; *Dear v Reeves* [2002] Ch 1 at 10 per Mummery LJ.

<sup>49</sup> [2.3].

<sup>50</sup> [2.3].

<sup>51</sup> See further Harris *Property and Justice* (1996) at 50-51.

mere right, then by virtue of assignability it attracts a value, and in this circular way can then be considered property.<sup>52</sup>

It may be that assignability in fact had little effect on the 'propertising' of choses in action as legal assignment generally was not possible until provided for by legislation. Moreover, as will be discussed in Chapter Four, equity originally upheld the assignment of a legal chose in action by way of contract between the assignor and assignee rather than by viewing the transaction as involving a true transfer.<sup>53</sup> Later, the view was adopted that equity viewed choses in action as property for the purposes of transfer.<sup>54</sup> This view should not, however, be interpreted as equity adopting the circular reasoning referred to in the last paragraph, as it simply reflected the notion that equity called property that which it protected, and assignments were effective in equity because of the protection it afforded.<sup>55</sup> Moreover, although it is sometimes said that equity, conscious of commercial needs, recognised choses in action as property for the purposes of transfer,<sup>56</sup> it may be more correct to simply say that *initially*, acting by reference to reasonableness,<sup>57</sup> and commercial needs, equity upheld assignments of legal choses in action.

What is clear, as already noted, is that prior to the recognition that choses in action were assignable, the lack of transferability played an important part in allowing the class of choses in action to be expanded.<sup>58</sup> Holdsworth suggests that this in part allowed lawyers

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<sup>52</sup> See Williams 'Property, Things in Action and Copyright' (1895) 11 *LQR* 223 at 227-228. An alternative is to simply adopt the position that all legally protected interests may be considered property for certain purposes, see Smith *The Law of Tracing* (1997) at 49.

<sup>53</sup> [4.6].

<sup>54</sup> [4.7].

<sup>55</sup> [3.16.2].

<sup>56</sup> Treitel *The Law of Contract* (10<sup>th</sup> ed, 1999) at 621.

<sup>57</sup> Tudsbury *The Nature, Requisites and Operation of Equitable Assignments* (1912) at 6.

<sup>58</sup> *Colonial Bank v Whinney* (1885) 30 Ch D 261 at 287 per Fry LJ. See also Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1013 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 529).

in the eighteenth century to class patents and copyrights as choses in action.<sup>59</sup> In fact, it may have been due to this expansion (based on non-assignability) that it later appeared logical to split all interests into choses in action and choses in possession.<sup>60</sup> It has been said, that the term 'chose in action' moved from being described as a mere right of action to a 'right incapable of being assigned.'<sup>61</sup> It may be that once assignability was recognised, it, in fact, had some impact on limiting the further expansion of the class of choses in action.<sup>62</sup>

### (c) Assignment of Choses in Action

**[2.4] Choses in action and assignment, the position at common law.** It is generally accepted that the common law did not develop a set of rules for the assignment of choses in action.<sup>63</sup> It may be that a more precise statement is that to the extent the common law did at some stage recognise the assignment of choses in action, that position did not prevail.<sup>64</sup> The original reason for the common law's reluctance to recognise the assignment of choses in action was probably due to the view that 'property' meant something tangible so that there could be no transfer without delivery

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<sup>59</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1013 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 529). See also Marshall *The Assignment of Choses in Action* (1950) at 21-22, 28-32.

<sup>60</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1014 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 530).

<sup>61</sup> Sweet 'Choses in Action' (1894) 10 *LQR* 303 at 307.

<sup>62</sup> See the debate between Elphinstone and Williams on including tort within the class of choses in action; Elphinstone 'What is a Chose in Action?' (1893) 9 *LQR* 311 at 315, Williams 'Is a Right of Action in Tort a Chose in Action?' (1894) 10 *LQR* 143. See also Sweet 'Choses in Action' (1894) 10 *LQR* 303 at 315; Editors' note (1904) 20 *LQR* 113; Editors' note (1905) 21 *LQR* 101.

<sup>63</sup> Cf Cook 'The Alienability of Choses in Action' (1916) 29 *Harv LR* 816; Glenn 'The Assignment of Choses in Action: Rights of Bona Fide Purchaser' (1934) 20 *Virginia LR* 621. One exception was that from early times, members of the Jewish community in England could assign debts, see Bailey 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1931) 47 *LQR* 516, (1932) 48 *LQR* 248, 547.

<sup>64</sup> Warren *The Rights of Margin Customers* (1941) ch 4.

of possession.<sup>65</sup> However, as noted earlier, the common law has long recognised the idea of intangible property, so that this reasoning alone could not be sustained.<sup>66</sup> Nevertheless, the view was also taken that choses in action could not be assigned because they were personal in nature.<sup>67</sup>

[2.4.1] The origins of the 'too personal' labeling of choses in action is not entirely clear and may have more than one source.<sup>68</sup> It has been said that it is a rule that could only arise in an economy at a time when credit played only a minor role.<sup>69</sup> On one view, a chose in action was personal because it presupposed a personal relationship between two people, one having a right, the other a corresponding duty,<sup>70</sup> that is, a chose in action, being a mere right of action presupposes a definite plaintiff and defendant.<sup>71</sup> It was irrelevant whether the action was to recover damages or some tangible property. It has also been suggested that the notion that a debt was personal and not transferable owed much to the dire consequences in early times that could follow the non-payment of a debt. Most obvious of these was the threat of debtor's prison. Therefore, a debtor

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<sup>65</sup> Pollock and Maitland *The History of English Law* Vol II at 226; Warren *The Law Relating to Choses in Action* (1899) at 32; Commons *Legal Foundations of Capitalism* (1924) at 247; Warren *The Rights of Margin Customers* (1941) at 38-47; Biscoe *Credit Factoring* (1975) at 96. See also Maitland 'The Seisin of Chattels' (1885) 1 *LQR* 324; Maitland 'The Mystery of Seisin' (1886) 2 *LQR* 481.

<sup>66</sup> [2.2]. For example, Holdsworth writes, a 'lord of a villein [could] take an incorporeal thing like a rent which [had] been granted to the villein, and of which the villein [was] seised', see Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1000, 1012 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 518, 528). These were treated as incorporeal hereditaments.

<sup>67</sup> Marshall *The Assignment of Choses in Action* (1950) at 36-45. See also *Fitzroy v Cave* [1905] 2 KB 364 at 372 per Cozens-Hardy LJ. Cf Glenn 'The Assignment of Choses in Action: Rights of Bona Fide Purchaser' (1934) 20 *Virginia LR* 621 at 638-639 (suggesting that it was really the fear of maintenance that was solely responsible for the position at common law. However, as noted below, the fear of maintenance arose in respect of choses in action real and almost by accident was applied to choses in action personal). See [2.4.3].

<sup>68</sup> Warren *The Rights of Margin Customers* (1941) at 68.

<sup>69</sup> Farnsworth *Farnsworth on Contracts* (1990) Vol 3 para 11.2.

<sup>70</sup> Ames *Lectures on Legal History* (1913) 210 at 211-212.

<sup>71</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1000 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 518).

had a great interest, not only in the identity of the creditor, but in the likelihood of enforcement action being taken.<sup>72</sup> In addition, choses in action were considered at one time to be too uncertain to be the subject of a grant until liquidated by a judgment or recognisance.<sup>73</sup> Finally, because it was the duty of the debtor to seek out its creditor, it was thought this would be rendered too onerous if assignments were upheld.<sup>74</sup>

[2.4.2] Another explanation lies in traditional notions of property. The history of assignment may be seen as a movement towards the 'propertisation' of rights. However, this is something of an oversimplification. Most of the history of assignment concerned the assignment of debts, and, as noted earlier,<sup>75</sup> an action in debt was considered proprietary in nature as it was an action to recover certain coins or chattels. That is, an action to enforce a debt was not seen as the enforcement of an agreement but was thought to be in the nature of a real action to recover a thing that had been detained.<sup>76</sup> It may have been the fact that such an action was considered proprietary that actually resulted in choses in action being considered personal.

To appreciate this argument a few points should be emphasised. There was a time when the law did not distinguish a promise from its tangible representation.<sup>77</sup> In addition, the relationship of debtor and creditor, in a cash society, was not seen in terms of assets and liabilities. That is, the law did not recognise the idea of a credit bargain. This was the basis of the idea that an action in debt was in fact an action to recover coins or chattels unlawfully withheld. It could not be an action to enforce a promise, because the law was incapable of separately distinguishing the promise.<sup>78</sup> Because an action in debt was thought to be an action to recover certain coins or chattels from a *certain person*, then once the move was made to distinguish the promise or obligation from the coins or

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<sup>72</sup> Bailey 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1932) 48 *LQR* 248 at 257, (1932) 48 *LQR* 547 at 549-550.

<sup>73</sup> Bailey 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1932) 48 *LQR* 547 at 554; Biscoe *Credit Factoring* (1975) at 97.

<sup>74</sup> Warren *The Law Relating to Choses in Action* (1899) at 31-2.

<sup>75</sup> [2.2] note 14.

<sup>76</sup> *Young v Queensland Trustees Ltd* (1956) 99 CLR 560 at 567; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 265 per Dawson J.

<sup>77</sup> Commons *Legal Foundations of Capitalism* (1924) at 247.

<sup>78</sup> Commons *Legal Foundations of Capitalism* (1924) at 250.

chattels, it remained a personal obligation correlative to a personal right. Thus, a particular view of property may have halted assignability, in that it prevented the recognition of the concept of 'ownership' of a personal right to an obligation. Therefore, although choses in action were recognised as property (things) prior to the passing of the Judicature Act 1873 (UK), the common law still did not develop any sustained rules for the assignment of these 'things', because it still entertained the objection that they were personal 'things'. Moreover, at the time this process was going on the law of contract was developing, and that development clearly reflects a movement from 'property' to 'obligation'.<sup>79</sup> It may have been difficult at this time to also entertain the thought of a movement in the opposite direction, which was required for the assignment of choses in action.

[2.4.3] Despite the above argument, it has been suggested that the most promising development, so far as the possible recognition of the assignment of choses in action was concerned, was that personal actions to recover personal property started to be conceived of as personal actions to protect proprietary interests.<sup>80</sup> For example, by the sixteenth century it was accepted that a bailor's interest in the reversion was proprietary.<sup>81</sup> As noted earlier, this may have resulted from the merging of the traditional class of 'choses in action personal' with the new class of 'choses in action

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<sup>79</sup> Orth 'Contract and the Common Law' in Scheiber (ed) *The State and Freedom of Contract* (1998) 44 at 45-49; Atiyah *The Rise and Fall of Freedom of Contract* (1979) at 398.

<sup>80</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1002 (reprinted in Holdsworth *A History of English Law* Vol 7, 515 at 521). See also Marshall *The Assignment of Choses in Action* (1950) at 10-16.

<sup>81</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1004 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 522). Cf Warren *The Rights of Margin Customers* (1941) at 42 who suggests that it was not until the middle of the 19<sup>th</sup> century that it became clear that a bailor's right in a chattel was more than a chose in action.



real', which evolved sometime just before the sixteenth century.<sup>82</sup> In commentating on these developments, Holdsworth states:<sup>83</sup>

We might therefore have expected that the rights of the owner out of possession would come to be recognised as something more than a mere personal *chose* in action; and that they would develop into assignable rights of property.

Why this did not take place, he puts down to two causes.<sup>84</sup> The first he identifies were events that took place in personal actions to recover property. The action in detinue, which was regarded as proprietary<sup>85</sup> in character, was superseded by trover which, although, protecting a proprietary interest, was not characterised as a proprietary action and was considered a mere chose in action.

To understand the second cause it must be kept in mind that, as noted earlier, the term 'chose in action' was used, not only to describe 'choses in action personal', but, at least by the sixteenth century, 'choses in action real'.<sup>86</sup> Choses in action real never developed past being considered mere personal choses in action because of the law's growing concern with maintenance and champerty.<sup>87</sup> Holdsworth writes:<sup>88</sup>

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<sup>82</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1001 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 521).

<sup>83</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1005 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 522).

<sup>84</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1005 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 522).

<sup>85</sup> Barbour 'The History of Contract in Early English Equity' in Vinogradoff (ed) 4 *Oxford Studies in Social and Legal History* (1914) at 28-33.

<sup>86</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1001 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 519).

<sup>87</sup> Sweet 'Choses in Action' (1894) 10 *LQR* 303 at 306, 308, 311.

<sup>88</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1007-1009 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 524-525).

In England in the Middle Ages the disorderly state of the country, the technicality of the common-law procedure, the expense of legal proceedings, and the ease with which jurors, sheriffs, and other ministers of justice could be corrupted or intimidated, made maintenance ... so crying an evil that it was necessary to prohibit sternly anything which could in the smallest degree foster them. Therefore the courts in the Middle Ages stretched the offence of maintenance to its utmost limits... Thus it happened that all trafficking in rights of entry upon land were sternly forbidden... On the other hand, a permission to release a right of entry to the tenant in possession tends to stop litigation and therefore to discourage maintenance. Such a release was therefore permitted.

In the case of rights of action, indeed, it was recognised that they were unassignable because, though rights to recover property, they were rights of *action*, and therefore essentially personal [being a right to sue a person]. Any chance that the law would recognise that a disseised owner's right to recover his ownership was merely incidental to that ownership, and that he would therefore be permitted to assign his right of ownership, and with it his right of action to recover it, was stopped by the fact that such a permission would obviously encourage maintenance. On the other hand, a release of a right of action to the tenant in possession was allowed for exactly the same reason as a release of a right of entry.

Thus it happened that these rights arising in the sphere of real actions exactly resembled the rights arising from the personal actions in that they could be released, but could not be assigned. No doubt both their capacity of being released and their incapacity of being assigned were partly due to their personal character; but their incapability of assignment was due also chiefly, in the case of many of these actions, to the dread of encouraging maintenance. The dread of encouraging maintenance bulked so large that the fact that their incapability of assignment was due to the personal character of many of these actions was overlooked; and thus it came to be thought that all rights of action were unassignable for this cause.

Further, in summing up the effect maintenance had on the development of choses in action, Holdsworth states:<sup>89</sup>

It seems to me that it was the influence of this idea which led to the extension of the conception of a *chose* in action to cover rights to bring not only personal but real actions, and therefore to include in this conception not only rights which depended on a contractual or delictual obligation, but also rights which depended upon a claim to the ownership of property. The manner in which this influence was exercised was, it seems to me, somewhat as follows: It is

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Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1009-1010 (also printed in Holdsworth *A History of English Law* Vol 7, 515 at 526-527).

quite obvious that a right of action which is based on a contractual or delictual obligation is entirely personal in its character, and that on that account its release can, but its assignment cannot, logically be allowed. But this is not by any means so obvious where an owner out of possession is claiming from a possessor a thing in his possession by virtue of his right as owner to get possession. There is ... no logical reason why such ownership and, with the ownership, the right of action should not be assigned; and in fact there are some signs that the lawyers of the fifteenth and sixteenth centuries might, on this ground, have allowed a modified right to assign the ownership of chattels personal, and, with the ownership, the rights of action. But the dread of encouraging maintenance has led to the permission to release and to the refusal to permit any assignment of rights of entry and action to land. Thus it happened that rights of action, whether real or personal, had these two important features in common – both could be released, and neither could be assigned. .... [A]s the reason for the non-assignability of rights of entry upon and action for land was only too obvious, .. [lawyers] naturally adopted the idea that this reason was applicable to all these rights of action. When this happened it was inevitable that all these rights of action should be grouped together under the comprehensive title ‘*choses in action*’.

Therefore, the concern over maintenance and champerty in respect of real actions appeared to have an effect on personal actions, thus stunting the recognition of choses in action as property and thereby also holding up assignability, while at the same time having the effect of widening the class of choses in action.<sup>90</sup>

**[2.5] Common law exceptions and circumventions.** It is possible to find a number of exceptions to the general position taken by the common law. For example, subject to a number of factors, it was possible for the Crown to take (or give) an assignment.<sup>91</sup>

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<sup>90</sup> It is possible, however, that the importance of maintenance has been over-emphasised. Perhaps the most cited judgment as evidencing the relevance of maintenance is that of Sir Edward Coke in *Lamper's* case (1612) 10 Co Rep 48a, 77 ER 994 at 997 viz, it was 'the great wisdom and policy of the sages and founders of our law, who have provided that no ... thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits.' However, it has been persuasively argued that Coke referred to 'choses in action' in both a broad and narrow sense and in this famous statement he used it in a narrow sense to mean 'cause of action' thus saying nothing about a contractual right prior to breach, see Warren *The Rights of Margin Customers* (1941) at 47-59. See further Winfield 'Assignment of Choses in Action in Relation to Maintenance and Champerty' (1919) 35 *LQR* 143.

<sup>91</sup> Warren *The Law Relating to Choses in Action* (1899) at 34-7; Bailey 'Assignment of Debts in England from the Twelfth to the Twentieth Century' (1931) 47 *LQR* 516 at 520, 529; Winfield 'Assignment of Choses in Action in Relation to Maintenance and Champerty' (1919) 35 *LQR* 143 at 144-147; Fenton *Garrow and Fenton's Law of Personal Property in New Zealand* (6<sup>th</sup> ed,

Moreover, the common law readily accepted bills of exchange, promissory notes and bills of lading as negotiable instruments<sup>92</sup> and various statutory provisions were enacted to allow for the assignment of certain choses in action.<sup>93</sup> There are also examples of the common law accepting assignments when the debtor had bound him or herself in advance by 'obligatory writing to the creditor and his assigns'.<sup>94</sup> By the end of the seventeenth century the common law courts, although still adhering to the notion that choses in action could not be assigned, allowed an assignee to sue the assignor for breach of covenant.<sup>95</sup> There are also examples (prior to the end of the eighteenth century) of the common law courts allowing assignees to bring an action in the name of the assignor where the debtor continued to pay the assignor when he or she had notice of the assignment.<sup>96</sup>

[2.5.1] In addition, there existed the idea of 'acknowledgment'. If a debtor held funds belonging to his or her creditor and agreed, upon a request being made by the creditor,

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1998) para 12.043; *Ling v Commonwealth of Australia* (1994) 123 ALR 65 at 69-70 per Gummow, Lee and Hill JJ. If an assignee from the Crown further assigned the chose, that second assignee could not enforce the assignment as it was void, see *King v Twine* (1607) Cro Jac 179 at 180, 79 ER 156.

<sup>92</sup> Warren *The Law Relating to Choses in Action* (1899) at 37-41; Fenton *Garrow and Fenton's Law of Personal Property in New Zealand* (6<sup>th</sup> ed, 1998) para 12.044. See also Rogers *The Early History of the Law of Bills and Notes* (1995) Ch 8.

<sup>93</sup> Tudsbury *The Nature, Requisites and Operation of Equitable Assignments* (1912) at 8.

<sup>94</sup> Bailey 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1932) 48 *LQR* 547 at 548-549. Perhaps these cases simply reflect the fact that prior to the establishment of the doctrine of privity of contract in *Tweddle v Atkinson* (1861) 1 B & S 393, 121 ER 761, the common law allowed third parties to enforce contracts made for their benefit, see *Privity of Contract: Contracts for the Benefit of Third Parties* Law Commission, Law Com No 242 (1996) (UK) paras 2.2-2.5; Flannigan 'Privity - The End of an Era (Error)' in Kincaid (ed) *Privity: Private Justice or Public Regulation* (2001) at 29. Keeton and Sheridon *Equity* (3<sup>rd</sup> ed, 1987) at 227, state that this 'was how it became possible for the common law to admit the rule of mercantile law governing the negotiability of bills of exchange: for an acceptor of a bill of exchange is deemed to undertake an acceptance to pay the sum, when due, to any bona fide holder who presents it for payment.'

<sup>95</sup> Bailey 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1932) 48 *LQR* 547 at 574. See further [4.11.3].

<sup>96</sup> Bailey 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1932) 48 *LQR* 547 at 575-579.

to pay a third party out of the fund, then on notification to the third party, there is authority for the view that the third party could bring an action against the debtor for the amount, even though there was no consideration moving from the third party for the debtor's promise.<sup>97</sup> It has been suggested that this doctrine is similar to that of attornment in respect of tangible chattels.<sup>98</sup> Where the debtor did not hold a fund belonging to the creditor, then consideration moving from the third party was necessary.<sup>99</sup> Despite this, more recently this doctrine was applied to a case where the debtor did not hold a fund of the creditor's, but merely owed a debt to the creditor and agreed to a request from the creditor to pay a third party and notified that third party.<sup>100</sup> If this doctrine is akin to attornment, it may be that in this latter case the transfer should take place by either assignment or novation which would require the formalities of either assignment or novation be complied with. Without a fund of the creditor's in the hands of the debtor it is not possible for him or her to attorn to the third party.<sup>101</sup> Note, however, that unlike assignment, the consent of the debtor was always required in an acknowledgement. Today, given the recognition of legal assignments, the concept of 'acknowledgment' has fallen into disuse.

[2.5.2] The strict position of the common law was also circumvented by use of a power of attorney.<sup>102</sup> This became popular from around the fourteenth century and was achieved simply by the assignor appointing the assignee as his or her attorney to sue (in the assignor's name or on behalf of the assignor) for a debt with a stipulation that the

<sup>97</sup> *Morrell v Wootten* (1852) 16 Beav 197, 51 ER 753; *Griffin v Weatherby* (1868) LR 3 QB 753.

<sup>98</sup> Goff and Jones *The Law of Restitution*, (5th ed, 1998) ch 28. See further Palmer *Bailment* (2nd ed, 1991) ch 21.

<sup>99</sup> *Liversidge v Broadbent* (1859) 4 H & N 603, 157 ER 978.

<sup>100</sup> *Shamia v Joory* [1958] 1 QB 448.

<sup>101</sup> *Liversidge v Broadbent* (1859) 4 H & N 603, 157 ER 978. See further Goff and Jones *The Law of Restitution* (5th ed, 1998) ch 28; Davies 'Shamia v Joory: A Forgotten Chapter in Quasi-Contract' (1959) 75 *LQR* 220; Yates 'Trusts, Contracts and Attornments' (1977) 41 *Conv (NS)* 49; Hall 'Gift of Part of a Debt' [1959] *CLJ* 99 at 118-19; Oditah *Legal Aspects of Receivables Financing* (1991) para 5.4 at 88.

<sup>102</sup> Marshall *The Assignment of Choses in Action* (1950) at 67-71. As to its origins, see Bailey 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1931) 47 *LQR* 516 at 527. Even today, many assignments are coupled with powers of attorney, eg *Tailby v Official Receiver* (1888) 13 App Cas 523; *Re Androma Pty Ltd* [1987] 2 QdR 134.

assignee was to keep any monies recovered.<sup>103</sup> The power of attorney had a number of problems. Such arrangements could still be attacked as savouring of maintenance if the assignor and assignee did not have some common interest in the suit.<sup>104</sup> The main type of interest accepted by the courts was where the assignor, at the time of the appointment of the assignee as his or her attorney, owed money to the assignee. In addition, unless prevented by injunction, the assignor could still exercise its common law rights such as, giving a release to the debtor.<sup>105</sup> This may have made the assignor liable to the assignee in damages, however, if the power was validly revoked, the assignee could not bring an action against the debtor. In time, limitations on the right to revoke were developed in circumstances where the power of attorney was given for valuable consideration.<sup>106</sup> There is also evidence that the common law went the further step and recognised the actual assignment of debts by a debtor to its creditor<sup>107</sup> and allowed anyone with a pecuniary interest in a debt to sue in the name of the creditor.<sup>108</sup> Novation was also recognised by the common law.<sup>109</sup>

[2.5.3] From around the eighteenth century the law started to accept that rights to recover personal property could be assigned.<sup>110</sup> For example, a bailor could make a gift of the right to the bailed goods and, although initially any action for detinue did not go with the goods, this eventually changed with the acceptance that a chose in action may be transferred as an incident to the transfer of some tangible property.

<sup>103</sup> Tudsbery *The Nature, Requisites and Operation of Equitable Assignments* (1912) at 9.

<sup>104</sup> Ames *Lectures on Legal History* (1913) 210 at 213. See also Marshall *The Assignment of Choses in Action* (1950) at 67.

<sup>105</sup> Cook 'The Alienability of Choses in Action' (1916) 29 *Harv L R* 816 at 823-824.

<sup>106</sup> Marshall *The Assignment of Choses in Action* (1950) at 68.

<sup>107</sup> Warren *The Law Relating to Choses in Action* (1899) at 42.

<sup>108</sup> *Fitzroy v Cave* [1905] 2 KB 364 at 372 per Cozens-Hardy LJ.

<sup>109</sup> *Olsson v Dyson* (1969) 120 CLR 365 at 388 per Windeyer J. See also Ames *Lectures on Legal History* (1913) 210 at 212. See further Starke *Assignments of Choses in Action in Australia* (1972) at 52-4.

<sup>110</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1017 (reprinted in Holdsworth *A History of English Law* Vol 7, 515 at 533).

Nevertheless, the common law generally did not change its position as regards contractual rights which remained unassignable except by operation of law, for example, upon death.

**[2.6] The approach of equity.** By the beginning of the eighteenth century, it was settled that equity would recognise the assignment of a legal chose in action and viewed the common law's position as 'absurd'.<sup>111</sup> The mechanics of how equity gave effect to such 'assignments' and how it protected the position of the obligor are dealt with in Chapter Four. Equity also remained unconvinced of any necessary link between assignment and maintenance.<sup>112</sup> However, equity did not recognise the assignment of choses in action it thought were too personal or uncertain. For example, a claim for unliquidated damages in tort for a personal wrong or for breach of contract.<sup>113</sup> More generally, the assignment of a bare right of action, that is, a right without occupation or enjoyment,<sup>114</sup> was not upheld on public policy grounds.

**[2.7] The reaction of the common law.** The common law eventually dropped its presumption of maintenance and began to recognise the 'assignment' of debts, but still only by use of the power of attorney.<sup>115</sup> This was not a true assignment but it was now no longer open to the suggestion of maintenance or champerty. Moreover, there is evidence that the existence of a power of attorney became a mere formality and could be implied.<sup>116</sup> Generally, however, most choses in action remained unassignable at common law.<sup>117</sup>

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<sup>111</sup> *Master v Miller* (1791) 4 TR 320 at 340, 100 ER 1042 at 1053 per Buller J.

<sup>112</sup> *Master v Miller* (1791) 4 TR 320 at 340, 100 ER 1042 at 1053 per Buller J.

<sup>113</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1022-1023 (reprinted in Holdsworth *A History of English Law* Vol 7, 515 at 538-539).

<sup>114</sup> Blackstone *Commentaries on the Laws of England* Vol 2 at 396.

<sup>115</sup> Holdsworth 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harv L Rev* 997 at 1021 (reprinted in Holdsworth *A History of English Law* Vol 7, 515 at 536).

<sup>116</sup> Costigan 'Gifts *Inter Vivos* of Choses in Action' (1911) 27 *LQR* 326 at 328.

<sup>117</sup> Nevertheless whilst reiterating that a chose in action was not assignable, the common law courts would take notice of the assignee's right in equity and allowed an action to be brought in the name of the assignor without the need to go to equity. Thus, where the assignor had become bankrupt, the court recognised the equitable assignment so that the property did not pass to the

Legal assignment became possible upon the passing of section 25(6) of the Judicature Act 1873 (UK). This provision effected a procedural change to the law to the extent that any legal chose in action that was assignable in equity prior to its passing was now assignable at law. It did not make assignable at law something that prior to its enactment was not assignable in equity. This is the extent of the procedural effect of this provision, which has been the cause of some confusion and is dealt with in detail later.<sup>118</sup> Today, equivalent statutory provisions exist in England and in all Australian States and Territories and allow an assignee to bring an action in its own name if the formal requirements of the statute are made out. There remain some interests that cannot be assigned under the statutory provisions, but may still be assigned in equity, the most important being an assignment of part of a debt.

## (d) Conclusion

**[2.8] Conclusion.** There are two principal conclusions to be drawn from the above history. The first is that the law has adopted a property model of assignment. The second is that Anglo-Australian law has been left with two methods of assignment, legal and equitable, each with its own set of rules. A full study of the property model falls outside this dissertation, however, an explanation for it is suggested in Chapter Three. Before moving on to discuss the rules for the assignment of contractual rights, it is, however, necessary to look in some detail at the two broad categories of legal and equitable assignment. This is done in Chapters Four and Five. However, prior to this it is necessary to understand the operation of the notion of transfer within these categories. This is done in Chapter Three.

Finally, throughout this Chapter reference has been made to choses in action (and more particularly contractual rights) being property. This is consistent with the language used

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trustee, see *Winch v Keely* (1787) 1 TR 619, 99 ER 1284. This approach led Gilmore (Gilmore *Security Interests in Personal Property* (1965) para 7.3) to make the now famous remark; 'Thus by the typically muddle-headed process of thinking known as the genius of the common law, assignments of intangibles were made effective in fact whilst basic theory still proclaimed them to be legal impossibilities.'

<sup>118</sup>

[5.4]-[5.10.4].



in legal discourse as regards the assignment of choses in action and it is convenient to continue to use it throughout this dissertation. However, it is suggested that this should be viewed as a shorthand way of expressing a more sophisticated idea. The law did not 'propertise' contractual rights to performance, what the law did was recognise that a party to a contract had title to a right to contractual performance.<sup>119</sup> It was this title (ownership) that was considered property. That is, a party to a contract had a (proprietary) right to a (personal) right of performance.<sup>120</sup> The importance of this point is discussed in Chapter Three.<sup>121</sup>

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<sup>119</sup> See *Norman v FCT* (1963) 109 CLR 9 at 26 per Windeyer J (suggesting that anything that can be the subject of ownership may be assigned). Cf Williams 'Property, Things in Action and Copyright' (1895) 11 *LQR* 223 at 230-31 cited above para 2.2.3.

<sup>120</sup> See further Smith *The Law of Tracing* (1997) at 61.

<sup>121</sup> [3.7].

## **PART 2**

# **FUNDAMENTALS OF ASSIGNMENT**

### ***3. Assignment and the Concept of Transfer***

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#### **(a) Introduction**

**[3.1] Purpose of part.** This Part looks at some fundamental aspects of assignment. It is divided into three chapters. This Chapter deals with the meaning of assignment. In Chapters Four and Five the principal ways in which legal rights may be assigned are analysed. The purpose of this Part is to elucidate the legal concept of transfer and to investigate whether that concept is reflected in equitable and legal assignments. In addition, various other aspects of assignment are investigated where it is necessary to take a view on an issue for the analysis that follows.

**[3.2] Purpose of chapter.** This Chapter considers the meaning of assignment and investigates the legal concept of transfer. Its primary purpose is to extract the principal features and ingredients of an assignment so that such transactions can be further analysed. This exercise is also important in helping distinguish assignments from other transactions, so that the scope of this dissertation is clearly identified.

It will be suggested that the principal feature of an assignment is contained in the idea that an assignment involves a transfer. The principal ingredients are the requirement of an intention to assign and the existence of a proprietary right which is the subject matter of the transfer.

**[3.3] Structure of chapter.** This Chapter begins by looking at the meaning of assignment and what is meant by and involved in the idea that an assignment involves a transfer. It also deals with the relevance of intention in assignment and its importance in distinguishing assignments from other transactions. This is followed by a section which attempts to explain the current (property) model of assignment. Finally, the distinction between assignment and privity of contract is emphasised.

## (b) Meaning of Assignment

**[3.4] The legal concept of assignment.** The word 'assignment' has not been used uniformly throughout legal history.<sup>1</sup> At one time it may have been used to describe a transaction that today would be described as a mere direction to pay.<sup>2</sup> In *Norman v Federal Commissioner of Taxation*,<sup>3</sup> Windeyer J described the modern assignment of a chose in action as involving, 'the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee'.<sup>4</sup> This description captures the most important feature and ingredients of assignment as a legal concept today.

First, assignment is concerned with transferring rights. More precisely, it is suggested that a transaction is only properly termed an assignment if its effect is to transfer to the assignee the ownership of a right vested in the assignor. Transfer, it is suggested, is the essence of assignment. It is the principal feature of an assignment. The transferred interest may amount to the ownership of the entire interest held by the assignor in the subject right, or ownership of a part of that interest.<sup>5</sup> Moreover, a true assignment results in an immediate transfer. This helps distinguish assignments from other transactions.

Second, although not expressly stated by Windeyer J, except where the assignment is by operation of law, it is inherent in his description that there be an intention to transfer the

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<sup>1</sup> See Bailey 'Assignment of Debts in England from the Twelfth to the Twentieth Century' (1932) 48 *LQR* 547 at 580. See also [4.6.1]. In general discourse 'assignment' or 'assign' can also be used in the sense of to 'allot', 'appoint' or 'determine', see *The New Shorter Oxford English Dictionary*.

<sup>2</sup> Bailey 'Assignment of Debts in England from the Twelfth to the Twentieth Century' (1932) 48 *LQR* 547 at 580.

<sup>3</sup> (1963) 109 CLR 9.

<sup>4</sup> (1963) 109 CLR 9 at 26. See further Blackstone's *Commentaries on the Laws of England* Vol 2 at 326.

<sup>5</sup> It has been said that there can only be an assignment if the assignor parts with its entire interest, see *Butler v Capel* (1823) 2 B & C 251 at 253, 107 ER 377. It is suggested that such statements today should not be interpreted as denying the actual assignability of partial interests but should be viewed as emphasising the need for there to be a vesting of ownership (legal or equitable) in the assignee.

right. This is the first main ingredient to any assignment. It may be expressed as a substantive formality. This intention helps to distinguish an assignment from other transactions such as revocable mandates.<sup>6</sup> Usually the intention required is an intention to immediately assign, however, there are instances where equity can uphold an agreement to legally assign an interest as an immediate equitable assignment.<sup>7</sup>

Third, the law of assignment is concerned with the transfer of property rights.<sup>8</sup> The existence of a present property right is the second main ingredient to any assignment or the second substantive formality. Moreover, when dealing in property rights, there is always a requirement that the property be identifiable.<sup>9</sup>

This dissertation is concerned with the principal feature of assignment, that is transfer.

**[3.5] The institution of 'assignment'.** Clearly, Windeyer J's description could be used to describe the 'transfer of rights' component of many transactions, for example, sale of goods.<sup>10</sup> However, in practice the use to which the word 'assignment' is put tends to be limited to describing either a transfer of rights where there is no tangible asset being transferred,<sup>11</sup> that is, transactions involving mere choses in action or transfers by way of

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<sup>6</sup> [3.11].

<sup>7</sup> [4.4].

<sup>8</sup> [3.15].

<sup>9</sup> In the case of assignments of choses in action this issue most often arises where a debtor intends to pay a creditor by assigning rights to a fund which is coming to the debtor and fails to properly identify the fund or where the assignment is in the form of either an order made on a debtor to pay an assignee or a notice given to an assignee ordering a debtor to pay the assignee and which fails to identify the relevant debt, see generally *Watson v The Duke of Wellington* (1830) 1 Russ & M 602 at 605, 39 ER 231 at 232; *Rodick v Gandell* (1852) 1 De GM & G 763 at 777-78, 42 ER 749 at 754. See also Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (4<sup>th</sup> ed, 2002) para 6.440.

<sup>10</sup> In fact, following his description of assignment, he said ((1963) 109 CLR 9 at 26): 'Anything that in the eye of the law can be regarded as an existing subject of ownership, whether it be a chose in possession or a chose in action, can to-day be assigned'.

<sup>11</sup> Strangely, the word 'assignment' is not generally used to describe a transaction which involves the transfer of title to tangibles (by way of sale) but where no transfer of possession occurs.

security, whether the security is tangible or intangible property.<sup>12</sup> It is here that 'assignment' appears as an institution or subject in its own right with its own peculiar rules and which, to a limited extent, appear to divorce it from the rules governing sale of goods and sale of land.

This dissertation is concerned with this institutional concept of assignment as it applies to intangible property. Moreover, as the concern is with the assignment of contractual rights, the focus is on transactions in which some third party is taking a transfer of rights, rather than where the transaction merely involves two parties.

### **(c) Assignment as Transfer**

**[3.6] 'Transfer' generally.** An 'assignment', in legal discourse, is said to involve a transfer. It is therefore important to determine what 'transfer' means in the context of assignment.

There is little doubt that the word 'transfer' is capable of wide meaning.<sup>13</sup> In its day to day use (and in part as a legal concept) it is employed to describe the situation where a person parts with something in circumstances where the transferee obtains the exact same thing as that once held by the transferor, such as a transfer of possession.<sup>14</sup> For example, in the context of sale of goods the goods themselves are the subject of such a transfer. However, in its popular sense, 'transfer' may occur without there being a consequent movement of legal rights.<sup>15</sup>

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<sup>12</sup> This use of the word 'assignment' is sometimes used in practice to describe any transaction which is concerned with the alienation or vesting of rights and which does not involve the transfer of a tangible asset, for example, a declaration of trust and a charge.

<sup>13</sup> *Gathercole v Smith* (1881) 17 Ch D 1 at 7 per James LJ, at 9 per Lush LJ. See also *Bank of Victoria Ltd v Langlands Foundry Co Ltd* (1898) 23 VLR 230 at 251 per Holroyd J. See further *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1021 per Viscount Simon LC.

<sup>14</sup> *Lyle & Scott Ltd v Scott's Trustees* [1959] AC 763 at 778 per Lord Reid.

<sup>15</sup> See *Booth v Commissioner of Taxation* (1987) 164 CLR 159 at 164 per Mason CJ.

**[3.7] The legal meaning of 'transfer'.** In law, 'transfer' is also used to describe a conveyance of property.<sup>16</sup> In the context of a conveyance, the law's focus is not merely on the transfer of tangibles but on the transfer of property rights.<sup>17</sup> However, a transferee never obtains the exact same property rights as that held by the transferor. All property rights at a certain level of sophistication are personal and incapable of this type of transfer.<sup>18</sup> Rather, it is generally accepted that a transfer of such rights occurs when the transferor disposes of a right (which is extinguished) and where an equivalent right is created and vested in the transferee.<sup>19</sup>

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<sup>16</sup> It may not be possible to state that assignment (in the institutional sense) and transfer are synonymous. Such an assignment involves (and is) a transfer but it may be that not all transfers necessarily involve (or are) assignments. For example, in *Orakpo v Manson Investments Ltd* [1978] AC 95 at 104 Lord Diplock described subrogation as involving a transfer of rights without an assignment. However, in the case of subrogation, the action is not merely nominally in the name of the plaintiff, it is the plaintiff's action as subrogation merely gives a person the right to stand in the shoes of another without vesting the chose in action in the party with the right to be subrogated, see *James Nelson & Sons Ltd v Nelson Line (Liverpool) Ltd* [1906] 2 KB 217 at 223 per Collins MR; *Central Insurance Co Ltd v Seacalf Shipping Corp (The Aiolos)* [1983] 2 Lloyd's Rep 25 at 30; *MH Smith (Plant Hire) Ltd v DL Mainwaring (T/A Inshore)* [1986] 2 Lloyd's Rep 244 at 246. See also Mitchell *The Law of Subrogation* (1994) at 5, 7. In the law of documentary credits a distinction is drawn between the transfer of a credit and the assignment of a credit, see Jack, Malek and Quest *Documentary Credits* (3<sup>rd</sup> ed, 2001) ch 10. See further *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 at 22 per Dixon J and see note 21.

<sup>17</sup> It is often said that only rights and not tangibles can be property in the eyes of the law. It is doubtful that such a position can be sustained today, see Gray and Gray 'The Idea of Property in Land' in Bright and Dewar (eds) *Land Law: Themes and Perspectives* (1998) at 18-27.

<sup>18</sup> On one view this fact should end the law's fascination with the idea of a transfer of rights, see Penner *The Idea of Property in Law* (1997) at 147; Ames 'The Disseisin of Chattels' (1890) 3 *Harv L Rev* 313 at 315; Ames 'The Disseisin of Chattels' (1890) 3 *Harv L Rev* 337 at 339; Beale *Conflict of Law* (1916) para 152 as cited by Cook 'The Alienability of Choses in Action: A Reply to Professor Williston' (1916-17) 30 *Harv LR* 449 at 449. Cf Kenneson 'Purchase for Value Without Notice' (1914) 23 *Yale LJ* 193; Searey 'Purchase for Value Without Notice' (1914) 23 *Yale LJ* 447. See also Mincke 'Property: Assets or Power? Objects or Relations as Substrata of Property Rights' in Harris (ed) *Property Problems: From Genes to Pension Funds* (1997) ch 7.

<sup>19</sup> *R v Preddy* [1996] AC 815 at 834 per Lord Goff cf at 841 per Lord Jauncey.

However, in the context of choses in action, it has been said that what is transferred is the chose in action, that is, the exact chose in action and not an equivalent.<sup>20</sup> This is an important point and holds the key to whether or not it is sensible to speak of 'the assignment of contractual rights'. It is suggested that an actual transfer of a right to contractual performance, akin to the transfer of goods in a contract for the sale of goods, does occur when there is an assignment of a contractual right and it occurs when the transferee is put in the same relationship to the right to performance as that previously held by the transferor.

To substantiate this point it must first be understood that the legal concept of transfer which requires an extinction of rights on the one hand and the creation and vesting of new but equivalent rights on the other hand, does not refer to the right to performance under a contract. That concept of transfer is concerned with the transfer of title to a contractual right. It is title that is the subject of extinction and creation. Moreover, it is the recognition of title to (or ownership of) a contractual right that provides the proprietary character. In the case of a sale of goods the effect of the sale is that the title of the seller is extinguished and there is created and vested in the buyer rights that equate to the seller's title. The subject matter of the transaction is 'title to the goods'. Similarly, in the assignment of a contractual right to performance, the assignor's title to that right is extinguished and a new and equivalent title is vested in the assignee. Here, like the sale of goods example, the subject matter of the transfer is 'title to the right to performance'. However, it is important not to get confused over what is meant by 'the right to performance'. Inasmuch as a sale of 'A' goods cannot vest in the buyer 'B' goods, a transfer of title to a contractual right to performance cannot vest in the assignee something akin to 'the assignee's contractual right of performance'. Although it is convenient to speak of 'contractual rights to performance', there is, in fact, no such thing. There is only 'the promisee's right to performance'. This results from the personal nature of contract and is all that the assignor has to sell. The assignee's title is derived

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<sup>20</sup> Eg *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 915 per Lord Hoffmann. In the case of a debt, at times the 'debt' (rather than the right to payment) itself has been referred to as a piece of property which can be dealt with like any other asset - the necessity of enforceability to the characterisation of it being a chose in action being considered a mere incident, see *Fitzroy v Cave* [1905] 2 KB 364 at 372, 373 per Cozens-Hardy LJ.



from the assignor and although the assignor's title to the right to performance is extinguished and replaced, the obligation of the obligor is not replaced or extinguished.<sup>21</sup> The obligation owed to the assignee is therefore the same obligation.<sup>22</sup> As a result of the transfer of title, the assignee owns and is owed the performance under the contract but what the assignee owns and is owed remains a contractual obligation promised by the obligor to the assignor.<sup>23</sup> This is what the assignee buys and this is a crucial point in the process of valuing the assignee's interest. If the assignor's right to performance was extinguished and replaced by 'the assignee's right to performance' or if there existed some innocuous notion of 'a right to contractual performance' then the effect of an assignment would be to create privity of contract between the obligor and assignee which is not the law.

From what has been said above, it follows that the result of an assignment is that title is extinguished and created and vested in the assignee but (in the case of a contractual right) the 'right to performance' remains a right to an obligation promised to the assignor which the assignee now owns. Thus (although intangible) it is sensible to speak of the

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<sup>21</sup> This point distinguishes 'transfer' as the term is used in assignment from the notion of 'transfer' when used in banking law to describe a 'transfer of funds'. Take for example, a simple transfer of funds where the payer and payee have accounts at the same bank. The 'transfer' would take place without any transfer of money, all that is required are book entries. In the result, the bank's liability to the payer will be decreased and the bank's liability, under a separate contract, to the payee will be increased. Thus although this transaction involves both an extinction of rights on the one hand and a creation of rights on the other, this does not occur by way of assignment. Such directions are also not intended to be assignments but revocable mandates. However, even when the directions become irrevocable, the fact that at least two separate contracts are involved prevents there being a transfer by way of assignment. It has been suggested that what is transferred is a transfer of liability, see Tyree and Beatty *The Law of Payment Systems* (2000) para 3.2.2. In economic terms there is a transfer of purchasing power, see Crane, Fraser and Martin *Financial Institutions, Markets and Instruments* (5<sup>th</sup> ed, 2001) at 27. It has also been suggested that 'transfer' is a misleading word here, see *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 at 750 per Staughton J.

<sup>22</sup> *Loxton v Moir* (1914) 18 CLR 360 at 377 per Isaacs J.

<sup>23</sup> Moreover, it is not correct to say that as a matter of property the obligor owes its obligation to the assignee but as a matter of contract it continues to owe an obligation to the assignor as that would call into question the efficacy of the transfer. The result of an assignment is that the contractual right to performance is transferred.

right to performance being transferred in a similar way that goods are transferred under a sale of goods contract. That is, although there can be no transfer of possession, the assignee now owns the exact thing previously owned by the assignor. This type of transfer is referred to in this dissertation as an 'actual transfer' to distinguish it from the extinction/creation transfer that applies to title.

The importance of recognising this actual transfer needs to be stressed. The transfer of title results in the assignee owning the subject right and being owed the subject obligation. However, if there were no more to assignment than that, then the obligor could in all cases discharge its obligation to the assignee by continuing to perform to the assignor. That is, because the assignee merely owns the title to a promise made by the obligor to the assignor, then by continuing to perform to the assignor the assignee receives its expected performance. Thus performance is to the assignor but (legally) for the benefit of the assignee. It may be that for commercial reasons an assignee requires the obligor to perform to the assignor but this would be dictated by the assignee not the law governing the assignment. Moreover, there may be rules regulating the relationship between the obligor and assignee (such as a requirement of notice) which would prevent the obligor having to account to the assignee if it discharged its obligation to the assignor. However, generally, it is accepted that the effect of an assignment is not merely that the obligation be performed for the benefit of the assignee but rather *to* the assignee, that is, the assignee can expect personal performance. This is achieved by recognising that the contractual right to performance is actually transferred upon the transfer of title with the result that the obligor performs the exact same obligation, but to the assignee.

A further example of the relevance of the distinctions drawn above can be seen in the startling result in *R v Preddy*.<sup>24</sup> In that case it was suggested that the accused could not be guilty of having obtained 'property' belonging to another when what was obtained was a chose in action because the transferor's chose in action was extinguished and a new chose in action created and vested in the transferee.<sup>25</sup> However, that extinction and creation only related to title and not the 'thing' which the reference to 'property' here was

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<sup>24</sup> [1996] AC 815.

<sup>25</sup> The facts of the case itself were more complicated as it involved an electronic funds transfer, see note 21 above.

concerned with. If the result were right then even in the case of tangibles one could never obtain 'property' belonging to another as the transfer of title occurs in exactly the same way. The point is that the 'thing' (the 'property') that is, the 'debt' obtained by the accused was the exact same obligation to pay as that previously vested in the creditor.<sup>26</sup>

Finally, it is suggested that all true assignments of contractual rights require an actual transfer of the right to performance. Unlike a sale of goods where it is possible to transfer title without possession, a transfer of title to a contractual right must always carry with it the actual right to performance.<sup>27</sup>

**[3.8] The extended meaning of 'transfer' in assignment.** The view could be taken that any transaction which does not have as one of its components this dual disposition and creation of title does not involve a transfer and in turn cannot be described as an assignment.<sup>28</sup> However, this restricted notion of title 'transfer' would not capture an equitable assignment of a legal right which merely creates and vests in the assignee an equitable interest.<sup>29</sup> The assignor does not dispose of an equitable interest because when

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<sup>26</sup> The result in *R v Preddy* was quickly reversed by legislation, see Law Commission *Offences of Dishonesty: Money Transfers* Law Com 243 1996. For a reference to contractual rights and debts as 'things' see *Portuguese-American Bank of San Francisco v Welles* (1916) 242 US 7 per Holmes J.

<sup>27</sup> See further 6.14.

<sup>28</sup> Eg *Re VGM Holdings Ltd* [1942] Ch 235 at 241 per Lord Greene MR; *Commissioner of Taxes (Queensland) v Camphin* (1937) 57 CLR 127 at 133-4 per Latham CJ; *George Wimpey & Co Ltd v IRC* [1975] 2 All ER 45 at 50 per Sir John Pennycuik; *Burton v Camden London Borough Council* [2000] 2 AC 399 at 408-9 per Lord Millett. In these cases, it was suggested, that a transaction which involves the vesting in one party of an interest not previously held by the other party cannot be described as a sale, transfer or assignment, cf *AGIP (Africa) Ltd v Jackson* [1991] Ch 547 at 561; *Swiss Bank Corp v Lloyds Bank Ltd* [1982] AC 584 at 615 per Lord Wilberforce; *Fasken v Minister of National Revenue* [1949] 1 DLR 810. However, what was really in issue in these cases was whether a particular transaction came within a statute and therefore they cannot be accepted as strong authority for this more general proposition. This is not to suggest, however, that there may be cases at common law, outside of assignments, where the mere creation and vesting of some interest should not be classified as a transfer. It is also conceivable that a transaction may amount to a transfer for one purpose and not for another, see *FCT v Everett* (1980) 143 CLR 440 at 453-454. See also *MSP Nominees Pty Ltd v Commissioner of Stamps* (1999) 198 CLR 494.

<sup>29</sup> See [4.7].

one person holds the 'whole right of property' no distinction is drawn between legal and equitable interests.<sup>30</sup> Equitable interests are 'engrafted' or 'impressed' upon legal interests rather than 'carved out of' them. Nevertheless, these transactions are today treated in law as assignments and therefore must involve a transfer.<sup>31</sup> Any description of the legal concept of transfer as it applies to assignments would be seriously lacking if it did not capture such a large parcel of the subject matter.

It is suggested, that in addition to the primary meaning of title transfer set out above, a transfer by way of institutional assignment also occurs where a derivative title to a right is merely created and vested in the transferee if that title may be said to give the transferee the equitable ownership of *the right* which is the subject matter of the assignment.

It may at first appear fictional to describe a transaction as involving a transfer when all that is involved is the creation and vesting of rights in the transferee. However, that is perhaps no more than a reflection of the limits of any analytical analysis of the movement of rights upon assignment. Moreover, although coming under some attack in recent years,<sup>32</sup> if resort is made to the 'bundle of rights' theory of ownership it is easy to view the assignor as disposing of an interest in all cases. Take for example the equitable assignment of a legal right. In such a transaction, the assignor maintains the legal title to the subject right. Clearly, however, the interest<sup>33</sup> the assignor continues to hold is now worth less to the assignor as it is held for the benefit of the assignee.<sup>34</sup> But this is not

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<sup>30</sup> *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 at 712 per Viscount Radcliffe; *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 442 per Gibbs CJ, at 463-4 per Aickin J. See also *Grey v IRC* [1958] Ch 690 at 708 per Lord Evershed MR (affirmed [1960] AC 1); *Re Transphere Pty Ltd* (1986) 5 NSWLR 309 at 311 per McLelland J; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 706 per Lord Browne-Wilkinson.

<sup>31</sup> [4.7]. Cf Neave, Rossiter and Stone *Sackville and Neave, Property Law Cases and Materials* (6<sup>th</sup> ed, 1999) para 4.2.18.

<sup>32</sup> Gray 'Property in Thin Air' [1991] *CLJ* 252; Gray 'Equitable Property' (1994) 47 *CLP* 157 at 183; Penner 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Rev* 711; Campbell 'On the General Nature of Property Rights' (1992) 3 *KCLJ* 79.

<sup>33</sup> For the distinction between title and interest see Goode *Commercial Law* (2<sup>nd</sup> ed, 1995) at 35.

<sup>34</sup> *Three Rivers District Council v Bank of England* [1996] QB 292 at 304 per Waite LJ.

merely an issue of decreased value,<sup>35</sup> there is a clear diminishing of the assignor's interest and an enlargement of the interest of the assignee which, on the bundle of rights theory, evidences a disposal and consequent vesting in the assignee.<sup>36</sup>

In the result, the word 'transfer' is a word of wide import and the sophistication of legal notions of property and transfer make it impossible to limit the concept of 'transfer' to a narrow analytical formula.<sup>37</sup> The context must dictate how wide or narrow the concept is in the particular case. In the assignment of contractual rights, so far as the title to those rights is concerned, the concept of transfer must encapsulate both extinction and creation type transactions as well as transactions where title is merely created and vested. In other contexts the concept may be required to be narrower or broader than this, however, the modern description of assignment as involving a transfer would be meaningless if the analysis suggested is not adopted.

**[3.9] Transfer and *nemo dat quod non habet*.** The *nemo dat* rule is the fundamental rule governing transfers. Since an assignment of a contractual right involves a transfer, it is governed by this rule and one of the fundamental issues in this dissertation is to determine the impact of the *nemo dat* rule in the various phases of an assignment.

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<sup>35</sup> A movement in value may in some cases amount to a transfer, see *Agip (Africa) Ltd v Jackson* [1991] Ch 547 at 561. However, for some purposes, such as tax, the value of a legal right may stand unaffected by an equitable interest, see *Farm Products Co-operative (Taranua) Co Ltd v Inland Revenue Commissioner (NZ)* (1969) 1 ATR 85 at 89-90 per Turner J.

<sup>36</sup> Eg *Residues Treatment & Trading Co Ltd v Southern Resources Ltd* (1988) 6 ACLC 1,160 (issuing of shares so as to reduce voting rights of certain shareholders held to amount to an expropriation of shareholder's rights); *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 (incorporation of land subject to mining leases within a national park thus reducing the utility of the lessees rights under the lease amounted to an acquisition of property by the government, even though what was taken did not correspond to the interest held by the mining company). See also *Smith v ANL Ltd* (2000) 204 CLR 493; *MSP Nominees Pty Ltd v Commissioner of Stamps* (1999) 198 CLR 494 at 509.

<sup>37</sup> Indeed, it has even been suggested that the acquisition of a promise under a contract takes place by way of transfer, see Weinrib 'The Juridical Classification of Obligations' in Birks (ed) *The Classification of Obligations* (1997) at 52-3. Despite this perhaps being a legitimate theory, if it were adopted as contract law doctrine it could have undesirable results, eg *The Commissioner of Stamp Duties (New South Wales) v Yeend* (1929) 43 CLR 235 at 241.

The rule states that 'no one gives what he does not have'. This rule has two principal aspects. First, a person cannot acquire title without the consent of the owner.<sup>38</sup> Second, a person cannot transfer to another a better right than he or she has. This second aspect of the rule has three important consequences. The first and most obvious is that a transferee takes subject to existing real rights such as an existing security interest. Second, and related to the first, a transferee must take subject to any inherent weakness or infelicity in the subject right. Third, from a practical perspective, it is very important to properly characterise the features of the right which is the subject matter of the assignment because if this is not done correctly, then although strictly the rule cannot be breached, the effect may be equivalent to a breach as the transferee may end up taking advantage of features that the right did not have. A simple example would be where a conditional contractual right was mistakenly construed as unconditional in the hands of an assignee.

The rule does allow for the transfer of what may loosely be termed 'lesser' rights. For example, a creditor may assign a debt in equity rather than at law. Nevertheless, the assignee in such a case obtains an interest in the debt and not something different.<sup>39</sup>

It should be mentioned that a number of exceptions to the *nemo dat* rule do exist. Perhaps the most well known examples concern buyers and sellers in possession under sale of goods legislation. It is not necessary here to go into the reasons for developing these exceptions as this has been well documented. However, it should be noted that even as regards the assignment of choses in action exceptions do occur. For example, it is generally accepted that where an assignor assigns a debt twice, then priority will go to the assignee first giving notice to the debtor. However, without there being an exception to the *nemo-dat* rule, such a priority dispute could not arise, because, if the first assignment was effective at law, the assignor had nothing to assign the second assignee.<sup>40</sup>

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<sup>38</sup> Weir 'Taking for Granted-The Ramifications of Nemo Dat' (1996) *CLP* 325 at 328.

<sup>39</sup> [6.8].

<sup>40</sup> Of course, where the legal assignment is by way of mortgage the assignor will have an equity of redemption.

Another exception may have recently appeared. It has been held that where an assignor assigns a right to an advance payment which is conditional upon some later performance by the assignor, the assignee obtains an unconditional right of payment.<sup>41</sup> At first sight, the result here appears to go beyond an exception to the *nemo dat* rule. Generally, exceptions to the rule address defects in title to an existing asset. The effect of these exceptions is generally to allow not only for the transfer of the defective title held by the transferor but also for the title held by some third party. The issue in the example, however, is not a simple defect in title, the assignor had a perfectly good title to a conditional right of payment. The issue was simply that an unconditional right to payment as a chose in action simply did not exist. The exception to the rule here seems to create the asset which is the subject of the assignment. Nevertheless, this appears to be the way some exceptions to the *nemo dat* rule operate when dealing in pure intangibles. The example was given above of how a priority dispute may arise when a debt is assigned twice even though in the second assignment the assignor had, in doctrinal terms, nothing to assign. Arguably, the example here goes even further because in the case of a double assignment at least the subject matter of the assignment, for example title to the debt, does exist although vested in a third party, namely, the first assignee. In the example, title to the unconditional right to payment was not held by anyone. Exceptions in the case of tangibles are usually based on the transferor at least having possessory title of the subject asset.

**[3.10] Transfer and negotiation.** Finally, and for completeness, it should be mentioned that the concept of transfer, being subject to the *nemo dat* rule, is often contrasted with negotiability. The idea of a contrast here should not be overstated since negotiation in fact does involve a transfer that is free of the *nemo dat* rule. The essential point, however, is that an instrument that is negotiable (by delivery or endorsement and delivery) allows a bona-fide transferee for value without notice to take the instrument free of any defects in title of prior parties and free from any equities that could be raised by prior parties.

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<sup>41</sup> See *Pan Ocean Shipping Co Ltd v Creditcorp (The Trident Beauty)* [1994] 1 WLR 161.

## (d) The Element of Intention

### (i) Introduction

[3.11] **The element of intention.** It will be recalled that Windeyer J in *Norman's* case described an assignment as involving an immediate transfer. It was suggested that this must in turn require an intention to assign.<sup>42</sup> In this section it will be shown that this intention is a crucial ingredient because it helps to distinguish an assignment from some other transactions. The focus here is on the distinction between equitable charges and declarations of trust as these are closely related to assignment.<sup>43</sup>

There is no attempt in this dissertation to elucidate the process courts go through to determine whether an intention to assign has been proven. This can at times be a complex issue, however, generally, in assignments for value it is a question of contract construction and this falls outside the dissertation as it does not concern the transfer thesis.

### (ii) Equitable Charges

[3.12] **Assignment, equitable charges and transfer.** A charge is a security which makes certain property liable to discharge an obligation.<sup>44</sup> It may be created by trust<sup>45</sup> or contract<sup>46</sup> and gives the chargee a proprietary interest by way of security. Like an equitable assignment of a legal right, a charge merely involves the creation and vesting of an interest in the chargee. However, it is said that a charge merely encumbers the

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<sup>42</sup> [3.4].

<sup>43</sup> The intention to assign also distinguishes an assignment from a revocable mandate.

<sup>44</sup> *Swiss Bank Corp v Lloyds Bank Ltd* [1982] AC 584 at 595 per Buckley LJ; *Re Charge Card Services Ltd* [1987] Ch 150 at 176 per Millett J.

<sup>45</sup> Sykes and Walker *The Law of Securities* (5<sup>th</sup> ed, 1993) at 773.

<sup>46</sup> *Re Bond Worth Ltd* [1980] Ch 228 at 250 per Slade J. When created by contract, a charge requires consideration, *Re Earl of Lucan* (1890) 45 Ch D 470. See also *Agnew & Bearsley v Commissioner of Inland Revenue* [2001] 2 AC 710 at 726.



relevant property, it does not operate by way of assignment.<sup>47</sup> Rather, the chargee may, by judicial process, call for an assignment of the charged property upon default by the chargor and it is only then that an assignment of the charged property takes place.

Nevertheless, there are numerous judicial decisions stating that a charge operates as an equitable assignment and an equitable assignment operates by way of charge.<sup>48</sup> In some cases an equitable charge has been said to involve a partial assignment.<sup>49</sup> Recently both the House of Lords and the High Court of Australia in mentioning an equitable charge talked of a right to redeem whereas, if a charge did not operate by way of assignment, it would automatically be discharged upon performance of the secured obligation.<sup>50</sup> Moreover, it is not possible to view a chargee's rights as being merely potential. Prior to default by the chargor the chargee does have rights that may be enforced directly against

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<sup>47</sup> *Re Charge Card Services Ltd* [1987] Ch 150 at 176 per Millett J; *Re Bond Worth Ltd* [1980] Ch 228 at 250 per Slade J; *Tancred v Delagoa Bay and East Africa Railway Co* (1889) 23 QBD 239 at 242 per Denman J. See also Sykes and Walker *The Law of Securities* (5<sup>th</sup> ed, 1993) at 17-20, 193-197, 616-7, 771-3.

<sup>48</sup> *Eg Rodick v Gandell* (1852) 1 De GM & G 763 at 777-778, 42 ER 749 at 754 per Lord Truro (cited with approval in *Palmer v Carey* [1926] AC 703 at 706 and *Swiss Bank Corp v Lloyds Bank Ltd* [1982] AC 584 at 613 per Lord Wilberforce); *Re Kent & Sussex Sawmills Ltd* [1947] 1 Ch 177 at 183; *Thomas v Harris* [1947] 1 All ER 444 at 445 per Scott LJ; *National Mutual Life Nominees Ltd v National Capital Development Commission* (1975) 6 ACTR 1 at 3-5 per Blackburn J; *Compaq Computer Ltd v Abercorn Group Ltd* [1993] BCLC 602 at 619 per Mummery J; *Agnew & Bearsley v Commissioner of Inland Revenue* [2001] 2 AC 710 at 721. See also *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431 at 449-50 per Atkin LJ. Cf *Ashby Warner & Co Ltd v Simmons* [1936] 2 All ER 697 at 708 per Greene LJ. There is also academic authority suggesting that a charge operates by way of assignment, see Gough *Company Charges* (2<sup>nd</sup> ed, 1996) at 19, 38-9 (Gough appears to rely on the bundle of rights theory to argue that there is an assignment, see also in this regard *Waitomo Wools (NZ) Ltd v Nelsons (NZ) Ltd* [1974] 1 NZLR 484 at 490 per Richmond J and *Young v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* (1988) 12 ACLR 399 at 403 per Brinsden J).

<sup>49</sup> *Durham Bros v Robertson* [1898] 1 QB 765 at 769 per Chitty LJ; *Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd* [1995] 1 WLR 1140 at 1144 per Lord Hoffmann. See also *Tooth v Brisbane City Council* (1928) 41 CLR 212 at 221 per Isaacs J.

<sup>50</sup> *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214 at 226 per Lord Hoffmann; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588 at 595-96. See also *Compaq Computer Ltd v Abercorn Group Ltd* [1993] BCLC 602 at 612 per Mummery J; *Durham Bros v Robertson* [1898] 1 QB 765 at 770 per Chitty LJ.

the security property.<sup>51</sup> In addition, the chargee's interest subsists despite the chargor transferring ownership of the charged property to a third party (except a bona-fide purchaser for value and without notice of the legal estate) and despite the chargor becoming insolvent. The chargee therefore is vested with some form of immediate proprietary interest in respect of the subject property.<sup>52</sup>

Arguably there may seem little point in suggesting that a charge does not involve a transfer. Nevertheless, this 'transfer' does not amount to an assignment and it is possible to distinguish a charge from an assignment.<sup>53</sup> This distinction in part flows from the clear difference in the intention of a chargor and that of an assignor. That is, the ingredients in both differ. Unlike the assignor, the chargor does not intend to immediately vest ownership in the chargee. This also points to a difference in effect. Thus, even if it is accepted that a charge involves a transfer there is a difference in degree between an assignment and a charge because, in an equitable assignment, the assignee becomes the beneficial owner of the assigned right. Even where a chargee obtains an assignment by enforcing the charge this is different from having ownership upon the creation of the security. In addition, where the chargee obtains an order for sale, this does not equate to a right to sell property held by an owner.<sup>54</sup> Thus any transfer that does take place upon the execution of a charge is not an absolute transfer. Moreover, to the extent that a chargee obtains rights that are not merely potential, those rights do not equate with ownership. In addition, if the chargor grants the chargee a charge over some fund owed to the chargor by a debtor, the chargee obtains no right of action against the debtor. The chargee's right is limited to a right of action against the

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<sup>51</sup> Oditah *Legal Aspects of Receivables Financing* (1991) para 5.6; Gough *Company Charges* (2<sup>nd</sup> ed, 1996) at 19. Cf Sykes and Walker *The Law of Securities* (5<sup>th</sup> ed, 1993) at 17-20.

<sup>52</sup> *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214 at 226 per Lord Hoffmann. See also Gough *Company Charges* (2<sup>nd</sup> ed, 1996) at 19; Sykes and Walker *The Law of Securities* (5<sup>th</sup> ed, 1993) at 18.

<sup>53</sup> In practice, the express powers usually given to a chargee under a charge make the legal distinctions between an assignment by way of mortgage and a charge of little practical importance, see Oditah, *Legal Aspects of Receivables Financing* (1991) para 5.6. Moreover, it appears to be generally accepted that upon the crystallisation of a floating charge, there is a complete equitable assignment, see *National Mutual Life Nominees Ltd v National Capital Development Commission* (1975) 6 ACTR 1 at 5-6 per Blackburn J.

<sup>54</sup> Sykes and Walker *The Law of Securities* (5<sup>th</sup> ed, 1993) at 17.

chargor.<sup>55</sup> Generally, and subject to the particular characteristics of an assigned right, an assignee may have recourse against the obligor directly.<sup>56</sup> Finally, in the case of a charge, there is no actual transfer of an underlying personal right which is necessary for a transfer by way of assignment.

### **(iii) Declarations of Trust**

**[3.13] Assignment, declarations of trust and transfer.** Trusts form part of the law's machinery for alienating assets. Therefore, there is nothing heretical in readily accepting that they may involve a transfer. Trusts may be created by assignment, declaration or direction.<sup>57</sup> The concern here is solely with declarations of trust. A declaration of trust over a legal interest, like a charge, does not analytically involve a disposal of rights by the settlor/trustee but rather a creation and vesting of rights in the beneficiary.<sup>58</sup>

The importance of intention in distinguishing a declaration of trust from an assignment is perhaps even more important here than in the case of an equitable charge because it is common to describe the beneficiary of a trust as the beneficial owner of the trust property.<sup>59</sup> Clearly the concept of ownership here depends on the type of trust and the terms of the trust. However, there can be little wrong with calling the beneficiary under a bare trust who is *sui juris* and entitled to an equitable interest corresponding to the full legal interest the equitable owner of the trust property. Such a beneficiary may require the trustee to transfer to it the legal interest or direct the trustee to hold the property for a third party. In addition, under a fixed trust, whether created by declaration, assignment or direction, the beneficiary may obtain an interest in the trust property itself for some

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<sup>55</sup> *Burlinson v Hall* (1884) 12 QBD 347 at 350.

<sup>56</sup> [4.11.5].

<sup>57</sup> A transaction may require a combination of these, eg *Corin v Patton* (1990) 169 CLR 540; *McLeay v Commissioner of Inland Revenue* [1963] NZLR 711 at 717.

<sup>58</sup> Cf the position as regards a declaration of trust over an existing equitable interest, see Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, 2002) paras 7.200-7.215; Heydon and Loughlan, *Cases and Materials on Equity and Trusts* (6<sup>th</sup> ed, 2002) para 7.15; Meagher and Gummow *Jacobs Law of Trusts* (6<sup>th</sup> ed, 1997) ch 7.

<sup>59</sup> Cf Brunyate (ed) *Maitland's Equity: A Course of Lectures* (2<sup>nd</sup> revised ed, 1936) at 17.

purposes and not merely personal rights against the trustee.<sup>60</sup> Finally, trust property is not available to the trustee's creditors which suggests that the beneficiaries have some immediate interest in the trust property.

However, in the case of a declaration of trust, the settlor/trustee's intention is for it to maintain ownership and hold the trust property for the benefit of the beneficiary. In the case of an assignment the intention is to simply transfer ownership be that legal or equitable. It is therefore irrelevant that a court may impose trustee obligations on the assignor in some instances to protect the interest of the assignee. When equity upholds transactions as a declaration of trust or assignment, it is to give effect to these varying intentions.

## **(e) The Requirement of a Proprietary Right**

**[3.14] Introduction.** An assignment of a contractual right is said to involve the transfer of existing proprietary rights.<sup>61</sup> It may be questioned whether this property analysis still has value. Clearly the fact that something is thought of as property may mean that it is transferable but this is not true of all property.<sup>62</sup> Transferability may be a characteristic of a proprietary right but it is not a determining feature.<sup>63</sup> In addition, it is not necessary today for something to be considered property for it to be enforceable against a third party and the fact that something is considered property does not necessarily mean it is enforceable against third parties or has some impact on third parties.<sup>64</sup>

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<sup>60</sup> See Parkinson and Wright in Parkinson (ed) *The Principles of Equity* (2<sup>nd</sup> ed, 2003) para 303; Goode *Commercial Law* (2<sup>nd</sup> ed, 1995) at 43; Gardiner *An Introduction to the Law of Trusts* (1990) at 196, 206-11.

<sup>61</sup> For some purposes it may be necessary to view assignment as primarily involving an issue of contract rather than property, eg, for private international law purposes, see *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825.

<sup>62</sup> *Dorman v Rodgers* (1982) 148 CLR 365 at 374 per Murphy J; *R v Toohey ex p Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342-3 per Mason J.

<sup>63</sup> [2.3.1].

<sup>64</sup> Gray and Gray 'The Idea of Property in Land' in Bright and Dewar (eds) *Land Law; Themes and Perspectives* (1998) at 35-6.

Nevertheless, it is beyond the scope of this dissertation to delve into the detail of any alternatives. It is also beyond the scope of this dissertation to provide any detailed defence of the current model. However, given that this Chapter is concerned with the fundamental feature and ingredients of an assignment and the transfer of a property right is, as noted by Windeyer J, one of those fundamental ingredients, it is legitimate to offer some rationale for the current model. That is, some explanation as to why a contractual right may be considered a transferable property right.

In this section, the concern is not with explaining the 'propertisation' of contractual rights by reference to history. The history of choses in action was dealt with earlier and it was seen that the 'propertisation' of choses in action was in no way systematic and probably occurred by virtue of a number of legal and economic factors. The aim of this section is to suggest an analysis of 'contract as transferable property' that reflects modern legal thought.

Finally, before moving on, it was noted earlier that where a transaction involves property, it is a requirement that that property be identifiable. No detailed treatment of what amounts to identifiable property is given here as this matter falls outside this dissertation. Moreover, in the case of contractual rights, unlike transfers of the subject matter of a contract, it is not a matter that has ever created much difficulty although, as already mentioned, there are numerous cases involving the assignment of funds or debts where the relevant fund or debt has not been sufficiently identified.<sup>65</sup>

**[3.15] Contractual rights as transferable property rights.** It is generally accepted that from a legal perspective, property rights arise as a legal response to some causative event.<sup>66</sup> One such causative event is consent.<sup>67</sup> This is the relevant category of causative event for contractual rights. Of course, consent may also give rise to personal rights. It is therefore necessary to look at what principles determine when such a causative event

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<sup>65</sup> [3.4].

<sup>66</sup> Birks 'Property and Unjust Enrichment: Categorical Truths' [1997] *NZLR* 623; Grantham and Rickett 'Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?' [1997] *NZLR* 668.

<sup>67</sup> Gray 'Property in Thin Air' [1991] *CLJ* 252 at 302-3.

may give rise to a property right, that is, what principles inform the law to recognise that a person should be designated as having title (ownership) of a right.

As evidenced in Chapter Two, the assignability of choses in action, outside of statute, has been the creature of equity. Although the common law reached the point of recognising choses in action as being property, it never appeared to entirely accept that they had the characteristic of being transferable. It could be said that the legislative regime for legal assignment ended the need for that characteristic to develop at law, however, because that regime made assignable at law that which was previously assignable in equity, it is perhaps more accurate to conclude that in the result, the common law (by force of legislation) adopted the approach of equity. Therefore, despite the fact that this dissertation is generally concerned with the assignment of legal choses in action, it is necessary to look to those principles that give rise to equitable proprietary rights not only for the purpose of characterising contractual rights as property but also having the characteristic of transferability.

Professor Gray has suggested that in equity, property is defined by reference to inclusion rather than exclusion. The exclusionary aspect of property has its origins in the common law but in equity property is access.<sup>68</sup> He states:<sup>69</sup>

It is perhaps worth noticing that the historic function of equitable intervention in property matters has always been to ensure, promote and safeguard rights of access. Equity's concerns have long focused on the perceived need to preserve, for doctrinal reasons,<sup>70</sup> various forms of access to the beneficial value of desired goods and resources. Thus, for example, the critical duty of the trustee is to deflect enjoyment to the beneficiary. The function of the restrictive covenant is likewise to permit the covenantee access to part of the utility in the land subject to covenant. The principal must be protected in his or her access to the commercial opportunities which the fiduciary might otherwise hijack. In each of these instances equitable property and the notion of stewardship seldom stand apart. Whereas legal rights, with their stolid and uncompromising character, more clearly connote the exclusionary aspect of property, equitable rights more subtly articulate a range of protected access to the benefits derived from profitable guardianship.

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<sup>68</sup> Gray 'Property in Thin Air' [1991] *CLJ* 252 at 294. See also Cohen 'Dialogue on Private Property' (1954-5) 9 *Rutgers L Rev* 357 at 373.

<sup>69</sup> Gray 'Equitable Property' (1994) 47 *CLP* 157 at 171.

<sup>70</sup> He suggests the doctrinal force that drives equity here is the conscience of the community; see Gray 'Equitable Property' (1994) 47 *CLP* 157 at 207.

This analysis may be applied to debts and contractual rights. It can be readily accepted that in market economies debts and contractual rights are valuable assets and may be considered property because of that value.<sup>71</sup> In addition, community members require the law to provide access to those assets. The assignor requires access so as to use that debt or contractual right like any other asset, for example, as security for the raising of finance and to pay off a debt. Access here requires transferability. That is, there is a need to recognise access; access would be cumbersome if, in every case, the assignor was required to obtain the consent of the obligor to transfer the asset; therefore, 'propertisation' is a way of providing such access.<sup>72</sup> Thus to talk of access (or property) here without the character of transferability would be nonsense. In addition, the assignee also requires reasonable access to legitimately call for performance of an assigned right and to enforce the rights it has purchased from the assignor. Access here requires enforceability. Therefore, assignment is a method by which access is both controlled and given to these resources without the consent of the person bound to provide the performance.<sup>73</sup>

**[3.16] Property and enforcement by the assignee.** As noted in the previous paragraph, if access is to be provided to the assignor, it is essential that the subject right be transferable. Little more needs to be said on this point. However, the position of the assignee requires further explanation. In the last paragraph, it was suggested that access vis-à-vis the assignee requires enforceability. This still begs the further question, how does the characterisation of the assignee's interest as property aid in this enforceability?

**[3.16.1]** As a starting point, it is instructive to review how the characterisation of something as property affects rights and duties in respect of that property. Grantham and Rickett<sup>74</sup> suggest, correctly it is submitted, that once a property right is created as a

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<sup>71</sup> [2.3].

<sup>72</sup> See Merrill and Smith 'The Property/Contract Interface' (2001) 101 *Columbia LR* 773.

<sup>73</sup> Another related reason for granting access would be the promotion of efficient use of resources, see Bayles *Principles of Law: A Normative Nalysis* (1987) at 78-9, 83.

<sup>74</sup> Grantham and Rickett 'Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?' [1997] *NZLR* 668 at 671.

response to some causative event, it then becomes a causative event in itself<sup>75</sup> which may be the subject of a legal response as it gives rise to primary rights and correlative duties, which, when infringed, gives rise to secondary rights and obligations.<sup>76</sup> Those rights may be personal rights or rights in rem. Importantly, although the party subject to a duty owes that duty to the right holder, these are rights in respect of a thing in the case of personal rights and as regards rights in rem, these are rights which relate to a thing not a person. Thus property de-personalises the 'right-duty correlation'.<sup>77</sup> As Penner explains:<sup>78</sup>

The reference to things is vital. If a thing stands between the right-holder and the duty-owner, then we can see how the normative guidance of the rights and duties can be impersonal. We do not have to frame the duty to respect property as a duty to particular individuals, but as a duty in respect of things. This will, of course, benefit the individual right-holders, but they need not be individually enumerated in order to understand the content of the duty.

Of course, as noted earlier,<sup>79</sup> a 'thing' may include a chose in action. This analysis could explain why a person in the position of an assignee, who has no contractual relationship with the obligor, can enforce performance by the obligor. The law may be seen as

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<sup>75</sup> Admittedly, some rights are abstract rights, such as the right of an owner of property to the income generated by that property. Such a right cannot be transferred separately from the property as it follows the ownership of the property and it only becomes active if the owner uses the property to generate income, see *Booth v Commissioner of Taxation* (1987) 164 CLR 159 at 165 per Mason CJ. Nevertheless, it cannot be correct to hold that until infringed all property rights are inanimate and not causative events in themselves. To be able to infringe a right the right must not only exist but cause the relevant duty to arise, that is, it is causative; cf Birks 'Property and Unjust Enrichment: Categorical Truths' [1997] NZLR 623.

<sup>76</sup> Cf Birks 'Property and Unjust Enrichment: Categorical Truths' [1997] NZLR 623; Birks 'Definition and Division: A Meditation on *Institutes* 3.13' in Birks (ed) *The Classification of Obligations* (1997) ch 1. See also Watts 'Property and "Unjust Enrichment": Cognate Conservators' [1998] NZLR 151.

<sup>77</sup> Grantham and Rickett 'Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?' [1997] NZLR 668 at 677.

<sup>78</sup> Penner *The Idea of Property in Law* (1997) at 24, see also at 75-7. See also Harris *Property and Justice* (1996) ch 8; Waldron *The Right to Private Property* (1988) at 38; Honoré 'Rights of Exclusion and Immunities Against Divesting' (1960) 34 *Tulane LR* 453 at 463; Raz *The Concept of a Legal System* (2<sup>nd</sup> ed, 1980) at 179-81.

<sup>79</sup> [3.7].



responding to a property right by enforcing, in the case of an assigned contractual right, a personal obligation.<sup>80</sup> Thus, the actual transfer of the right to performance allows the assignee to expect that the contractual obligation will be performed for the personal benefit of the assignee, however, that obligation is owed to the assignee by virtue of the assignee's title to the contractual right, and it is this title (ownership) that allows the assignee to enforce performance.

[3.16.2] However, it is not clear to what extent these general rules of property, which for convenience are here referred to as a rights model, explain the assignment of legal choses in action. There are two reasons for this doubt. First, a legal assignment is enforceable by virtue of statute. The common law never had to address these enforcement issues. Second, it must be kept in mind that in equity, certain subject matter may be considered property due to the degree of protection equity provides.<sup>81</sup> That is, courts do not in all cases protect property but rather, 'the judiciary calls property that which they protect'.<sup>82</sup> This reflects equity's history as a system which treats remedies as 'a surrogate for rights'.<sup>83</sup> In fact, in *Norman v Federal Commissioner of*

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<sup>80</sup> Cf Penner *The Idea of Property in Law* (1997) at 129-132.

<sup>81</sup> *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1990) 95 ALR 87 at 135-136 per Gummow J (affirmed (1990) 99 ALR 679). See also *Cooney v Burns* (1922) 30 CLR 216 at 232-3 per Isaacs J ('The word 'contract' itself primarily means a transaction which creates personal obligations; but it may, though less exactly, refer to transactions which create real rights ... If the personal obligations are such that according to the rules of equity operating on the conscience of the defendant it is a right specifically to enforce the performance of the contract, then, and then only, does equity regard the purchaser as owner of the property.')

<sup>82</sup> Cribbert 'Concepts in Transition: The Search for a New Definition of Property' (1986) *U Ill L Rev* 1 at 41. See also Wright 'The Remedial Aspects of Equitable Property' in Jackson and Wilde (eds) *Contemporary Property Law* (1999) ch 2. See further *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 at 712 (equity 'calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines.') Cf Birks 'Proprietary Rights as Remedies' in Birks (ed) *Frontiers of Liability* Vol 2 (1994) at 216; Birks 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' (1999) 23 *MULR* 1; Birks 'Rights, Wrongs, and Remedies' (2000) 20 *OJLS* 1; Birks 'Personal Property: Proprietary Rights and Remedies' (2000) *KCLJ* 1; Birks 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 *WALR* 1 and see Evans 'Defending Discretionary Remedialism' (2001) *Syd LR* 463.

<sup>83</sup> Getzler 'Patterns of Fusion' in Birks (ed) *The Classification of Obligations* (1987) ch 7 at 175.

*Taxation*,<sup>84</sup> Windeyer J not only described assignment as involving a transfer but suggested that equitable assignments were effective because of the remedies equity provided. That is, it is only possible to define the assignee's interest by reference to the relief the court would provide.<sup>85</sup> It is important to stress that equity's approach here is not in fact circular, it is not moving from effect to cause. In each case the cause for equity's intervention is the existence of some equity that calls for protection. Thus, the obligation, not the remedy protecting that obligation comes first.<sup>86</sup> It is merely the degree of protection provided that dictates that what is being protected is property. Nevertheless, there is little doubt that in equity there exists a coalescence between property and obligation.<sup>87</sup> An agreement to assign, creating an obligation on the part of the assignor, can (if equity would provide sufficient protection) be upheld as an immediate equitable assignment giving the assignee beneficial ownership of the assignor's right against the obligor. Clearly, equity's approach here is still in line with the idea of property as access as that notion was developed to explain equitable property.

[3.16.3] In terms of enforcement, this remedial model does not require a highly technical explanation. If the conscience of equity is drawn to an assignment, an equity will be raised and equity will consider that an obligation is owed to the assignee by the assignor.<sup>88</sup> Equity will make remedies available to the assignee to protect its interest in having those obligations carried out. The degree of protection made available results in

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<sup>84</sup> (1963) 109 CLR 9 at 33-4 per Windeyer J. See also *GE Crane Sales Pty Ltd v FCT* (1971) 126 CLR 177 at 180 per Barwick CJ.

<sup>85</sup> See further *Central Trust & Safe Deposit Co v Snider* [1916] 1 AC 266 at 272 per Lord Parker.

<sup>86</sup> *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1990) 95 ALR 87 at 135-136 per Gummow J (affirmed (1990) 99 ALR 679); *Wily v St George Partnership Banking Ltd* (1999) 161 ALR 1 at 3 per Sackville J. See also Parkinson 'Reconceptualising the Express Trust' [2002] *CLJ* 657 at 663.

<sup>87</sup> Gray 'Equitable Property' (1994) 47 *CLP* 157 at 165, 183. See also Goode 'Ownership and Obligation in Commercial Transactions' (1987) 103 *LQR* 433 at 437. Query whether the common law can continue to maintain this distinction, see Samuel 'Property Notions in the Law of Obligations' [1994] 53 *CLJ* 524 and Benson in Benson (ed) *The Theory of Contract Law* (2001) ch 4.

<sup>88</sup> This will depend on whether the elements of an equitable assignment are made out such as an intention to assign, executed consideration or a completed gift on the part of the assignor.

the interest of the assignee in the subject right being viewed as a proprietary interest. If proprietary, then the assignee can be said to own the subject right and will be owed the obligation by the obligor and may, depending on certain factors, have direct recourse against the obligor.<sup>89</sup> Alternatively, and more directly, the explanation may run that it is necessary to call into existence a proprietary interest here to give effect to equitable doctrine. That is, equity's conscience (via equitable doctrine) is drawn to the transaction, to give effect to that doctrine it is necessary to characterise the assignee's interest as proprietary because the assignment may not only be voluntary but it may be necessary to allow the assignee to have recourse directly against the obligor. It is therefore necessary here to admit an equitable interest in the subject matter of the assignment.<sup>90</sup>

[3.16.4] This remedial view of assignment it is suggested, is not at odds with the idea that an assignment involves a transfer. In fact, as noted earlier, it was in *Norman v Federal Commissioner of Taxation* that Windeyer J described assignments as involving a transfer and, moreover, in the sentence before referring to the remedial approach he said, 'Before 1873 a chose in equity and a chose in action were both *transferable* in equity'.<sup>91</sup> It does not matter to the transfer thesis what method equity uses to hold the assignor to its promise to assign the legal right (or an equitable right) so long as it is acting to give effect to the intention of the assignor (and perhaps in some cases the expectation of the assignee) and so long as the interest vested in the assignee is the equitable ownership of the subject legal right.

[3.16.5] It should be added, that although it has never been expressly displaced, it is not entirely clear to what extent this remedial model still represents the totality of equity's approach to assignment. There may be some scope to also recognise the operation of the rights model. There are a number of reasons for this. First, the notion that equity calls property that which it protects means little if this is not dependent upon the degree of protection provided. It is readily accepted that where a court would decree specific

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<sup>89</sup> [4.10].

<sup>90</sup> *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 at 712 per Viscount Radcliffe.

<sup>91</sup> *Norman v FCT* (1963) 109 CLR 9 at 34 (emphasis added).

performance, the interest protected is proprietary.<sup>92</sup> Nevertheless, there are numerous authorities that have suggested that so long as equity will provide any type of protection, the interest of the assignee may be considered proprietary.<sup>93</sup> Such decisions appear to rob the idea of 'the degree of protection' of any meaning. Simply because a party may claim some equitable relief in respect of some subject matter does not automatically equate with them having a proprietary interest in that subject matter much less equitable ownership of the subject matter.<sup>94</sup> Transactions properly termed 'assignments' should be limited to cases where the assignee is vested with an interest equating to ownership (legal or equitable) and not something less than this. Arguably where the protection being provided is not specific performance, then unless the transaction can be upheld as an assignment on some other approach, such as the rights model, it should perhaps be viewed as a transaction that is on its way to being an assignment but not in fact an assignment.<sup>95</sup>

Second, the remedial model was adopted at a time when an equitable assignment was viewed as only giving the assignee rights against the assignor.<sup>96</sup> In such circumstances it makes sense to speak of the assignment being capable of being the subject of an order for specific performance. The assignee was only interested in forcing the assignor to lend its name to the suit or later taking the necessary steps to complete a legal assignment. Today, the joinder of the assignor is generally thought to be a mere matter of procedure and, in any case, no separate action is required to join the assignor. Moreover, it is now accepted that an equitable assignee may have direct claims against the obligor and, although it may make sense to say that the assignee owns the subject right by reason of the degree of protection equity will afford the assignee as against the assignor, ultimately, to enforce that right against the obligor the assignee is relying on its ownership of the assigned right and not the availability of a remedy against the

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<sup>92</sup> The relevant time for determining the availability of a remedy is the time of the assignment rather than the time an order to enforce it is sought, see Keeler 'Some Reflections on *Holroyd v Marshall*' (1967-70) 3 *Adel LR* 360 at 371.

<sup>93</sup> For a collection, discussion and criticism of these decisions see The Hon Justice RP Meagher 'Sir Frederick Jordan's Footnote' (1999) 15 *JCL* 1.

<sup>94</sup> The Hon Justice RP Meagher 'Sir Frederick Jordan's Footnote' (1999) 15 *JCL* 1 at 9.

<sup>95</sup> *Haque v Haque* (1965) 114 CLR 98 at 124-125 per Kitto J; *Stern v McArthur* (1988) 165 CLR 489 at 523 per Deane and Dawson JJ.

<sup>96</sup> [4.6].

assignor. Thus the better view may be that the two models work in combination to give full effect to the assignment. In addition, the relevance of the rights model may be seen in the fact that the efficacy of an assignment is not dependant upon the continued existence of a remedy against the assignor.<sup>97</sup> Moreover, the fact an equitable assignment is operative prior to notice being received by the obligor,<sup>98</sup> does suggest that equity is not merely relying on a remedial model as the transfer takes place prior to the conscience of the obligor being bound.<sup>99</sup> Therefore, it may make more sense in some instances to recognise that equity is not here calling property that which it protects but is simply protecting an interest in property that was already in existence. That is, as is sometimes said, equity simply recognises that a chose in action is property for the purposes of transfer.<sup>100</sup>

Third, it is readily accepted that where parties agree for valuable consideration to immediately assign a legal right, then if for any reason the transaction is not upheld as a legal assignment, it will be upheld as an equitable assignment as soon as the assignee's consideration is executed.<sup>101</sup> That equitable assignment is not dependent upon the

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<sup>97</sup> See above note 92. This ability to recognise a right by virtue of a remedy (or the presence of executed consideration) also makes it possible in equity to give effect to an agreement to assign a legal interest as an immediate equitable assignment. However, the efficacy of the assignment here would be dependant upon the continued enforceability of the contract to assign. Similarly in respect to agreements to lease, it has long been accepted that equity will regard as done that which ought to be done if the 'lessee' can claim specific performance of the contract. However, there was a long debate as to whether the interest that arose by virtue of the availability of this remedy was properly described as an interest under a lease, see Gardiner 'Equity, Estate Contracts and the Judicature Acts: *Walsh v Lonsdale* Revisited' (1987) 7 *OJLS* 60. Today, it is readily accepted that the interest arises under an 'equitable lease', see Gray and Gray *Elements of Land Law* (3<sup>rd</sup> ed, 2001) at 579-80; Butt *Land Law* (4<sup>th</sup> ed, 2001) paras 1532-1534. See further Meagher, Heydon and Leeming *Meagher Gummow and Lehane's Equity, Doctrines and Remedies* (4<sup>th</sup> ed, 2002) paras 2.180-2.225.

<sup>98</sup> [4.10].

<sup>99</sup> [4.10].

<sup>100</sup> [4.7]. Arguably, such statements can be legitimately applied to both the rights and remedial models.

<sup>101</sup> See Meagher, Heydon and Leeming *Meagher Gummow and Lehane's Equity, Doctrines and Remedies* (4<sup>th</sup> ed, 2002) para 6.050 and the cases there cited.

availability of specific performance.<sup>102</sup> Therefore, although equity clearly will provide a remedy to protect the interest of an assignee to such a transaction, that remedy arguably flows from a right which in turn arises from having an interest in the legal right which is the subject of the assignment. Thus it does not matter what remedy equity would provide to protect the interest of the assignee. In fact, in *Tailby v Official Receiver*,<sup>103</sup> Lord Macnaghten, in discussing the relevance of specific performance to assignments of future property said:<sup>104</sup>

[T]he Court is merely asked to protect rights completely defined as between the parties to the contract, or to give effect to such rights either by granting an injunction or by appointing a receiver, or by adjudicating on questions between rival claimants.

The truth is that cases of equitable assignment ... where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done if that principle is applicable under the circumstances of the case. The doctrines relating to specific performance do not, I think, afford a test or measure of the rights created.

This is significant because equitable assignments of legal rights are important to commerce and must therefore be seen as based on a set of reliable factors rather than being entirely discretionary.<sup>105</sup> Thus, although it may be said that where a failed legal assignment is upheld as an equitable assignment or where an agreement to legally assign is upheld as an immediate equitable assignment, it is, in a sense, upheld in equity

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<sup>102</sup> See Meagher, Heydon and Leeming *Meagher Gummow and Lehane's Equity, Doctrines and Remedies* (4<sup>th</sup> ed, 2002) para 6.055.

<sup>103</sup> (1888) 13 App Cas 523.

<sup>104</sup> (1888) 13 App Cas 523 at 547-48.

<sup>105</sup> Alternatively, it may be that equity gives effect to the assignment upon execution of consideration because at that point damages become inadequate. This is not to introduce a requirement of specific enforceability but it may suggest that equity's approach here is still remedial rather than rights based. It would follow that if damages were still an adequate remedy the assignment would not be upheld. This may explain why no equitable interest arises upon entry into an agreement for the sale of goods, see further Keeler 'Some Reflections on *Holroyd v Marshall*' (1967-70) 3 *Adel LR* 360 at 374.

by operation of law,<sup>106</sup> today, such equitable assignments may be all that is intended by the parties.<sup>107</sup> That is, they intend to take advantage of those equitable principles that have been applied to uphold such transactions. However, on a pure remedial approach the type of remedy available should be very important and strictly only the availability of specific performance would be enough to give rise to an interest amounting to the beneficial ownership of the legal right.

## **(f) Derivation of the Transfer Thesis**

**[3.17] The transfer thesis.** From the above analysis it is possible to state the process by which the transfer thesis is derived. That process takes the following steps.

1. Case law dictates that institutional assignments are concerned with the 'transfer' of pure intangibles.
2. The assignment of a contractual right falls within this institutional idea of assignment.
3. A transaction should only be called an assignment in this institutional sense if the assignor intends to vest the ownership (legal or equitable) of the subject contractual right in the assignee, and if the assignee is in fact vested with either the legal or equitable ownership of that right. Any transaction that does not accomplish this should not be called an assignment.
4. A legal transfer requires title to be extinguished on the one hand and created and vested in the transferee on the other hand.
5. An equitable transfer of a legal right can be incorporated within this notion of transferring title even though from an analytical perspective it results in only the

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<sup>106</sup> That is, here equity operates by reference to the conduct of the parties and is drawn to uphold the transaction when it would be unconscionable for the assignor to deny the efficacy of the assignment. The presence of executed consideration generally will suffice to uphold the transaction as an immediate equitable assignment even if what was intended was an immediate legal assignment or even if what was intended was an agreement to legally assign. Equity, therefore may operate merely on the basis of an intention to assign without in all cases requiring an intention to immediately assign.

<sup>107</sup> Eg in receivables financing often there is only intended to be an equitable assignment, such transactions are not upheld as failed legal assignments.

creation and vesting of title. This is because at some level the interest of the assignor is diminished.

6. Not only is it sensible to refer to the actual transfer of a chose in action but such a transfer is necessary for the efficacy of an assignment of the chose in action and automatically follows upon the transfer of title.
7. Since the assignment of a contractual right displays all these characteristics of a transfer, and little else, it can be concluded that such an assignment not only involves a transfer but is a transfer.
8. If assignment is transfer, it must follow that the rules governing the assignment of contractual rights must not only conform to the *nemo dat* rule which governs legal transfers, but the legal concept of transfer must also explain the genesis of the rules governing the assignment of contractual rights as transfer is the essence of assignment.

## (g) Assignment and Privity of Contract

**[3.18] Assignment distinguished from privity.** The assignment of a contractual right does not create privity of contract between the assignee and obligor.<sup>108</sup> This is obvious enough in the case of an equitable assignment<sup>109</sup> but it is also true of a legal

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<sup>108</sup> Similarly, a contract for the benefit of a third party does not, without more, create an assignment, *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460.

<sup>109</sup> *Bagot Pneumatic Tyre Co v Clipper Pneumatic Tyre Co* [1902] 1 Ch 146 at 156 per Vaughan Williams LJ; *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430 at 445 per Sir John Pennycuik. Cf *Calaby Pty Ltd v Ampol Pty Ltd* (1990) 71 NTR 1 at 17-20 per Angel J. In this last case, Angel J was inclined to think that an assignment can create privity and in any case believed privity would exist if the original contract was expressly made with the promisee and its assigns. However, the better view, it is suggested, is that such a provision merely goes to evidencing the assignability of the subject right, see further [2.5]. There is a rule as regards deeds that if a person is named in a deed and later takes a benefit under the deed without executing it, then they will also be bound by any associated obligation under the deed, see *Gallagher v Rainbow* (1994) 179 CLR 624 at 647 per McHugh J. In one case, this principle appears to have been applied to a contract in deed form where there was merely a reference to the promisee and 'its assigns' without naming the assignee, see *Farrow Mortgage Services Pty Ltd v Hogg* (1995) 64 SASR 450. Presumably, the decision rested on the notion that it is only necessary that the beneficiary be sufficiently designated, see *Sunderland Marine Insurance Co v Kearney* (1851) 16 QB 925 at 938, 117 ER 1136 at 1141.



assignment.<sup>110</sup> As noted earlier, the effect of an assignment is that the relevant obligation is owed to the assignee, but what the assignee acquires in terms of characterisation is title to a contractual obligation promised by the obligor to the assignor. The assignment does not substitute the assignee for the assignor as a matter of contract.<sup>111</sup> If it were otherwise there would have been no need to state in the legislative provisions that the assignee takes subject to the equities, nor expressly state that the assignment transfers the legal right as well as the legal remedies and other remedies for its recovery.<sup>112</sup> Moreover, if an assignment did bring the parties into privity, it would not be possible to maintain the distinction that is drawn between the assignment of contractual rights and contractual duties.<sup>113</sup> If an assignee is brought into privity with the obligor, it would be bound by contractual duties and liable for the non-performance of those duties. This is not the law.<sup>114</sup> Moreover, if the assignee and obligor are brought into privity, the assignee should, in all cases, be able to recover for its own personal loss resulting from a breach of contract by the obligor.<sup>115</sup> It may be noted, however, that the

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<sup>110</sup> Cf *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430 at 445 per Sir John Pennycuik; *Showa Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) 34 NSWLR 548 at 561 per Giles J.

<sup>111</sup> *International Leasing Corp (Vic) Ltd v Aiken* [1967] 2 NSWLR 427 at 438 per Jacobs JA.

<sup>112</sup> *Read v Brown* (1888) 22 QBD 128 at 132 per Lord Esher MR. See also *Bennett v White* [1910] 2 KB 643 at 646 per Cozens-Hardy MR.

<sup>113</sup> [6.30].

<sup>114</sup> *Bagot Pneumatic Tyre Co v Clipper Pneumatic Tyre Co* [1902] 1 Ch 146 at 156 per Vaughan Williams LJ; *Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd* [1993] 1 WLR 138 at 147 per Hoffmann J (overruled on another point [1995] Ch 152); *Rhone v Stephens* [1994] 2 AC 310 at 317 per Lord Templeman.

<sup>115</sup> [8.9].

enforcement of the assignee's right is not at odds with privity because what the assignee protects or enforces is its title to the subject right. Thus assignment is not a true exception to privity.

## **4. *Equitable Assignments***

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### **(a) Introduction**

**[4.1] Purpose of chapter.** This Chapter is concerned with the characterisation of an 'equitable assignment' of a legal right. In Chapter Three it was suggested that such an 'assignment' can be legitimately understood as involving a transfer and therefore properly termed an 'assignment'. The purpose of this Chapter is to determine whether this 'assignment as transfer' analysis is in fact reflected in case law despite not being articulated in the manner suggested in Chapter Three. If not, then given the explanatory nature of this dissertation, there is no point pursuing the transfer thesis in respect of equitable assignments. This is an issue that is not only important in attaching a label to such transactions. Whether or not the transaction is properly seen as an assignment will affect the nature and characteristics of the right vested in the assignee as well as how, and the extent to which, the assignee may enforce its 'assigned' right.

**[4.2] Structure of chapter.** The main focus of this Chapter is on the equitable assignment of legal rights assignable at law. This forms the subject matter of most equitable assignments of contractual rights and it is the most problematical area so far as characterising such transactions as true assignments. As will be seen this flows from the view that the assignee is, to a certain extent, dependant on the assignor for its protection, or may only have rights against the assignor. The Chapter also briefly looks at the equitable assignment of legal interests not assignable at law to determine whether such transactions are properly termed 'assignments'. Finally, the Chapter addresses the so called 'assignment' of future interests.

For completeness, the Chapter begins with a short statement of the position as regards an equitable assignment of an equitable interest. Although the principal concern of the dissertation is the assignment of legal contractual rights, an equitable assignee of such a right who further assigns the right, will obviously be attempting to assign an equitable

rather than a legal interest.<sup>1</sup> It is, therefore, important to canvas equitable assignments of equitable interests briefly as the presence of such intermediate assignees will be important when later addressing the position of the parties in Chapter Eight.

## **(b) Equitable Assignment of Equitable Interests**

**[4.3] Equitable assignment of equitable interests.** The assignee of an assignment of an equitable interest can sue in his or her own name and give a good discharge as the assignee alone is regarded as having an interest in the subject matter assigned.<sup>2</sup> However, where the equitable assignment is of only part of an equitable interest, then clearly the assignor must be joined in any action as a procedural safeguard.<sup>3</sup> In either case, there can be no doubt that there is a true transfer of the equitable interest. The assignee becomes the owner (in equity) of the relevant interest and is owed the relevant duty. There is both a transfer of title and an actual transfer of the subject right.

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<sup>1</sup> Eg *Care Shipping Corp v Latin American Shipping Corp* [1983] 1 QB 1005. See also *Letts v IRC* [1957] 1 WLR 201, where it was held that a contractual right to have shares issued was an equitable chose in action as it could only be protected by specific performance.

<sup>2</sup> *Redman v Permanent Trustee Co of NSW Ltd* (1916) 22 CLR 84 at 95 per Isaacs J. However, it has been held that a partner cannot separately assign his or her right to share in the profits of the partnership as it is not distinct from the interest in the partnership. Moreover, an assignment of a partner's interest in the partnership, though valid, does not make the assignee a partner. Therefore, to give effect to the assignment it is necessary to hold that the assignor remains a partner and holds the relevant interest on trust for the assignee, see *FCT v Everett* (1980) 143 CLR 440; *Commissioner of Taxation v Galland* (1986) 162 CLR 408. Cf *Hadlee v Commissioner of Inland Revenue* [1989] 2 NZLR 447, [1991] 3 NZLR 517, [1993] AC 524, *FCT v Everett* (1978) 21 ALR 625 at 643-644 per Deane J.

<sup>3</sup> Eg *Letts v IRC* [1957] 1 WLR 201. Moreover, in the case of a mortgage where an action is on foot between the assignee and obligor, if the assignor wishes to enforce its equity of redemption, he or she would need to be joined, see *Re Pain* [1919] 1 Ch 38.

## (c) Equitable Assignment of Legal Interests Assignable at law

### (i) Introduction

**[4.4] Introduction.** In three situations, a dealing with a legal interest, which is assignable at law, may be upheld as an equitable assignment.<sup>4</sup> The first is where there exists an immediate intention to assign a legal interest for value but where there is a failure to comply with the statutory requirements for a valid legal assignment - the failure may be intended or unintended. In such a case, where the consideration is executed, equity will uphold the transaction as an equitable assignment.<sup>5</sup> Similarly, where there exists a valid agreement for value to assign an existing legal interest and where the consideration for that assignment is executed, equity will uphold the transaction as an equitable assignment.<sup>6</sup> Finally, the preferred view appears to be that where a voluntary assignment of a legal interest fails to satisfy the statutory requirements for a legal assignment, it too may be upheld as an equitable assignment if

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<sup>4</sup> An assignor may also be estopped from denying the assignment, see *Olsson v Dyson* (1969) 120 CLR 365 at 376, 378-379 per Kitto J. See also *Ward v Duncombe* [1893] AC 369 at 391-392 per Lord Macnaghten; *Shropshire Union Railways & Canal Co v The Queen* (1875) LR 7 E & I App 496 at 506 per Lord Cairns LC; *Dempsey & The National Bank of New Zealand Ltd v The Traders' Finance Corp Ltd* [1933] NZLR 1258 at 1303 per Smith J; *Re Matahina Rimu Co Ltd* [1941] NZLR 490; *Riseda Nominees Pty Ltd v St Vincent's Hospital (Melbourne) Ltd* [1998] 2 VR 70.

<sup>5</sup> [3.16.5] Consideration here does not include past consideration but does include a forbearance to sue, see *Glegg v Bromley* [1912] 3 KB 474.

<sup>6</sup> *Norman v FCT* (1963) 109 CLR 9 at 33 per Windeyer J; *Holroyd v Marshall* (1862) 10 HLC 191 at 209, 11 ER 999 at 1006 per Lord Westbury; *Tailby v Official Receiver* (1888) 13 App Cas 523 at 531 per Lord Herschell, at 546-549 per Lord Macnaghten; *EM Bowden's Patents Syndicate Ltd v Herbert Smith & Co* [1904] 2 Ch 86; *FCT v Betro Harrison Constructions Pty Ltd* (1978) 20 ALR 647 at 650-651 per Bowen CJ; *Commercial Factors Ltd v Maxwell Printing Ltd* [1994] 1 NZLR 724; *Marchant v Morton, Down & Co* [1901] 2 KB 829. Query where the consideration is executed after the agreement is entered into whether the assignment relates back to the time of the agreement, see *Rayner v Preston* (1881) 18 Ch D 1 at 11 per Brett LJ, at 13 per James LJ.

the assignor has done all the things it and only it can do to vest the legal title in the assignee.<sup>7</sup>

The relevant equitable maxim operating in each of the above instances is that equity treats as done that which ought to be done. That is, equity treats the transfer as having already occurred. In each case, the interest vested in the assignee is not dependant upon the availability of specific performance, in the first two cases equity considers that the right ought to be transferred due to the presence of executed consideration,<sup>8</sup> and in the third case the conscience of the assignor 'becomes bound not by value received, but because as between him and the assignee, his gift [is] complete.'<sup>9</sup>

The above statements should not be taken to suggest that this area is free from difficulty. For example, there is still a view that the availability of specific performance is crucial.<sup>10</sup> Moreover, in the case of an agreement to assign, there are limits to the extent to which equity will uphold such a transaction as giving rise to an immediate equitable assignment and much depends on the nature and extent of any conditions precedent to the assignment.<sup>11</sup> However, a detailed investigation of these points falls outside this dissertation.

**[4.5] The equitable assignment conundrum and the transfer thesis resolution.** More importantly for this dissertation is that there exists some confusion as to whether these

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<sup>7</sup> *Corin v Patton* (1990) 169 CLR 540. See also *Re Rose* [1952] Ch 499; *Re Paradise Motor Co Ltd* [1968] 1 WLR 1125; *T Choithram International SA v Pagarani* [2001] 1 WLR 1; *Pennington v Waine* [2002] 1 WLR 2075. See generally Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4<sup>th</sup> ed, 2002) paras 6.074-6.155.

<sup>8</sup> *Tailby v Official Receiver* (1888) 13 App Cas 523 at 547 per Lord Macnaghten; *Redman v Permanent Trustee Co of NSW Ltd* (1916) 22 CLR 84 at 96 per Isaacs J. See also Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4<sup>th</sup> ed, 2002) para 6.050.

<sup>9</sup> *Norman v FCT* (1963) 109 CLR 9 at 33 per Windeyer J.

<sup>10</sup> See Sykes and Walker *The Law of Securities* (5<sup>th</sup> ed, 1993) at 152-153; Gough *Company Charges* (2<sup>nd</sup> ed, 1996) at 70; Gray and Gray *Elements of Land Law* (3<sup>rd</sup> ed, 2001) at 599-600. See also Worthington *Proprietary Interests in Commercial Transactions* (1996) para 8.3.1(i). See further [3.16.5].

<sup>11</sup> See *Re Androma Pty Ltd* [1987] 2 Qd R 134 at 150-152 per McPherson J.

transactions should be characterised as true assignments. There is also a lack of analysis as to the true nature of the interest vested in the assignee. In practice, these unresolved issues tend to cause problems in two areas. The first concerns whether notice to the obligor is required for the validity of the assignment<sup>12</sup> and the second is the more problematic conundrum caused by the requirement of joinder. Although the issue of notice is prima facie a matter of formality, it is important to address it here as it impacts on the nature of the relationship between the assignee and obligor which is an important concern of this dissertation. As to joinder, the great weight of modern authority holds that in any action by the assignee to enforce its assigned right it must join the assignor as a matter of procedure. Being merely a matter of procedure, joinder may be dispensed with in certain cases. This gives rise to a conundrum in that the procedural view of joinder apparently allows an assignee with a mere equitable interest to enforce a legal right. If such an assignee seeks to enforce the legal right, which is the subject of the assignment, then the assignor, who holds that legal right, should be joined as a matter of substantive law. At the same time as the authorities appear to accept the procedural view of joinder, there is another line of authority that suggests that an equitable assignment merely gives the assignee rights against the assignor. If this is correct, then any action against the obligor must by definition be brought by the assignor which would, in turn, dictate that joinder is substantive. This directly calls into question both the character of these transactions as true assignments and the interest vested in the assignee. The resolution of the issues of joinder and notice is therefore necessary to further substantiate the characterisation of such transactions as involving transfers as is advocated below (the assignment analysis). The following resolution to this issue of characterisation is proposed:

1. A transaction is only properly characterised as an equitable assignment of a legal right if the assignor intends to transfer ownership of the (identifiable) right to the assignee and if the assignee is vested with the equitable ownership of the subject legal right and is treated (in equity) as being owed the relevant obligation.
2. Notice to the obligor is not necessary for the efficacy of an equitable assignment.<sup>13</sup>

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<sup>12</sup> This issue was left open by Windeyer J in *Norman v FCT* (1963) 109 CLR 9 at 38.

<sup>13</sup> Although it is not necessary to pursue the point here, it is also suggested that the better view is that notice to the assignee is also not required. However, the assignee will have a right to reject

3. Notice is necessary to bind the conscience of the obligor.
4. The issue of joinder is first dependent on whether the assignee is seeking an equitable or legal remedy.
5. If the assignee seeks a legal remedy, then joinder is properly viewed as a matter of substantive law.
6. If the assignee seeks an equitable remedy, then joinder is properly seen as a matter of procedure.
7. When the assignee seeks an equitable remedy, in order to determine whether or not a claim can be brought directly against the obligor, it is necessary to investigate the precise nature of the assignee's interest. In this dissertation this is referred to as the 'strength' of the assignee's right. In certain cases the assignee's interest will not be strong enough to support a direct claim against the obligor. In such cases, the only right enforceable against the obligor will be the legal right and therefore joinder here becomes a matter of substantive law. Therefore, there may be cases where a transaction is properly entitled an 'assignment' as the assignee's title amounts to ownership, and the assignee is (in equity) owed the obligation, but where the assignee's rights are nevertheless limited to taking action against the assignor by reason the assignee's interest.

Point 7 above is only alerted to in this Chapter and so too is the extent and type of remedies that may be available to the equitable assignee. These are dealt with in more detail in Chapters Seven and Eight.

The resolution of the above issues begins with an investigation as to the character of an equitable assignment of a legal right.

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the transfer, see *Grey v Australian Motorists & General Insurance Co Pty Ltd* [1976] 1 NSWLR 669. See also Hill 'The Role of the Donee's Consent in the Law of Gift' (2001) 117 *LQR* 127 at 137-39; Crago 'Principles of Disclaimer of Gifts' (1999) 28 *WALR* 65; Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's 'Equity, Doctrines and Remedies'* (4<sup>th</sup> ed, 2002) para 6.430.



## **(ii) The Character of an Equitable Assignment of a Legal Right**

**[4.6] The contract analysis.** Historically, for an equitable assignee of a legal right to enforce the legal right the action had to be brought by the assignee in the name of the assignor.<sup>14</sup> If the assignor refused to allow its name to be used the assignee could, if the assignment was for valuable consideration,<sup>15</sup> file a bill in equity and upon giving an indemnity as to costs, obtain an injunction allowing the assignor's name to be used in a suit at law to recover the assigned debt.<sup>16</sup> The action therefore had the appearance of one brought by the assignor. Even today, the assignor maintains a cause of action.<sup>17</sup>

Even if capable of enforcing the claims directly, the equity courts generally did not do so because the potential then existed for the assignor to bring an action at law on the same claim thus requiring the obligor to obtain an injunction to stop the second suit. The fact the action proceeded at law, and in the name of the assignor, was logical because the proceedings were intended to enforce the legal right. If the assignee could enforce the legal right directly it would suggest the legal right had been transferred.

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<sup>14</sup> Cf as to the assignment of part of a debt, *Norman v FCT* (1963) 109 CLR 9 at 29-30 per Windeyer J.

<sup>15</sup> *Re Westerton* [1919] 2 Ch 104 at 111 per Sargant J; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 3 per Atkinson J. See also *Norman v FCT* (1962) 109 CLR 9 at 31 per Windeyer J.

<sup>16</sup> *Crouch v Credit Foncier of England Ltd* (1873) LR 8 QB 374 at 380 per Blackburn J. See also *Winch v Keeley* (1787) 1 TR 619, 99 ER 1284; *Re Westerton* [1919] 2 Ch 104; *Three Rivers District Council v Bank of England* [1996] QB 292; *Norman v FCT* (1963) 109 CLR 9 at 26 per Windeyer J. The assignor could also be restrained from receiving the debt, see *Norman v FCT* (1963) 109 CLR 9 at 27 per Windeyer J. Alternatively, the defendant could be forced to admit, in the action at law, that the assignee held the legal interest, see *Sweet v Cator* (1841) 11 Sim Rep 572, 59 ER 994. Where the assignee held a power of attorney from the assignor it could bring an action at law and could only obtain relief in equity if the assignor obstructed or threatened to obstruct the assignee's claim, see *Cator v Burke* (1785) 1 Brown's Ch 434, 28 ER 1222. If the assignee failed to offer the indemnity before joining the assignor as defendant, the assignee, although successful in the action, may have been required to pay the defendant's costs, see *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 89 per Gaudron and Gummow JJ. See also *Turquand & the Capital & Counties Bank v Fearon* (1879) 4 QBD 280.

That result would have been beyond the jurisdiction of equity to deliver. Equity could not put in place rules for the transfer of legal rights. What it could do was take the view that if a person intends to assign a legal right, that person should, in certain circumstances, (such as where there is executed consideration for the promise) be bound by that act. Thus equity acting in personam attaches to the conscience of the assignor and forces the assignor to lend his or her name to the suit at law.

On the above analysis the equitable assignment of a legal right merely provides the assignee with a remedy against the assignor, that is, an equitable assignment only operated between the assignor and assignee. What is obtained or 'assigned' from the assignor appears to be no more than a right to sue in the name of the assignor.<sup>18</sup> There are numerous authorities, even of recent origin, that take this view of the assignee's position.<sup>19</sup> The rationale for this analysis is that such an assignment operates by way of agreement or contract between the assignor and assignee.<sup>20</sup> This may be called the contract analysis. The effect of this analysis is that equity forces the assignor to perform its promise rather than leave the assignee with a remedy in damages. It is important to note what that promise is. Initially, the assignor had agreed to immediately assign a legal right to the assignee. Such an agreement was incapable of being performed at law and therefore it cannot be the case that equity would only uphold such contracts of assignment if they were capable of being the subject of an order for specific performance. It appears that equity implied a promise that the assignor would lend its name to any suit against the obligor and it was this promise that it held the assignor to.<sup>21</sup>

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<sup>17</sup> *Three Rivers District Council v Bank of England* [1996] QB 292.

<sup>18</sup> *Hammond v Messenger* (1838) 9 Sim 327, 59 ER 383.

<sup>19</sup> Eg *Long Leys Co Pty Ltd v Silkdale Pty Ltd* (1991) 5 BPR 11,512 at 11,518; *Showi Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) 34 NSWLR 548 at 561; *Corin v Patton* (1990) 169 CLR 540 at 576 per Deane J. See also *Neave v Neave* [1926] GLR 254 at 256.

<sup>20</sup> *Wright v Wright* (1749-50) 1 Ves Sen 410 at 412, 27 ER 1111 at 1112.

<sup>21</sup> From this it is not difficult to see the legitimacy of equity giving immediate effect to what in law is a mere agreement to assign and, alternatively, where an immediate assignment fails at law, giving effect to the transaction as an agreement to (legally) assign and thus an immediate equitable assignment.

[4.6.1] The remedial model of an equitable assignment of a legal right originated with the contract analysis.<sup>22</sup> However, one obvious problem with the contract analysis is that it does not seem to involve any transfer.<sup>23</sup> If the assignee's vested interest in all cases merely results in it having a remedy against the assignor, that result could probably have been achieved without resort to the language of assignment.<sup>24</sup> This is even more so the case if the 'remedy' is merely in respect of a promise by the assignor to lend its name to any suit against the obligor. As noted earlier, the mere fact that a person may have an equitable remedy in relation to a legal right does not mean they have an interest in the legal right.<sup>25</sup> Clearly, in the past, the word 'assignment' has been used in a broad sense,<sup>26</sup> because if the extent of the assignee's rights were limited to actions against the assignor then equity did little more than the common law except to construct a power of attorney when no express power was given.<sup>27</sup> For there to be a true assignment, that is, a transfer, it is not sufficient for the assignor to vest in the assignee a right against the assignor but rather the assignee must be vested with the ownership of rights which exist between the assignor and the obligor by virtue of the contract between the assignor and obligor. The contract analysis does not appear to provide this result yet this must be the result if such transactions are true assignments. Moreover, as will be discussed, it appears clear that the better view is that equitable assignments of legal rights are true assignments.<sup>28</sup>

[4.7] **The assignment analysis.** An alternative analysis, and one which gives effect to a transfer, is that equity recognised the proprietary character (ownership) of a *legal right* for the purpose of transfer.<sup>29</sup> Such transactions then take effect as assignments because

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<sup>22</sup> [3.16.5].

<sup>23</sup> It would prevent the recognition of voluntary assignments.

<sup>24</sup> [3.16.5].

<sup>25</sup> [3.16.5].

<sup>26</sup> [3.4].

<sup>27</sup> Bailey 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1932) 48 *LQR* 547 at 567.

<sup>28</sup> [4.8], [4.9.5]. Eg a valid equitable assignment of a debt takes that debt out of the assets belonging to the assignor so that a garnishee of the assignor may not claim the debt, see *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1; *Davis v Freethy* [1890] 24 QBD 519.

<sup>29</sup> *Fitzroy v Cave* [1905] 2 KB 364 at 372-373 per Cozens Hardy LJ. See also *Re Steel Wing Co Ltd* [1921] 1 Ch 349 at 355 per PO Lawrence J. As noted earlier, such statements can legitimately be

an equitable interest is created and vested in the assignee and that interest is the beneficial ownership of the legal right which is the subject of the assignment and the assignee is treated (in equity) as being owed the obligation. That is, in less precise terms (and in respect of contractual rights), the assignee obtains an interest in the contract that exists between the assignor and obligor. This is referred to here as the assignment analysis,<sup>30</sup> and, as noted earlier,<sup>31</sup> the fact that equity achieved this 'propertisation' by reference to the degree of protection it provided does not detract from the interpretation of these transactions as involving a transfer. This is simply the manner by which it gives effect to its view that *legal rights* should be transferable. Thus equity did not merely take the view that in certain circumstances an assignor should be bound by his or her promise to assign,<sup>32</sup> rather, by virtue of the degree of protection it was prepared to provide the assignee, it recognised the assignee's beneficial ownership of the subject matter of the assignment.

#### **[4.8] Conclusions on the characterisation of equitable assignments of legal rights.**

There is a dichotomy between the assignment analysis and the contract analysis. It is suggested that the assignment analysis represents the modern and better view. This is evidenced by the procedural view taken of joinder which, although designed to protect the obligor from duplicated suits and to ensure all interested parties are before the court, appears implicitly to recognise that the obligor owes its obligation in part to the assignee

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applied to both the remedial and rights models of equitable assignments. Clearly, however, this analysis was not needed during that period where equity applied the contract analysis.

<sup>30</sup> This analysis can be confused with a trust analysis, that is, an equitable assignment operated by way of trust, see Spry *Equitable Remedies* (6<sup>th</sup> ed, 2001) at 80. Here, the beneficial interest of the assignee is equated to the interest of a beneficiary under a trust. However, it is inaccurate to align an assignment with a trust merely because a court may impose a trust to protect the interest of an assignee, see *Re Rose* [1952] Ch 499 at 510-11 per Evershed MR; *Warner Bros Records Inc v Rollgreen Ltd* [1976] 1 QB 430 at 443-44 per Roskill LJ. See further *GE Crane Sales Pty Ltd v FCT* (1971) 126 CLR 177 at 183 per Menzies J (suggesting that where a creditor constitutes itself as a trustee of its debts for another, this amounts to an assignment in equity of the debts). Nevertheless, the trust analysis is perhaps an important indicator that equity would recognise the assignment of legal interests by way of gift, see *Norman v FCT* (1962) 109 CLR 9 at 33 per Windeyer J.

<sup>31</sup> [3.16.4].

<sup>32</sup> [4.6].

as the assignee can bring an action in its own name against the obligor under this rule.<sup>33</sup> Thus, the view that such a transaction involves a true transfer is reinforced by the fact that the need for an action at law to enforce the obligation of the obligor began to be viewed as a mere procedural incident. The assignor plaintiff was merely a nominal plaintiff.<sup>34</sup> Moreover, it is strange that some modern cases still resort to the contract analysis, because it showed early signs of breakdown when equity took the view that if the assignor would not lend its name to the suit at law or did or intended to do some act which would prevent the assignee from recovering at law in the assignor's name, the assignee could commence an action in equity in its own name against the obligor, especially if there had been collusion between the assignor and obligor.<sup>35</sup>

[4.8.1] In addition, in time, and perhaps as a consequence of section 85 of the Common Law Procedure Act 1854,<sup>36</sup> if an assignor would not lend its name to a suit at law for the benefit of the assignee, then the assignee could commence an action in law in its own name and join the assignor as co-defendant. From this, the view naturally formed, at law, that it was only necessary that the assignor be a party to the action to ensure that the assignor was bound by the decision for the protection of the obligor. Strictly, however, that procedure reflects an equitable, rather than a common law, approach to joinder and was not formerly adopted in the common law courts until the Judicature Act reforms.<sup>37</sup> Certainly, the point was reached where, because the common law courts knew the assistance of equity was available, they adopted the position that an assignee

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<sup>33</sup> *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 4 per Atkinson J.

<sup>34</sup> *Fitzroy v Cave* [1905] 2 KB 364 at 372 per Cozens-Hardy LJ; *James Nelson & Sons Ltd v Nelson Line (Liverpool) Ltd* [1906] 2 KB 217.

<sup>35</sup> *Hammond v Messenger* (1838) 9 Sim 327 at 332, 59 ER 383 at 385-386. There is also early authority that appears to recognise the assignee as the owner in equity, see *Fashion v Atwood* (1688) 2 Chan Cas 37, 22 ER 835.

<sup>36</sup> Marshall *The Assignment of Choses in Action* (1950) at 77. This Act allowed the common law courts to entertain equitable defences. Thus if a debt was assigned in equity and the assignor attempted to enforce the debt for his own benefit in a common law court, the court could entertain the defence that in equity an injunction could be obtained to prevent this, see *Jeffs v Day* (1866) LR 1 QB 372.

<sup>37</sup> The fact the assignor may be joined as a defendant does not mean the action by the assignee is against the assignor. This is simply a procedure used by equity to ensure all interested parties are before the court and bound by the judgment.

could sue in the assignor's name without having to go to equity.<sup>38</sup> When this position was reached at law, equity adopted the position that because the assignee had a remedy at law, they should be left to that remedy rather than an equitable remedy. However, the common law courts never reached the point, prior to the Judicature Act 1873 s 25(6), of allowing an assignee of a chose in action to sue in its own name at law without joining the assignor.<sup>39</sup>

Today, no separate action in equity is required to force the assignor to lend its name to the suit. The assignor is simply joined as co-plaintiff and if it refuses to be so joined then it can be joined as co-defendant. Moreover, if the obligor does not take the point that the assignor has not been joined, the court may ignore it.<sup>40</sup> Finally, the assignment analysis gives effect to the transaction as a transfer and therefore is in line with the modern view that an assignment involves a transfer. It also follows that on the assignment analysis, the interest equity protects is the assignee's equitable ownership of the assigned right. The assignee's rights do not derive from a mere personal equity giving the assignee a personal right to seek an equitable remedy against the obligor.

### ***(iii) Notice and Joinder***

**[4.9] The case law.** A useful starting point for an investigation of the case law in this area is the recent decision of the New Zealand Court of Appeal in *Mountain Road (No 9) Ltd v Michael Edgley Corp Pty Ltd*.<sup>41</sup> This case involved a purported assignment for value of certain contractual rights, expressed to take effect only upon the signature of a memorandum of agreement of assignment. That memorandum was never signed by one of the parties and the invalidity of the assignment was and can be upheld on that ground.<sup>42</sup> However, the court went on to suggest that even if that were not the case the assignment could not be enforced as an equitable assignment of a legal right because

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<sup>38</sup> [2.7].

<sup>39</sup> *Norman v FCT* (1963) 109 CLR 9 at 27 per Windeyer J. See also *Price v Seaman* (1825) 4 B & C 525, 107 ER 1155.

<sup>40</sup> *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462 per Lord Macnaghten.

<sup>41</sup> [1999] 1 NZLR 335.

<sup>42</sup> [4.4].

notice had not been given to the obligor. Prior to such notice the assignment was only complete as between the assignor and assignee.

[4.9.1] Two principal authorities were relied upon in *Mountain Road*. The first was the decision of Lord Macnaghten in *William Brandt's Sons & Co v Dunlop Rubber Co Ltd*.<sup>43</sup> In this case the debtor had paid the assignor after receiving notice of the assignment. The issue raised for judgment was whether the debtor had received sufficient notice. If sufficient notice had been given the debtor remained liable to the assignee for the payments made to the assignor. The court in *Mountain Road* thought that the tenor of Lord Macnaghten's speech supported the view that 'the title of an equitable assignee is not effective against third parties unless and until they have been given notice.'<sup>44</sup> However, Lord Macnaghten made only two remarks as regards notice. First, he said that as between assignor and assignee the assignment was complete without notice.<sup>45</sup> Second, the only statement he made that may imply that notice is relevant to the efficacy of the assignment occurs where he said, 'All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person'.<sup>46</sup> However, that statement was simply addressing the

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<sup>43</sup> [1905] AC 454. Reliance was also placed on *Compania Colombiana de Seguros v Pacific Steam Navigation Co*. [1965] 1 QB 101 at 129 where Roskill J said that 'notice to the debtor before action is brought is clearly required'. These remarks were criticised by Scott J in *Weddell v JA Pearce & Major* [1988] Ch 26 at 45. However, it may be that Roskill J was simply referring to the requirements for a legal assignment. Cf *Torkington v Magee* [1902] 2 KB 427 at 431 (overruled on another point [1903] 1 KB 644) where Channell J, in dealing with an assignment of a legal right, suggested that prior to the passing of the Judicature Act the assignee would have had rights after giving notice to the obligor. See also *Deposit Protection Board v Dalia* [1994] 2 AC 367 at 387 per Sir Michael Fox (overruled on another point sub nom *Deposit Protection Board v Barclays Bank Plc* [1994] 2 AC 367).

<sup>44</sup> [1999] 1 NZLR 335 at 341.

<sup>45</sup> [1905] AC 454 at 462.

<sup>46</sup> [1905] AC 454 at 462. Cf *Morrell v Wooten* (1852) 16 Beav 197, 51 ER 753, where it is suggested that where an 'assignment' takes the form of an order by the assignor given to the debtor, no assignment results until there is notice to the assignee. However, the example given in the judgment concerns an order made on a banker which is countermanded prior to notice of it being given to the third party payee. Arguably such transactions are distinct from assignments as they are not intended to operate as assignments but are mere revocable mandates and the only real question is at what point do they become irrevocable. The better view is that notice to the

issue of the form that equitable assignments may take. That is, it need not be in the form of a communication to the assignee but rather a communication to the debtor/obligor. It was not meant as a comprehensive statement of the requirements of an equitable assignment. In fact, the statement was meant to convey the informal nature of equitable assignments which is completely at odds with the interpretation given to it in *Mountain Road*.

[4.9.2] The second case relied on was *Warner Bros Records Inc v Rollgreen Ltd*.<sup>47</sup> This case concerned the equitable assignment of an option. The preliminary issue put before the court was, 'Whether or not an equitable assignee of a contractual option who has not given notice of the assignment to the grantor of the option may exercise the same in his own name so as to bind the grantor of the option.'<sup>48</sup> Lord Denning MR said that 'it is a settled principle of equity that in order to perfect the title of an assignee of a debt notice to the debtor is necessary.'<sup>49</sup> He considered this principle was not limited to debts but

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assignee is not required, see *Grey v Australian Motorists & General Insurance Co Pty Ltd* [1976] 1 NSWLR 669 and see Meagher, Heydon and Leeming *Meagher Gummow and Lehane's Equity, Doctrines and Remedies* (4<sup>th</sup> ed, 2002) para 6.430. There is nothing to stop a mere communication to a debtor amounting to an assignment. The issue is one of construing the intention of the assignor, see Meagher, Heydon and Leeming *Meagher Gummow and Lehane's Equity, Doctrines and Remedies* (4<sup>th</sup> ed, 2002) para 6.425. Indeed it may be questioned whether notice to the assignee, when the debtor is ignorant of the notice, would advance the argument that an assignment was intended. If the test for determining intention is that of a reasonable person in the position of the debtor, such notice cannot help. If the court can take into account and combine the reasonable person in the position of the both the debtor and assignee, this may put the debtor in a precarious situation, especially if the assignor seeks to countermand the direction to pay which to the debtor would appear as a mere revocable mandate. Ultimately, this is an issue of formalities and does not have to be further addressed here.

<sup>47</sup> [1976] 1 QB 430.

<sup>48</sup> [1976] 1 QB 430 at 440.

<sup>49</sup> [1976] 1 QB 430 at 442 citing *Stocks v Dobson* (1853) 4 De GM & G 11, 43 ER 411. Essentially, the issue in that latter case concerned whether a sub-assignee, having given no notice, could force the debtor to pay again after it had settled with the assignor/intermediate-assignee. However, Turner LJ saw the facts as giving rise to a priority dispute, hence the reference to notice being necessary to perfect title. See also *Neave v Neave* [1926] GLR 254 at 256 per Adams J; *Squires v SA Steel & Sheet Pty Ltd* (1987) 45 SASR 147 at 144 per Bollen J; *Herkules Piling Ltd v Tilbury Construction Ltd* (1992) 61 BLR 107 at 119-20 per Hirst J; *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825.



also extended to options. He said that a 'grantor cannot be expected to act on a letter purporting to exercise the option which comes out of the blue from someone or other of which he knows nothing.... Notice is therefore necessary to perfect the right of the assignee to exercise the option.'<sup>50</sup> Arguably the latter statement does not follow from the former. The element of surprise may be a reason for staying an action brought by the assignee, however, that cannot be determinative of the title of the assignee.<sup>51</sup> The result in the case is no doubt the correct one but Lord Denning seems to confuse the assignee's title with the assignee's remedies. Ultimately, as will be discussed below, the assignee had to fail, because having only an equitable right it could only seek equitable remedies to enforce that right and there is no equitable remedy that would have provided it with the result it wished, namely exercise of the option. Thus notice becomes important in practice because it is usually the last step required to render an assignment a legal assignment.

In the same case Roskill LJ said that, 'an equitable assignee of a contractual option who has not given notice of the assignment to the grantor of the option cannot exercise that option in his own name.'<sup>52</sup> He continued, 'the only rights that an equitable assignment can create in the equitable assignee are rights against his assignor who thenceforth becomes the trustee of the benefit of the option for the assignee, and the assignor could, of course, be compelled in equity to exercise those rights for the benefit of the assignee.... The present equitable assignee never became the legal assignee, and so, in my judgment, never became in a position to enforce the contractual right.'<sup>53</sup> These remarks suggest that unlike Lord Denning MR, Roskill LJ saw notice as being relevant only to determining whether or not the statutory regime had been satisfied. He did not suggest that the assignment was not a perfectly good equitable assignment prior to notice being given. His remarks concerning enforcement by an equitable assignee

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<sup>50</sup> [1976] 1 QB 430 at 442. This statement on its face appears to merely address the sufficiency of notice, that is, it appears to suggest that for a notice to be legitimate, it must originate from the assignor. Cf *Morrell v Wootten* (1852) 16 Beav 197, 51 ER 753.

<sup>51</sup> *Showa Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) 34 NSWLR 548 at 561.

<sup>52</sup> [1976] 1 QB 430 at 443.

<sup>53</sup> [1976] 1 QB 430 at 443-44.

follow the traditional contract analysis although he added that the assignee becomes a trustee thus recognising a beneficial interest in the assignee.<sup>54</sup>

Similarly, Sir John Pennycuick took the view that in the case of an equitable assignment of a legal right, the equitable assignee cannot enforce that right directly against the obligor because the assignment does not put the assignee into a contractual relationship with the obligor. He suggested that the equitable assignee's interest consists only of a right in equity to require the assignor to protect the interest which he or she had assigned, by, in that case, exercising the option.<sup>55</sup> Where the assignor refuses to do so the assignee can take action in equity to compel the assignor to act for the benefit of the assignee. His analysis is an even more straightforward adoption of the contract analysis than that of Roskill LJ, as he saw enforcement as based on personal contractual rights and obligations. There being no contract between the assignee and obligor, the assignee had no rights against the obligor.

It appears that both Roskill LJ and Sir John Pennycuick were of the view that if a person wishes to enforce a legal right, they must have the legal right. An equitable interest in that right is not sufficient. This is a sound view.<sup>56</sup> Moreover, both Roskill LJ and Sir John Pennycuick appeared to be of the view that even if notice had been given the assignee would still not have been able to exercise the option in its capacity as an equitable assignee.<sup>57</sup> Notice would only have made a difference if it was the final element of a legal assignment. Therefore, it was only Lord Denning MR who emphasised a need for notice to perfect the title of an equitable assignee.<sup>58</sup> However, what cannot be accepted from the judgments of Roskill LJ and Sir John Pennycuick is

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<sup>54</sup> See note 33 above.

<sup>55</sup> [1976] 1 QB 430 at 445.

<sup>56</sup> [4.11].

<sup>57</sup> See also *Showa Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) 34 NSWLR 548 at 561 (however, here Giles J appears to be of the opinion that the reason why a legal assignment would have made a difference is because it creates privity of contract between the assignee and obligor whilst (relying on the contract analysis) an equitable assignment being merely operative between the assignor and assignee, does not touch the contract with the assignor and obligor and therefore the assignor could exercise the right). Cf [3.18].

<sup>58</sup> See further *Three Rivers District Council v Bank of England* [1996] QB 292 at 315 per Peter Gibson LJ.

the idea that an equitable assignment only ever gives the assignee rights against the assignor. There was no need for them to hark back to this contract analysis to provide the desired commercial result in the case when both could have simply relied on the more sound basis just mentioned which also gives effect to the transaction as a true assignment.

[4.9.3] Returning to *Mountain Road*, the court there disagreed with the decision of Scott J in *Weddell v JA Pearce & Major*.<sup>59</sup> This case involved the commencement of a claim in negligence by an equitable assignee prior to any notice of the assignment being given to the obligor. Scott J did not appear to be of the belief that notice was necessary for the efficacy of the assignment. Rather, he appeared to consider notice as being primarily relevant to priorities as between competing assignees. His decision was reached simply by focusing on the notion, expressed in a number of cases, that although the assignee should join the assignor, an action commenced by the assignee was not a nullity.<sup>60</sup> This assumed that the assignee is otherwise entitled to sue in its own name. Such an action, he thought, was liable to be stayed pending the joinder of the assignor.<sup>61</sup> Without such joinder the assignee could obtain interim relief<sup>62</sup> but would generally be unable to recover damages or a perpetual injunction. It followed that he considered joinder to be a matter of procedure. He said the reason for joinder was 'a pragmatic one'.<sup>63</sup> That is, the 'debtor must not be at risk of suit by the legal owner of the chose'.<sup>64</sup> Where there is no such risk, and where the debtor can obtain a complete discharge by paying the assignee, then joinder may be dispensed with. The court in *Mountain Road* said that Scott J had failed to recognise the 'difference between a proceeding lacking a party (the assignor not

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<sup>59</sup> [1988] 1 Ch 26.

<sup>60</sup> He cited *William Brandt's & Sons and Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462 per Lord Macnaghten; *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 at 14 per Viscount Cave LC, at 19 per Viscount Finlay, at 30 per Lord Sumner.

<sup>61</sup> *EM Bowden's Patents Syndicate Ltd v Herbert Smith & Co* [1904] 2 Ch 86.

<sup>62</sup> Eg *Sweet v Cater* (1841) 11 Sim Rep 572, 59 ER 994; *Actien-Gesellschaft für Cartonagen Industrie AG v Tenler* (1899) 16 RPC 447; *EM Bowden's Patents Syndicate Ltd v Herbert Smith & Co* [1904] 2 Ch 86 at 91 per Warrington J.

<sup>63</sup> [1988] 1 Ch 26 at 40.

<sup>64</sup> [1988] 1 Ch 26 at 40.

joined)<sup>65</sup> and a proceeding where there is no title in the plaintiff to sue at all because a prerequisite to the right to sue (notice of the assignment to the defendant) is absent'.<sup>66</sup>

[4.9.4] In two Australian cases, the decision in *Mountain Road* has been strongly criticised. The first is the decision of the Queensland Court of Appeal in *Thomas v National Australia Bank Ltd*.<sup>67</sup> In this case, the parties agreed to have tried, as a preliminary issue, whether the appellant assignee was entitled to bring and maintain an action even though at the time the action was commenced no notice of the assignment had been given to the obligor. The assignment concerned the transfer of certain rights of action by a trustee in bankruptcy to the appellant. Pincus JA wrote the leading judgment. His starting point was the undoubted position that an equitable assignment of a legal interest is complete between assignor and assignee without notice.<sup>68</sup> The next consideration was whether that meant property passed without notice. He suggested it would be a strange result practically if the giving of notice just prior to proceedings made the proceedings good but just after proceedings made them bad.<sup>69</sup> He thought that references to an equitable assignment being effective as between the assignor and

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<sup>65</sup> No action is dismissed for want of parties, see *Werderman v Société Générale D'Électricité* (1881) 19 Ch 246; *William Brandt's & Sons and Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462 per Lord Macnaghten.

<sup>66</sup> [1999] 1 NZLR 335 at 345.

<sup>67</sup> [2000] Qd R 448.

<sup>68</sup> [2000] Qd R 448 at 453. Other examples where similar statements have been made include, *Re General Horticultural Company* (1886) 32 Ch D 512 at 515 per Chitty J; *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 Ch D 128 at 132 per Cotton LJ; *Adcock v Jolly* (1893) 19 VLR 609 at 615 per Holroyd J; *The London & Yorkshire Bank Ltd v White* (1895) 11 TLR 570; *Anning v Anning* (1907) 4 CLR 1049 at 1064 per Isaacs J; *Re Westerton* [1919] 2 Ch 104 at 111 per Sargant J; *Re City Life Assurance Co Ltd* [1926] Ch 191 at 215 per Pollock MR, at 220 per Warrington LJ; *Robertson v Grigg* (1932) 47 CLR 257 at 266 per Gavan Duffy CJ & Starke J; *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614 at 622 per Dixon J; *Bank of Australasia v Annie Hertz* (1937) 54 WN (NSW) 179 at 180; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 4 per Atkinson J; *Corin v Patton* (1990) 169 CLR 540 at 577 per Deane J; *Herkules Piling Ltd v Tilbury Construction Ltd* (1992) 61 BLR 107 at 117, 119 per Hirst J. See also *Jones v Gibbons* (1804) 9 Ves Jun 407, 32 ER 659; *Donaldson v Donaldson* (1854) Kay 711, 69 ER 303; *Re Way's Trusts* (1864) 2 De GJ & S 365, 46 ER 416.

<sup>69</sup> [2000] Qd R 448 at 453. See also *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 5 per Atkinson J.

assignee without notice do not mean that it is void against all persons other than the assignor and assignee.<sup>70</sup> In this regard he concluded that the decision in *Mountain Road* had overlooked a number of authorities and that the decision in *Warner* (heavily relied on in *Mountain Road*) was irreconcilable with the general trend of the authorities.<sup>71</sup>

[4.9.5] One important decision overlooked was *Re City Life Assurance Co Ltd*.<sup>72</sup> This case involved two actions. In the relevant action, an insurance policy holder mortgaged the policy to the issuing company to secure certain advances. The issuing company then assigned their interest to certain trustees without notice. The issuing company then went into compulsory liquidation. It was held that by virtue of the fact that the mortgage debt had been assigned there was no right of set-off between the policy holder and the liquidator in respect of the amount due under the policy and the amount of the mortgage debt. That is, at the date of the winding up there was no debt due from the policy holder to the company but there was a debt due from the company to the policy holder. The equitable assignment was 'absolute and complete' despite the lack of notice.<sup>73</sup>

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<sup>70</sup> [2000] Qd R 448 at 455.

<sup>71</sup> [2000] Qd R 448 at 456.

<sup>72</sup> [1926] 1 Ch 191. See also *Hiley v The Peoples Prudential Assurance Co Ltd* (1938) 60 CLR 468.

<sup>73</sup> [1926] 1 Ch 191 at 220 per Warrington LJ, see also at 215 per Pollock MR. See further *Bell v The London & North Western Railway Co* (1852) 15 Beav 548, 51 ER 651; *Bank of NT Butterfield and Son Ltd v Golinsky* [1926] AC 733; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 5 per Atkinson J; *Ward v Duncombe* [1893] AC 369 at 392 per Lord Macnaghten; *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 Ch 128; *Re Patrick* [1891] 1 Ch 82 at 87 per Lindley LJ; *Re Connolly* [1931] GLR 551; *Adcock v Jolly* (1893) 19 VLR 609 at 615 per Holroyd J; *Bank of Australasia v Annie Hertz* (1937) 54 WN (NSW) 179 at 180. Of course, the assignor cannot assign property it does not own and an assignment caught by relation back in bankruptcy (and not subject to some statutory protection against relation back) will not be effective to vest title in the assignee, see *Tooth v Hallett* (1869) LR 4 Ch App 242; *Ex parte Nichols* (1883) 22 Ch D 782; *Ex parte Moss* (1884) 14 QBD 310. Moreover, where the assignment is of a present contractual right to payment but where the obligation to pay has not unconditionally accrued at the commencement of bankruptcy the assignee would not be able to recover the money if the trustee in bankruptcy performs the condition to render the obligation to pay unconditional. However, if there is a present assignment of an existing right which is entered into prior to the commencement of the relation back period, it will not matter that the debt assigned only accrued (that is, become payable) within the relation back period so long as it was earned by the assignor and not the trustee in bankruptcy, see *Robertson v Grigg* (1932) 47 CLR

[4.9.6] On the issue of joinder, Pincus JA recognised that the weight of authority was of the view that the joinder of the assignor was a matter of procedure (rather than substantive law) which might be departed from.<sup>74</sup> The most important decision in that regard is *Performing Right Society Ltd v London Theatre of Varieties Ltd*.<sup>75</sup> Here it was held that the equitable assignee of a copyright could not obtain a perpetual injunction to prevent infringement without joining the assignors. Viscount Cave LC said that although such an assignee may obtain interim relief, the person having the legal right must, subject to few exceptions, in due course be made a party.<sup>76</sup> He thought this was always the practice of the Court of Chancery and was also the rule of the Supreme Court. He noted that although an action could not be defeated by reason of misjoinder or non-joinder, this did not mean it was possible to obtain judgment in the absence of a necessary party. Viscount Finlay also referred to joinder being a rule of practice which should be observed except under very special circumstances.<sup>77</sup> Lord Sumner drew a distinction between the recognition of 'an equitable title or a valid title in equity and the grant of relief to a person so entitled'. The latter, he said, requires the joinder of the legal owner as a matter of procedure.<sup>78</sup> In *Thomas'* case, Pincus JA thought the joinder of the Trustee in Bankruptcy involved no practical advantage it would have increased delay and complexity and, moreover, the trustee would take no part in the proceedings in any

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257; *Re Trytel* [1952] 2 TLR 32; *Tailby v Official Receiver* (1888) 13 App Cas 523 at 538 per Lord Fitzgerald. See also *Burn v Carvalho* (1839) 4 My & Cr 690, 41 ER 265; *Crowfoot v Gurney* (1832) 9 Bing 372, 131 ER 655. Cf *Ex parte Hall* (1878) 10 Ch D 615 (revocable mandate).

<sup>74</sup> [2000] 2 Qd R 448 at 456-9.

<sup>75</sup> [1924] AC 1. See also *Norman v FCT* (1963) 109 CLR 9 at 29-30 per Windeyer J; *Central Insurance Co Ltd v Seacalf Shipping Corp (The Aiolos)* [1983] 2 Lloyd's Rep 25 at 32 per Oliver LJ; *National Mutual Life Nominees Ltd v National Capital Development Commission* (1975) 6 ACTR 1 at 7-8 per Blackburn J; *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825 at 850 per Mance LJ. See further *Three Rivers District Council v Bank of England* [1996] QB 292. As to the requirement that the assignor or assignee join the other party where they only wish to enforce that part of a debt either retained or assigned to them, or where the assignor, being the legal owner, wishes to enforce the entire debt, see *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584 at 588-589 per Parker LJ.

<sup>76</sup> [1924] AC 1 at 14, 18.

<sup>77</sup> [1924] AC 1 at 19.

<sup>78</sup> [1924] AC 1 at 29.

case. There was, therefore, no chance of the assignor later suing the debtor and so the rule could be relaxed.

[4.9.7] The second Australian case is the decision of Santow J in *Jennings v Credit Corp Australia Pty Ltd*.<sup>79</sup> The issue here concerned the Limitation Act 1969 (NSW), viz, does the Act bar an enforcement action against a debtor when the action was brought solely by an equitable assignee of a debt who only got in the legal estate after the limitation period expired. The initial action by the assignee was commenced within time. The debtor claimed that action was a nullity as the assignor was never joined and therefore it did not prevent time running for the purposes of the Act. The basis of this argument was that an equitable assignee only had rights against the assignor and had no standing to enforce the legal contractual right. No argument was raised concerning the effectiveness of an assignment without notice. The issue was one of joinder.

Santow J thought the long line of authority upholding the assignee's right to claim interlocutory relief and the statements that joinder was a matter of procedure clearly suggested that such actions were not a nullity. He referred to the proposition, expressed by Sheller JA in *Long Leys Co Pt. Ltd v Silkdale Pty Ltd*,<sup>80</sup> that the procedural rule requiring the joinder of the assignor said nothing about the actual validity of a demand made by an assignee against a debtor. In *Long Leys*, Sheller JA also said that joinder has both a procedural and substantive aspect. He thought that the procedural aspect is to protect against duplicated claims whereas the substantive aspect dictates that the equitable assignee's right is one against the assignor rather than the obligor.<sup>81</sup> Santow J thought these propositions could not co-exist if the latter was stated in such absolute terms. He thought it clear that the procedural rule does allow an equitable assignee rights against the obligor in certain circumstances, such as where a claim is made for interim relief or where the debtor waives the right for the legal assignor to be present. He thought this gave rise to a false dichotomy between the procedural and substantive rules - the substantive rule had exceptions and in each of those exceptions the assignee

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<sup>79</sup> (2000) 48 NSWLR 709.

<sup>80</sup> (1991) 5 BPR 11,512 at 11,518.

<sup>81</sup> (1991) 5 BPR 11,512 at 11,518. See also *Showa Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) 34 NSWLR 548 at 561 per Giles J.

was exercising a contractual (that is, presumably legal) right against the debtor. He thought that *Mountain Road* had adopted the substantive rule in its absolute form.

[4.9.8] It is suggested that Santow J was correct in his view that Sheller JA's two propositions could not co-exist. He was also correct in his observation that in the authoritative examples in which the joinder rule has been relaxed (namely *William Brandt's & Sons and Co v Dunlop Rubber Co Ltd*<sup>82</sup> and *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*<sup>83</sup>) it does appear as if the court readily allowed the assignee to enforce the legal right. However, it is suggested that it is wrong to accept that the substantive position has a number of exceptions. That is, it should not be accepted that an equitable assignee can enforce a legal right.<sup>84</sup> With respect, it is suggested that the weak link in Sheller JA's statement is the continued adherence to the idea that the assignee only ever has rights against the assignor. As an all-encompassing rule, this idea fails properly to reflect that the assignee is intended by the assignor to be either the legal or beneficial owner of the right and in any case is in law the beneficial owner because the transaction is upheld as involving a transfer by way of assignment. However, the weak link in Santow J's acceptance of exceptions to the substantive rule is the adherence to the notion that the assignee wishes to enforce the legal right. In any given case this may be true; that is, the assignee may wish to enforce only the legal right or, as will be argued in Chapter Seven, the strength of the assignee's equitable interest may dictate that its remedies are only against the assignor.<sup>85</sup> However, the dichotomy

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<sup>82</sup> [1905] AC 454.

<sup>83</sup> [1903] AC 414. See further *Thomas v National Australia Bank Ltd* [2000] 2 Qd R 448; *Equus Financial Services Ltd v Glengallen Investments Pty Ltd* (Qld CA, 19 May 1994) per McPherson JA; *Commercial Factors Ltd v Maxwell Printing Ltd* [1994] 1 NZLR 724; *Long Leys Co Pty Ltd v Silkdale Pty Ltd* (1991) 5 BPR 11, 512 at 11,518 per Sheller JA; *Central Insurance Co Ltd v Seacalf Shipping Corp (The Aiolos)* [1983] 2 Lloyd's Rep 25 at 34 per Ackner LJ; *National Mutual Nominees Ltd v National Capital Development Commission* (1975) 6 ACTR 1 at 708 per Blackburn J; *Camfield Pastoral Co v Dixon* [1972] Qd R 289; *Re Steel Wing Co Ltd* [1921] 1 Ch 349 at 256 per PO Lawrence J; *Wilson v Ragsone & Co Ltd* (1915) 84 LJKB 2185; *Manchester Brewery Co v Coombs* [1901] 2 Ch 608 at 616-17 per Farwell J; *Schneidman v Barnett* [1951] NZLR 301 at 307 per FB Adams J; *McMahon v Gilberd & Co Ltd* [1955] NZLR 1206 at 1219 per Turner J.

<sup>84</sup> Cf [4.11.2].

<sup>85</sup> [7.4]-[7.5.3].



that Santow J referred to falls away if the assignee is not attempting to enforce the legal right but rather is seeking an equitable remedy.

**[4.10] Conclusions on notice.** All the principal authorities agree that an equitable assignment is complete as between the assignor and assignee without notice to the obligor. That is, notice is not necessary to perfect the assignment.<sup>86</sup> It is submitted that whether or not the assignee has a direct remedy against the obligor, when an assignment is complete as between the assignor and assignee then the obligor is bound by the assignment.<sup>87</sup> Generally, (and putting aside priority disputes and exceptions to the *nemo dat* rule) in any dealing in property rights, once a transfer is complete between the parties title will vest in the transferee and this will automatically, without more, impact on relationships between the transferee and third parties in respect of the asset or thing which was the subject of an actual transfer.<sup>88</sup> If an equitable assignment of a legal right is properly entitled an 'assignment' then it must involve a transfer as this is the essence of assignment and therefore the same result must follow. It is non-sensical to speak of a transaction as being an assignment of a contractual right and only having an effect between the assignor and assignee. If the transaction is only valid between these two parties, then it is no more than a contract.

The reason why so many cases simply make statements to the effect that 'as between the assignor and assignee the assignment is complete without notice'<sup>89</sup> without any mention of the efficacy of the assignment vis-à-vis the obligor, may, in part, lie with the now outmoded contract analysis and in part with the view that such assignments were made effective because of the remedies equity provided. As already noted, the latter does not stop such transactions being properly recognised as assignments but courts were rarely asked to consider any remedies the assignee may have against the obligor. The assignee

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<sup>86</sup> In addition to the cases discussed above, see *Ward v Duncombe* [1893] AC 369 at 392 per Lord Macnaghten; *Walker v The Bradford Old Bank Ltd* [1884] 12 QBD 511; *Anning v Anning* (1907) 4 CLR 1049 at 1069-1070 per Isaacs J. See also *Donaldson v Donaldson* (1854) Kay 711, 69 ER 303.

<sup>87</sup> *FCT v Everett* (1979) 143 CLR 440 at 452.

<sup>88</sup> This may mean that third parties coming into contact with the transferee must respect the transferee's interest or it might mean that the transferee must recognise the interest of a third party.

<sup>89</sup> Note 68.

was content to either force the assignor to take steps to bring about a legal assignment (once legal assignments of choses in action became possible) or to force the assignor to lend its name to any suit by the assignee against the obligor. There was little need therefore to consider direct actions against the obligor despite the fact that joinder was ultimately perceived as being merely a requirement of procedure.

Notice it is suggested serves four purposes. First, it maintains the assignee's priority.<sup>90</sup> Second, it prevents certain equities arising as between assignor and obligor to which the assignee would be subject.<sup>91</sup> Third, it prevents the obligor from obtaining a discharge from the assignor.<sup>92</sup> Fourth, it binds the conscience of the obligor.<sup>93</sup>

It is not necessary to discuss in any detail the first three purposes as these appear generally accepted. However, the significance of the fourth purpose does require further explanation as it is important later in this dissertation for advancing the argument that a formal legal relationship exists between the assignee and obligor. If a transaction is upheld as an assignment, then the obligor must immediately owe its personal obligation in part to the assignee.<sup>94</sup> The fact that the obligor may at that point have no knowledge

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<sup>90</sup> It may be noted that it was in the narrow context of a priority dispute that Sir Thomas Plumer MR in *Dearle v Hall* (1828) 3 Russ 1 at 22, 24, 38 ER 475 at 483, 484, said that notice was necessary to perfect title (see also *Foster v Cockerell* (1835) 3 Cl & Fin 456 at 476, 6 ER 1508 at 1516; *Jones v Jones* (1838) 8 Sim 633 at 643, 59 ER 251 at 255; *Meux v Bell* (1841) 1 Hare 73, 66 ER 955; *Stocks v Dobson* (1853) 4 De GM & G 11, 43 ER 411; *Re Freshfields' Trust* (1879) 11 Ch D 198 at 202; *Arden v Arden* (1885) 29 Ch D 702 at 708). To the extent that Sir Thomas Plumer MR meant his statement to have a wider impact, this can be explained away on the basis of his concern with the reputed ownership provisions of the bankruptcy legislation which required notice to take 'goods', which included certain debts, out of the possession of the bankrupt, see *Ward v Duncombe* [1893] AC 369 at 378 Lord Herschell LC, at 392-93 per Lord Macnaghten.

<sup>91</sup> [8.30].

<sup>92</sup> *Brice v Bannister* (1878) 3 QBD 569.

<sup>93</sup> *Tooth v Brisbane City Council* (1928) 41 CLR 212 at 222 per Isaacs J; *Robertson v Grigg* (1932) 47 CLR 257 at 266 per Gavan Duffy CJ and Starke J.

<sup>94</sup> [3.7]. Generally, in the case of an equitable assignment, once the obligor receives notice it is in the unenviable position that neither the assignee nor the assignor can provide it with a valid discharge. This results from the obligor owing its duty in part to both the assignee and assignor, see [8.6].

of the assignee is not to the point.<sup>95</sup> In terms of knowledge, it is only important that the obligor knows it has a contractual obligation. If the obligor fails to carry out that obligation, for example, breaches the contract, it should be accountable to whoever was owed the obligation at the relevant time. Ultimately this will be the person beneficially entitled to the obligation. Thus, in the case of an assigned contractual right where the obligor is required to perform some obligation, the requirement of notice, in terms of binding the conscience of the obligor, is to bring home to the mind of the obligor its responsibility to the assignee before the time for performance accrues. Whether or not this should impact upon the assessment of damages available to the assignee is discussed later.<sup>96</sup>

Where the assigned right is such that an assignee may call for a personal accounting or performance, for example, in the case of an assignment of a debt, notice to the obligor is necessary to bind the conscience of the obligor to render that personal accounting. However, this does not mean that the obligation was not owed to the assignee prior to such notice. If that were the case then the efficacy of the assignment prior to notice is called into question. It simply means that a payment to the assignor will discharge the debtor as its conscience is not bound prior to notice, however, if the debtor fails to pay it is liable to the assignee as the assignment is valid prior to notice. It follows that it is not necessary to adopt a view that upon notice, the obligor has imposed on it a fresh obligation in equity. That obligation exists prior to notice.

**[4.11] Conclusions on joinder.** Logically, if an assignee's intention is to enforce the legal right then the assignor must be joined as a matter of substantive law as it holds that legal right, even if only for the benefit of the assignee. Despite the differences between a trust and an assignment, the position here is much the same as a beneficiary under a bare trust who is *sui juris* and entitled to an equitable interest corresponding to the full legal interest. Such a beneficiary may require the trustee to transfer to it the legal interest or direct the trustee to hold the property for a third party. However, generally the action of the trustee is required to deal with or protect the legal estate. A beneficiary

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<sup>95</sup> *Ward v Duncombe* [1893] AC 369 at 392 per Lord Macnaghten.

<sup>96</sup> [8.10].

can only bring an action in its own name if it is seeking equitable relief.<sup>97</sup> The same reasoning applies to a trust of the benefit of a contract.

[4.11.1] If the law were to stop there however, the result would be inconvenient. The ability of assignees in certain cases to bring an action in their own name against the obligor without joining the assignor and receive final judgment is clearly efficacious and must be maintained. What must be attempted is an explanation (which makes doctrinal and analytical sense) of how the assignee's right of enforcement operates.

[4.11.2] Arguably there are three possible paths the law could take. The first is based on equity's ability to enforce legal rights.<sup>98</sup> As already noted, the leading authoritative examples of equitable assignees obtaining final judgment in their own name appear to accept this jurisdiction without discussion.<sup>99</sup> However, the principal example of this jurisdiction is the remedy of specific performance. This is an equitable order forcing a person to carry out a legal obligation. However, generally, the benefit of an order for specific performance goes to a person who has a legal right to performance and has provided valuable consideration. That is, equity here aids legal rights not equitable rights and the rights it protects are personal primary rights to contractual performance. The only legal right the assignee has arises out of its contract with the assignor. There is therefore an inherent weakness in this path. However, this weakness is not necessarily insurmountable. Statements can be found which recognise a jurisdiction to grant specific performance to such assignees.<sup>100</sup> Moreover, the remedy is an equitable remedy

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<sup>97</sup> See Meagher and Gummow *Jacobs' Law of Trusts in Australia* (6<sup>th</sup> ed, 1997) para 2303.

<sup>98</sup> This is distinguished from the ability of a person who has rights which in equity are enforceable against the legal owner as the 'legal owner' here would merely be the assignor, see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 707 per Lord Browne-Wilkinson.

<sup>99</sup> [4.9.7]. See also *Hume v Monro (No 2)* (1943) 67 CLR 461 at 482 per Williams J.

<sup>100</sup> See *Hume v Monro (No 2)* (1943) 67 CLR 461 at 482 per Williams J. See also *JC Williamson Ltd v Lukey & Mulholland* (1931) 45 CLR 282 at 297 per Dixon J and *Manchester Brewery Co v Coombs* [1901] 2 Ch 608 at 616-17 per Farwell J. See further Spry *Equitable Remedies* (6<sup>th</sup> ed, 2001) at 80. Perhaps some weight could be placed on the fact that specific performance here is more in the nature of a mandatory injunction than true specific performance. Query whether modern privity rules which allow for a third party beneficiary to enforce the contract without characterising the third party's interest as either a legal or equitable now warrant equity adopting

and so in appropriate cases it could be awarded to a person with only an equitable interest.<sup>101</sup> In addition, equity has always allowed the assignee of part of a debt to sue for that debt in its own name (as an equitable creditor), even though, the chose in action is a legal chose in action. Therefore, there is no doubt support for the view that, in exceptional circumstances, a person with an equitable interest could claim relief that is not merely equitable.<sup>102</sup> However, where the assignor still exists and is capable of taking the necessary steps to complete a legal assignment, then even accepting a wider jurisdiction to grant specific performance, it will be rare for specific performance to issue against the obligor on application by the assignee. Moreover, this route only overcomes the issue of specific performance, it would not help an assignee claiming common law damages for breach of contract.

**[4.11.3]** A second path lies not in arguing that an assignee with an equitable interest can rely on that interest to bring an action in equity to enforce a legal right, but rather that that equitable interest is sufficiently recognised by the law to justify an action at law. If correct this would appear to be a case of either the law treating as done that which ought to be done or the law following equity.

There is no doubt that after the Judicature Acts, and even before then, the common law recognised equitable rights and interests.<sup>103</sup> Moreover, there is clear evidence that the common law recognised the effectiveness of equitable assignments<sup>104</sup> and the breach of a contract of assignment was actionable for damages at common law.<sup>105</sup> However, there is a clear difference between the common law recognising an equitable right and the

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a course that would allow a third person/assignee with an equitable interest in the relevant contract a right to seek specific performance of the contract.

<sup>101</sup> [4.11.5].

<sup>102</sup> See *Lidden v Composite Buyers Ltd* (1996) 67 FCR 560 at 563 per Finn J; *Pearson v Commissioner of Taxation* [2001] FCA 1427 para 13.

<sup>103</sup> *Winch v Keeley* (1787) 1 TR 619 at 623, 99 ER 1284 at 1286 per Ashhurst J.

<sup>104</sup> *Forth v Stanton* (1681) 1 Wms Saund 210, 85 ER 217; *Moulsdale v Birchall* (1772) 2 Black W 820, 96 ER 483; *Winch v Keeley* (1787) 1 TR 619 at 623, 99 ER 1284 at 1286 per Ashhurst J; *Master v Miller* (1791) 4 TR 320 at 341, 100 ER 1042 at 1053 per Buller J. See also *Israel v Douglas* (1789) 1 H Bl 239, 126 ER 139; *Carpenter v Marnell* (1802) 3 B & P 40, 127 ER 23; *Crowfoot v Gurney* (1832) 9 Bing 372, 131 ER 655, see further [2.7], [4.8.1], [4.11.4].

<sup>105</sup> [2.5].

common law allowing a person with an equitable right to enforce a legal right. Although exceptions can be found, the highest point reached by the common law was to recognise the interest of an equitable assignee and allow the assignee to bring an action in the name of the assignor.<sup>106</sup> However, the common law always required the assignor to be joined. Although the common law has moved a long way since its early stance of refusing to 'recognise that equitable rights, titles and interests entitled their holders to any relief at law,'<sup>107</sup> it has still not reached a general position where it will give its aid to *enforce* equitable interests. The trend of modern law has been one of increased availability of equitable relief to protect common law rights rather than of common law remedies being made available to protect equitable rights.<sup>108</sup>

[4.11.4] One way round this is the suggestion that in the case of assignment, the common law did not merely recognise the equitable assignment of legal rights but, in addition, accepted those assignments as assignments at law.<sup>109</sup> Thus where equity would recognise the assignment of a contractual right, it was concurrently recognised as an assignment at law. This argument was put forward by Professor Cook in 1916 in the *Harvard Law Review*.<sup>110</sup> Cook took the view that the common law reached the position where, upon notice to the obligor, legal ownership of the chose in action vested in the assignee and the assignor ceased to be the legal owner except for the purposes of lending its name to the title of the suit. It was in this sense that he thought the Judicature

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<sup>106</sup> [2.5]. Cf [4.8.1].

<sup>107</sup> Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's, Equity: Doctrines and Remedies* (4<sup>th</sup> ed, 2002) para 1.200.

<sup>108</sup> Sir Anthony Mason 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *LQR* 238 at 58.

<sup>109</sup> There are examples of the common adopting equitable doctrines either as its own or taking equities into account in working out common law rights, see Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's, Equity: Doctrines and Remedies* (4<sup>th</sup> ed, 2002) para 1.205. An example of the first is the adoption by the common law of equity's approach to variations of a principal contract without the approval of the guarantor. Another example is the common law's take over of the equitable doctrine of *stoppage in transitu*. An example of the second is the recognition of a mortgagor's equity of redemption, see *Pawlett v AG* (1667) Hard 465 at 469, 145 ER 550 at 552 per Hale CB.

<sup>110</sup> Cook 'The Alienability of Choses in Action' (1916) 29 *Harv LR* 816. See further Glenn 'The Assignment of Choses in Action: Rights of Bona Fide Purchaser' (1934) 20 *Virginia L R* 621; Gilmore *Security Interests in Personal Property* (1965) para 7.4.

Act provisions allowing the assignee to sue in its own name were procedural.<sup>111</sup> In his view the assignee's ownership of the chose was concurrently legal and equitable.

Cook's argument was principally based upon American authorities but he also relied on a handful of English common law cases that appeared to recognise the assignment of legal rights.<sup>112</sup> It must be said that the idea that the common law fully recognised the assignment of choses in action is at odds with the general flow of all historical treatises on the history of assignment of choses in action.<sup>113</sup> Although it is possible to point to cases that show the common law recognising assignments, it certainly did not develop any general doctrine of common law assignment that survived up to the passing of the Judicature Act 1872 section 25(6). Nor did it adopt the position that an assignment in equity was an assignment at law.<sup>114</sup> The English case on which Cook principally relied was *Legh v. Legh*,<sup>115</sup> a case in which a debtor paid an assignor and received a release from the assignor at a time when the debtor had notice of the assignment. The Court of Common Pleas ordered the release to be cancelled. This Cook, suggested was evidence that one of the ingredients that make up ownership, namely the right to give a release, was now missing from the bundle of rights held by the assignor.<sup>116</sup> Thus both at common law and in equity there was a transfer to the assignee. This analysis flows from Cook's application of Hohfeldian rights analysis which, although legitimate, was certainly not in the mind of the court at the time of *Legh v Legh*. Moreover, Cook would have needed to explain away the fact that the action was brought by the assignee in the name of the assignor which in fact evidences that there was no legal assignment operating. All this case really evidences is a recognition (rather than the adoption) by a

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<sup>111</sup> Cook 'The Alienability of Choses in Action' (1916) 29 *Harv LR* 816 at 821. See also *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1. See further Odith 'Priorities: Equitable Versus Legal Assignment of Book Debts' (1989) 9 *OJLS* 513 at 522. See [5.4]-[5.10.3].

<sup>112</sup> Cf *Fitzroy v Cave* [1905] 2 KB 364 at 372 per Cozens-Hardy LJ.

<sup>113</sup> [2.4]-[2.8].

<sup>114</sup> See Palmer *The Paths to Privy* (1992) at 146-147; Warren *The Law Relating to Choses in Action* (1899) ch 1; Bailey 'Assignment of Debts in England from the Twelfth to the Twentieth Century' (1932) 48 *LQR* 547 at 579.

<sup>115</sup> (1799) 1 Bos & Pul 447, 126 ER 1002.

<sup>116</sup> Cook 'The Alienability of Choses in Action' (1916) 29 *Harv LR* 816 at 824, 828.

common law court of the assignment in equity.<sup>117</sup> At its highest, it may evidence a court of common law exercising equitable jurisdiction. In this regard, in *Phillips v Clagett*,<sup>118</sup> Parke B suggested that this 'equitable jurisdiction' of the courts of common law was limited to 'preventing the defendant from pleading pleas of release, where the release is valid in point of law, but invalid in equity, as being a fraud for which the defendant is answerable.' If that is correct, it should not therefore have been extended to actually setting aside the release.<sup>119</sup>

Cook's views were convincingly criticised by Professor Williston.<sup>120</sup> Williston had no trouble calling the assignee's right legal if by that all that was meant was that it was enforced in a court of law in the name of the assignor. However, he thought Cook had meant to go further than that. Williston suggested that if Cook was right there was no doctrinal reason why the assignee should take subject to the equities that the obligor has against the assignor.<sup>121</sup> Second, he thought that if Cook's view was accepted, then the normal priority rules which treat the assignee as having an equitable right must be changed and the assignee as the holder of a legal right must generally prevail over other equitable rights. Third, he pointed out that, if Cook was correct, then a partial

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<sup>117</sup> See also *Winch v Keeley* (1787) 1 TR 619, 99 ER 1284. Cf Cook 'The Alienability of Choses in Action: A Reply to Professor Williston' (1917) 30 *Harv LR* 449 at 463.

<sup>118</sup> (1843) 11 M & W 84 at 93, 152 ER 725 at 729.

<sup>119</sup> See Marshall *The Assignment of Choses in Action* (1950) at 74-80. The requirement of fraud which allowed the common law courts to look beyond the parties to the action, was later alleviated by the Common Law Procedure Act 1854, s85 which allowed the assignee to set up an equitable reply to the defendant's plea of release, that is, the common law courts could take account of the assignee's reply that the obligor had notice of the assignment at the time it obtained a release from the assignor without the need for there to have been any fraud, see *De Pothonier v De Mattos* (1858) El Bl & El 461, 120 ER 581. See further *McDermott v Black* (1940) 63 CLR 161 at 186-189 per Dixon J.

<sup>120</sup> Williston 'Is the Right of an Assignee of a Chose in Action Legal or Equitable?' (1916) 30 *Harv LR* 97. For Cook's reply see Cook 'The Alienability of Choses in Action: A Reply to Professor Williston' (1917) 30 *Harv LR* 449. For Williston's final comments see Williston 'The Word "Equitable" and its Application to the Assignment of Choses in Action' (1918) 31 *Harv LR* 822.

<sup>121</sup> See Oditah *Legal Aspect of Receivables Financing* (1991) para 6.15.



assignment of a debt, being a mere equitable assignment, could always be defeated by a later legal assignment of the whole debt.<sup>122</sup>

Some further observations may also be made. First, although Cook denied that the assignor remains the owner of the assigned right (except for the purpose of lending its name to the suit), the weight of authority suggests that in the case of an equitable assignment of a legal right, the assignor retains the legal interest and remains the legal owner.<sup>123</sup> Combining that authority with Cook's argument would result in both the assignor and assignee having a legal interest when generally the common law has not recognised such divisions of legal title. The only way this could be overcome is to argue that the assignor and assignee were co-owners. However, that would be at odds with the intention to assign. In addition, if that were the case then presumably either party could release the debtor.<sup>124</sup> But the accepted position is that generally upon notice of an assignment, the assignor cannot discharge the obligor and, unless empowered to do so, nor can the equitable assignee.<sup>125</sup> Finally, Cook's idea that the assignee's interest is both concurrently legal and equitable appears to suggest the two interests may continue to exist separately when vested in the one person.<sup>126</sup> That too is at odds with the great weight of authority.<sup>127</sup>

**[4.11.5]** It is necessary then to turn to the third path. It is suggested that the stumbling block created by many cases is the notion that the assignee is attempting to enforce the legal right together with the idea that the assignee's right consists merely of rights against the assignor. Dealing first with the latter, it is suggested that the assignee's rights may be limited to action against the assignor in three cases. First, where the transaction is not really an assignment. Second, where the assignee wishes to enforce the legal right - although strictly this no longer requires an action, the assignor is simply joined. Third,

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<sup>122</sup> See Williston 'Is the Right of an Assignee of a Chose in Action Legal or Equitable?' (1916) 30 *Harv LR* 97 at 104.

<sup>123</sup> [3.8].

<sup>124</sup> See Williston 'Is the Right of an Assignee of a Chose in Action Legal or Equitable?' (1916) 30 *Harv LR* 97 at 108.

<sup>125</sup> [4.10].

<sup>126</sup> See Cook 'The Alienability of Choses in Action: A Reply to Professor Williston' (1917) 30 *Harv LR* 449.

<sup>127</sup> [3.8].

where the transaction is properly called an assignment but the strength of the assignee's right is such that it only allows for enforcement by taking action against the assignor. The idea of the strength of a right is dealt with in Chapter Seven. In essence it will be suggested that any assignment may expressly or impliedly limit the remedial avenues open to the assignee.<sup>128</sup> Structurally, this matter is best dealt with in Chapter Seven as it discusses the characterisation of the assignee's interest.

Turning to the former issue, it is suggested that the stone that has been left unturned is the assignee's ability to seek equitable relief to protect its equitable interest. If the assignee's action is merely a claim for such equitable relief the perceived conundrum that joinder, being procedural, appears to allow a person with an equitable interest to enforce a legal interest falls away. Clearly, the assignee is the proper plaintiff to claim such equitable relief against the obligor.<sup>129</sup> If equitable remedies are sufficiently versatile to protect the assignee's interest, there will be no need to take the strict procedural approach to joinder for the purposes of doing justice and allowing an assignee to bring an action in its own name in certain cases. That is, it could be accepted, as doctrinally it should be, that where the action is to enforce the legal right (whether the remedy is legal or equitable), then the joinder of the assignor is a requirement of substantive law. If that position is accepted then there appears to be only two situations, involving the enforcement of a legal right, that on their face may cause injustice. The first occurs where the obligor waives its right to have the assignor present and the second where the assignor ceases to exist. The first of these, it is suggested, may be dealt with on the basis of estoppel. As to the second situation, it must be rare for an assignor to cease to exist and its legal interest not vest in some other party by operation of law.<sup>130</sup> However, if that is the case, then there may be much to be said for the view that that outstanding legal interest should vest in the assignee.<sup>131</sup> The alternative, of

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<sup>128</sup> [7.5].

<sup>129</sup> Cf [4.11.2] and the discussion of specific performance and equitable remedies that aid legal rights.

<sup>130</sup> *Eg EM Bowden's Patents Syndicate Ltd v Herbert Smith & Co* [1904] 2 Ch 86.

<sup>131</sup> Perhaps this could explain the decision in *Tolhurst's* case (where the assignor ceased to exist) if one interprets the decision of the House of Lords as upholding the assignment as an equitable (rather than a legal) assignment, see [6.13]. In *Hume v Monro (No 2)* (1943) 67 CLR 461 at 482 Williams J suggested that where an assignor ceased to exist, the equitable assignee could in a proper case obtain an order for specific performance to enforce the assigned right and cited

course, is that if the legal interest dies so too does the equitable interest. Finally, if the analysis offered here is adopted then the position of the equitable assignee of a legal right where the legal right is assignable at law, becomes analogous to the position of an assignee of a legal interest not assignable at law, such as part of a debt. In the latter, it has always been accepted that the assignee is the proper plaintiff to enforce the equitable right in a court of equity.<sup>132</sup>

There is some support for the view that, generally, the action of the assignee should be seen as a cause of action in equity rather than an attempt to enforce the legal right. In *Three Rivers District Council v Bank of England*,<sup>133</sup> Staughton LJ said that the equitable assignee has a cause of action but it is a cause of action in equity.<sup>134</sup> In the same case, Peter Gibson LJ said that the equitable assignee becomes in equity the owner and controller of the assigned right and entitled to sue for the recovery of the chose.<sup>135</sup> Moreover, in *Durham Brothers v Robertson*<sup>136</sup> Chitty LJ, in one of the most famous statements of the joinder rule, characterised the assignee's action as being an action in equity rather than an action in law to enforce the legal right. He said:<sup>137</sup>

As is well known, an ordinary debt or chose in action before the Judicature Act 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. This was a fortiori the case where the assignment was by way of security, or by way of charge only, because the assignor had a right to redeem.<sup>138</sup>

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*Tolhurst's* case as authority. He did not state the doctrinal basis for this, that is, whether the legal interest vested in the assignee or whether this was a case where equity granted specific performance to a party only holding an equitable interest. See further [4.11.2].

<sup>132</sup> *Norman v FCT* (1963) 109 CLR 9 at 29 per Windeyer J.

<sup>133</sup> [1996] QB 292.

<sup>134</sup> [1996] QB 292 at 303.

<sup>135</sup> [1996] QB 292 at 308.

<sup>136</sup> [1898] 1 QB 765. See also *Adcock v Jolly* (1893) 19 VLR 609 at 615 per Holroyd J.

<sup>137</sup> [1898] 1 QB 765 769-770 (emphasis added).

<sup>138</sup> Note also that in referring to the suit being in equity, Chitty LJ did not suggest that after joinder the suit continued as one at law.

It is suggested that the insistence called for here that joinder to be seen as a matter of substantive law when the assignee seeks to enforce the legal right is not inconsistent with those cases which have held that the commencement of an action by the assignee to enforce the legal right is not a nullity. Clearly the assignee can claim interim relief. However, and more fundamentally, the equitable assignee may rely on its equitable interest to commence an action to enforce the legal right. Until a court issues an order granting a common law remedy the legal right is not enforced.<sup>139</sup> The mere commencement of the action is not the enforcement. Therefore, it is only necessary (substantively) that the assignor be joined prior to judgment. What the assignee cannot do is enforce the legal right. Thus, as noted, an election by the equitable assignee to exercise an option is a nullity.<sup>140</sup>

It is also suggested that there is nothing inconsistent between this approach and the decision in *Performing Right*.<sup>141</sup> That case strictly concerned a claim for injunctive relief. Clearly there joinder is procedural. Viscount Cave LJ, as noted above, focused on the need to join a 'necessary' party. The joinder of the legal right holder prior to judgment is merely joining a necessary party but in a substantive sense. Moreover, it is suggested that the speeches of Viscount Finlay and Lord Sumner may be read as limited to claims for equitable relief.

Finally, it is suggested that the analysis put forward here would be as efficacious as the procedural joinder rule, and more doctrinally sound, if equitable remedies are sufficiently versatile to protect the assignee's interest. The assignee's remedies are dealt with in Chapter Eight where it will be suggested that the assignee has a right to claim equitable compensation for breach of contract by the obligor and, where the assignment is of an obligation to pay, the assignee can (as a creditor in equity) enforce that primary obligation in equity.<sup>142</sup>

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<sup>139</sup> The same must apply to a claim for specific performance.

<sup>140</sup> A contractual right to arbitration is also a legal right and therefore, in addition to other procedural requirements, requires a legal assignment for the assignee to be able to exercise it in its own name, see *Baytur SA v Finagro Holding SA* [1992] 1 QB 610 at 618 per Lloyd LJ.

<sup>141</sup> *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1.

<sup>142</sup> [4.13].

## (d) Equitable Assignment of Legal Interests Not Assignable at Law

**[4.12] Introduction.** Certain legal choses in action may not be assignable at law but are said to be assignable in equity. The prime example is the assignment of part of a debt. Whether or not an assignment is entire or partial depends upon the construction of the terms of the assignment and need not be considered further here.<sup>143</sup> What is of concern is whether or not these transactions are properly termed 'assignments'.

**[4.13] The assignment of part of a debt.** In the case of an assignment of part of a debt, the proper plaintiff is the assignee. The reason for this result flows simply from the fact that although where an entire debt was assigned in equity the assignee could bring an action at law in the name of the assignor to enforce the debt, that procedure was not available in the case of a partial assignment. A debt could not be recovered piecemeal at law.<sup>144</sup> Despite a partial assignment, at law there remains one debt.<sup>145</sup> This is still the position under most statutory regimes for legal assignments.<sup>146</sup> It follows that such assignments (and such interests) were and still are (subject to a few statutory exceptions) only recognised in equity and, therefore, the assignee can bring an action in equity in its own name to enforce its assigned right.<sup>147</sup> However, generally, the assignor

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<sup>143</sup> Eg *Harding v Harding* (1886) 17 QBD 442; *Bank of Liverpool & Martins Ltd v Holland* (1926) 43 TLR 29. The ability to partially, fractionally or divisionally assign contractual rights to performance is considered later, [6.8].

<sup>144</sup> *Norman v FCT* (1962) 109 CLR 9 at 29 per Windeyer J. Moreover, although an assignor can partially assign a judgment debt, it does not lie within the assignor's power to split up execution of the judgment. The assignor can only issue one execution upon judgment. To allow a splitting up of execution would be to vest the assignor with a greater right than it holds thus breaching the principle of transfer. There can be only one execution creditor, see *Forster v Baker* [1910] 2 KB 636; *McIntyre v Gye* (1994) 122 ALR 289 at 293.

<sup>145</sup> *Deposit Protection Board v Dalia* [1994] 2 AC 367 at 385 per Simon Brown LJ (overruled on another point sub nom *Deposit Protection Board v Barclays Bank Plc* [1994] 2 AC 367).

<sup>146</sup> *Norman v FCT* (1962) 109 CLR 9 at 29 per Windeyer J (suggesting that earlier authorities discussing the statutory regime which were to the contrary must be taken to have been overruled).

<sup>147</sup> *Norman v FCT* (1962) 109 CLR 9 at 29 per Windeyer J. See also *McIntyre v Gye* (1994) 122 ALR 289 at 295.

must be joined to prevent multiplicity of actions.<sup>148</sup> Two important points would appear to flow from this. First, this explanation would appear to recognise the assignee as the beneficial owner of the assigned right and therefore the transaction is upheld as an assignment. Second, it appears that from early times equity had jurisdiction to enforce a debt on the basis that the assignee was the equitable creditor.<sup>149</sup> Joinder was not required for jurisdiction but merely to ensure complete and final adjudication.<sup>150</sup>

However, it is sometimes suggested that the assignment of a debt operates by way of charge.<sup>151</sup> The distinction between assignment and charge has already been dealt with,<sup>152</sup> but the question arises, whether, in the case of a partial assignment of a debt, it makes sense to speak of the actual assignment of a part or whether it is necessary, to give any legal effect to the transaction, that it be upheld as a charge. Any assignment requires compliance with two substantive formalities; intention and certainty of subject matter. The latter is relevant here. It is impossible to transfer an interest in goods when they are unascertained, transfer requires an unconditional appropriation of the goods to the contract. Similarly, it may be thought to be impossible to have an interest in an undivided part of a debt so that any interest must be a partial interest in the entirety of the debt and this can only be achieved by way of charge.<sup>153</sup>

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<sup>148</sup> *Norman v FCT* (1962) 109 CLR 9 at 29 per Windeyer J. See also *Bergmann v MacMillan* (1881) 17 Ch D 423; *Re Steel Wing Co Ltd* [1921] 1 Ch 349 at 356; *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81 at 100 per Greer LJ.

<sup>149</sup> *Re Steel Wing Co Ltd* [1921] 1 Ch 349 at 355.

<sup>150</sup> *Re Steel Wing Co Ltd* [1921] 1 Ch 349 at 357. Cf *Long Leys Co Pty Ltd v Silkdale Pty Ltd* (1991) 5 BPR 11,512 where the ability of an equitable assignee to enforce a debt was thought to be a triable issue. See further *Showa Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) 34 NSWLR 548 at 559.

<sup>151</sup> *Eg Rodick v Gandell* (1852) 1 De GM & G 763 at 777-778, 42 ER 749 at 754 per Lord Truro; *Palmer v Carey* [1926] AC 703 at 706 per Lord Wrenbury; *Re Lawsons Constructions Pty Ltd* [1942] SASR 201 at 201 per Mayo J; *Thomas v Harris* [1947] 1 All ER 444 at 445 per Scott LJ; *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584 at 588 per Parker LJ; *National Mutual Life Nominees Ltd v National Capital Developments Commission* (1975) 6 ACTR 1 at 5 per Blackburn J; *Wreckair Pty Ltd v Emerson* (1991) 5 ACSR 576.

<sup>152</sup> [3.12].

<sup>153</sup> Eg Goode 'Ownership and Obligation in Commercial Transactions' (1987) 103 *LQR* 433 at 448.

It may be true that when an 'assignment' of part of a debt is given by way of security, what is often meant is a charge.<sup>154</sup> In many cases it will probably not matter whether the transaction is upheld as a charge or assignment.<sup>155</sup> However, this should not be seen as denying the possibility of there being an actual assignment of part of a debt.<sup>156</sup> Arguably, anything capable of being charged is capable of assignment because the enforcement of a charge involves the chargee approaching a court for an assignment. However, 'assignment' here may only mean 'appropriation', that is an order for payment of the assigned sum. Nevertheless, when an assignor is indebted to an assignee, the assignment of a debt to the assignee, whether partial or otherwise, may be given as a method of payment. In such a case, the assignment will not discharge the debt. Therefore, despite operating as a form of 'security', it is not security in the strict sense and its purpose of providing a method of payment would be defeated if it was technically upheld as a charge.<sup>157</sup> Moreover, in *Norman v Federal Commissioner of Taxation*,<sup>158</sup> Windeyer J, in perhaps the leading modern statement on partial

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<sup>154</sup> *Sandford v DV Building & Constructions Co Pty Ltd* [1963] VR 137 at 141; *Hughes v Pump House Hotel Co Ltd* [1902] 2 KB 190 at 195 per Mathew LJ.

<sup>155</sup> See *Robertson v Grigg* (1932) 47 CLR 257 at 271 per Dixon J (who appears not to place too much weight on the distinction in this case).

<sup>156</sup> *Ashby, Warner & Co Ltd v Simmons* [1936] 2 All ER 697 at 704-5 per Greer LJ.

<sup>157</sup> See *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142 at 162 per Slade J. Cf *Wreckair Pty Ltd v Emerson* (1991) 5 ACSR 576 at 580 per McPherson ACJ. See also *Bank of New South Wales v The King* [1918] NZLR 945 at 947 per Hosking J. See further the transaction in *Durham Bros v Robertson* [1898] 1 QB 765. Cf *Re Cunningham* [1965] WAR 115 (which interpreted such a transaction as a charge; however it is difficult to see how an 'assignee' can call for payment if it is in reality a chargee as the enforcement of a charge is first dependent upon a default; this would defeat the purpose of the transaction which is to provide a method of payment from the fund). See further *Thomas v Harris* [1947] 1 All ER 444.

<sup>158</sup> (1963) 109 CLR 9 at 29. See also *McIntyre v Gye* (1994) 122 ALR 289 at 296; *Shepherd v FCT* (1965) 113 CLR 385; *Sandford v DV Building & Constructions Co Pty Ltd* [1963] VR 137 at 141; *Ashby, Warner & Co Ltd v Simmons* [1936] 2 All ER 697; *Re Steel Wing Co Ltd* [1921] 1 Ch 349 at 355 per PO Lawrence J; *Brice v Bannister* (1878) 3 QBD 569; *Durham Bros v Robertson* [1898] 1 QB 765 at 773 per Chitty LJ (but cf Chitty LJ at 774 where he appears to suggest that so far as the legislative scheme for legal assignments is concerned, any partial assignment is by way of charge (see also *Jones v Humphreys* [1902] 1 KB 10 at 13-14 per Lord Alverstone CJ, although on the facts before him, his statement may not be as objectionable as Chitty LJ's) - however, as noted above, the reason for partial assignments falling outside the legislative regime is properly based on the impediments to enforcement in common law courts -

assignments, did not, at any stage, suggest the transaction could only operate as a charge. In fact, the whole tenor of his judgment was that there could be partial assignments and they could be by way of gift. Therefore, it is unlikely that he was thinking of a charge as the creation of a charge is dependent upon either trust or contract.<sup>159</sup>

In addition, it appears odd for a transaction to be upheld as a charge when the intention of the parties was that of an assignment. It has been said many times that if an assignor intends to make an assignment and fails to comply with the necessary requirements, then a court will not rescue the transaction by upholding it as a trust.<sup>160</sup> The same must go for rescuing an assignment by upholding it as a charge. However, it has also been said that it is not inconsistent with this rule that a court may impose a trust to protect the interest of the assignee.<sup>161</sup> Perhaps upholding the equitable assignment of part of a debt as a charge merely serves this purpose.<sup>162</sup> That is, it does not deny the efficacy of the assignment and the vesting of ownership in the assignee but seeks to protect the interest of the assignee. This is an important point, perhaps equity, like the common law, cannot identify any part of the fund for the purpose of assignment. However, unlike the common law, equity cannot only treat remedies as a surrogate for rights but is capable of taking substantive institutions like trusts and charges and using them with a remedial or protective focus. Thus, by using the notion of an equitable charge, equity can protect the interest of the assignee as a true assignee and not a chargee. It would follow from this that equity's requirement that the subject matter be identified is satisfied merely by the identification of the debt or fund and not the part of the debt or fund.

Alternatively, in *Ashby, Warner & Co Ltd v Simmons*,<sup>163</sup> Greene LJ suggested that in those cases where it was said that an equitable assignee has a charge over the fund, the

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this reasoning of Chitty LJ was doubted in *Sandford v DV Building & Constructions Co Pty Ltd* [1963] VR 137 at 141).

<sup>159</sup> [3.12].

<sup>160</sup> *Re Rose* [1952] Ch 499 at 510.

<sup>161</sup> [4.7].

<sup>162</sup> It is suggested that this is the best explanation for the decision in *Re Lawson Constructions Pty Ltd* [1942] SASR 201. Cf *Re Brush Aggregates Ltd* [1983] BCLC 320 and the powerful criticism of this case in Oditah *Legal Aspects of Receivables Financing* (1991) at 74.

<sup>163</sup> [1936] 2 All ER 697 at 708.



expression was simply being used to make the point that the assignee has a right against the fund and not merely a personal right against an individual. It may also be the case that the word 'charge' has been used loosely when the judge in fact meant assignment or mortgage.<sup>164</sup> Moreover, it may be that in some cases, although the transaction was thought to be an assignment, it was still characterised as a charge for the purposes of some legislative provision.<sup>165</sup> Another possibility may be that perhaps some courts see an analogy between an assignment of part of a debt and the recognition of equitable interests in contracts for the sale of unascertained or future goods.<sup>166</sup> In the latter, equity has generally always followed the law requiring the goods to be ascertained, present and unconditionally appropriated to the contract before any transfer would be recognised. Thus, generally, no equitable interest is recognised as it would only arise at the same time the legal interest would be transferred. It is not necessary here to debate whether this is the approach equity should take to contracts for the sale of goods except to note that this analogy may have been impliedly drawn thus requiring the recognition of a charge to give effect to the partial assignment of a debt.<sup>167</sup>

It is suggested, however, that there is no impediment to the recognition of an outright assignment of part of a debt.<sup>168</sup> Moreover, the proper characterisation of such an assignment is not the assignment of an unascertained part of an ascertained whole but rather the assignment of something akin to the sale of specific goods. In the case of sale of goods, it has generally been thought that a sale of an undivided share (expressed as a fraction), in specific goods such as the sale of a share in a racehorse, is a sale of specific goods so that legal title could pass without an act of appropriation.<sup>169</sup> This is akin to

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<sup>164</sup> See *UTC Ltd v NZI Securities Australia Ltd* (1991) 4 WAR 349 at 354 per Ipp J.

<sup>165</sup> Eg *Re Kent & Sussex Sawmills Ltd* [1947] 1 Ch 177; *Compaq Computer Ltd v Abercorn Group Ltd* [1993] BCLC 602.

<sup>166</sup> See *Hoare v Dresser* (1859) 7 HL Cas 290 at 317-18, 11 ER 116 at 127 per Lord Cranworth, (cited in *Palmer v Carey* [1926] AC 703 at 706 per Lord Wrenbury); *Ashby Warner & Co Ltd v Simmons* [1936] 2 All ER 697 at 704 per Greer LJ; *Re Lawsons Construction Pty Ltd* [1942] SASR 201 at 204 per Mayo J.

<sup>167</sup> Cf *R v Grieg* [1931] VLR 413 at 435 per Cussen ACJ (suggesting different considerations apply as regards assignment of part of a debt and the sale of part of a bulk of goods).

<sup>168</sup> *Sandford v DV Building & Constructions Co Pty Ltd* [1963] VR 137 at 141.

<sup>169</sup> See Law Commission for England and Wales, *Sale of Goods Forming Part of a Bulk* (1993) (Law Com No 215) paras 2.5-2.7. It is not clear whether the sale of a fractional share in an

what occurs in the case of the assignment of part of a debt. The debt is specific property, it is a single specific thing and not akin to an identified bulk. In fact, most of the debate about this issue as regards sale of goods has been whether or not such a transaction concerns goods for the purposes of the legislation or merely a dealing in choses in action.<sup>170</sup> The notion that the transfer involves specific property is generally accepted. It may be argued that one weakness with this analysis is where the assignment is not expressed as a fraction. Here it could be argued that the 'assignment' is more akin to the transfer of an unascertained part of an ascertained whole. It is suggested that this is incorrect and that an assignment of part of a debt is always an assignment of a fraction no matter how it is expressed and must always be analysed in terms of a fraction of the whole debt no matter what expression is used in the transaction.<sup>171</sup> That fraction is specific and identifiable.

It should be added that although such an assignment is not 'absolute' for the purposes of most legislative regimes, it must be kept in mind that the construction of the statutory regime is driven by its focus on protecting the debtor and the procedural impediments to enforcing a debt piecemeal in a court of law. It should not be viewed as evidence of any fundamental impossibility of assigning part of a debt. Moreover, it must be recognised that the statutory regimes for legal assignments in some jurisdictions now expressly recognise the partial assignment of debts.<sup>172</sup> Given that the statutory regime is concerned with absolute assignments not by way of charge, these jurisdictions must be envisaging a true assignment of part of a debt.

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identified bulk is considered a sale of specific goods, see Sutton *Sale and Consumer Law* (4<sup>th</sup> ed, 1995) at 94 and cf Law Commission for England and Wales, *Sale of Goods Forming Part of a Bulk* (1993) (Law Com No 215) para 4.2.

<sup>170</sup> See Law Commission for England and Wales, *Sale of Goods Forming Part of a Bulk* (1993) (Law Com No 215) paras 2.5-2.7.

<sup>171</sup> Goode *Commercial Law in the Next Millennium* (1998) at 73.

<sup>172</sup> Eg Property Law Act 1969 (WA) s20(3).

## (e) Assignment of Future Interests

**[4.14] Introduction.** Since this Chapter is concerned with the proper characterisation of equitable assignments, it is necessary to say something here about the characterisation of so called 'assignments' of future interests.

**[4.15] Assignments of future property.** Strictly, it is not possible to assign future property as it does not exist. However, when made for value, equity will give effect to such transactions by upholding them as agreements to assign future property. Upon the property coming into existence the assignee takes an immediate interest as the transaction takes effect as an assignment at that point rather than being merely a bipartite transaction between the assignor and assignee. In *Palette Shoes Pty Ltd v Krohn*,<sup>173</sup> Dixon J expressed the position in the following manner:<sup>174</sup>

As the subject to be made over does not exist, the matter primarily rests in contract. Because value has been given on the one side, the conscience of the other party is bound when the subject comes into existence, that is, when, as is generally the case, the legal property vests in him. Because his conscience is bound in respect of a subject of property, equity fastens upon the property itself and makes him a trustee of the legal rights of ownership for the assignee.

It also follows that the assignor never takes for an instant the full beneficial interest as the assignment actually binds the property itself when it comes into existence.<sup>175</sup>

**[4.16] Nature of interest held by assignee.** An issue then arises as to the nature of the interest held by the assignee prior to the property coming into existence. Prima facie the assignee's rights would appear to rest simply in contract. However, it has been said, and it would appear settled, that the assignee's interest is not merely contractual but has

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<sup>173</sup> (1937) 58 CLR 1. See also *Re Lind* [1915] 2 Ch 345 at 357, 358, 360 per Swinfen Eady LJ; *Tailby v Official Receiver* (1888) 13 App Cas 523 at 543 per Lord Macnaghten; *Booth v FCT* (1987) 164 CLR 159 at 165 per Mason CJ.

<sup>174</sup> (1937) 58 CLR 1 at 27.

<sup>175</sup> *Re Lind* [1915] 2 Ch 345 at 360 per Swinfen Eady LJ; *Re Row Dal Constructions Pty Ltd* [1966] VR 249 at 254 per Herring CJ; *Re Androma Pty Ltd* [1987] 2 Qd R 134 at 152 per McPherson J.

some of the incidents of a proprietary interest.<sup>176</sup> The fact that the assignment takes place immediately upon the property coming into existence without any act of the parties evidences that the right of the assignee prior to this time is more than merely contractual.

This is an issue that is important when the assignor becomes bankrupt. For example, assume there is an assignment by way of sale where for a certain consideration the assignor agrees to assign some expectancy. Assume that prior to that expectancy coming into existence the assignor becomes bankrupt and is later discharged from bankruptcy and it is only after this that the property comes into existence and is vested in the assignor. Presumably the discharge from bankruptcy would discharge the assignor's obligation under the 'sale'. If the assignee's interest under the agreement to assign, which in this example is the same transaction as the sale, merely rests in contract then that too is discharged as the assignor's obligation is an obligation to pay monies worth upon breach. If, however, the assignee's interest is a 'higher interest' then arguably it should continue to attach to the property when it comes into existence.

Another, more likely, example is where an assignor assigns an expectancy as security for some debt owed to the assignee. The assignor then becomes bankrupt and is discharged from bankruptcy without the assignee proving in the bankruptcy and only later does the property come into existence. Here, again, the debt owed to the assignee would be discharged following the discharge of bankruptcy. Moreover, if the assignee's interest under the assignment merely rested in contract, that too would be discharged leaving the assignee with no claim to the subject property.

However, in *Re Lind*,<sup>177</sup> which is now the leading case in this area,<sup>178</sup> in a fact situation akin to the one just mentioned, it was held that the assignee does still continue to have

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<sup>176</sup> *FCT v Everett* (1978) 21 ALR 625 at 643-644 per Deane J (Deane J was in the minority in this case and the decision of the majority was later affirmed by the High Court ((1980) 143 CLR 440), but this point was not mentioned by the High Court and later decisions of the High Court have approved Deane J's statement as to the effect of such an assignment. See also *McIntyre v Gye* (1994) 122 ALR 289 at 296-97; *Booth v FCT* (1987) 164 CLR 159 at 177 per Toohey and Gaudron JJ.

<sup>177</sup> [1915] 2 Ch 345. Cf *Collyer v Isaacs* (1881) 19 Ch D 342. See also *Re Dent* [1923] 1 Ch 113.

an interest in the subject property when it comes into existence. Much of the reasoning of the court was based on the idea that the assignee's interest prior to the subject matter coming into existence is a 'higher' interest than a mere contractual interest.<sup>179</sup> The Court's reasoning was not based on the fact the transaction was by way of security. Therefore, it would apply to the first example.<sup>180</sup>

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<sup>178</sup> See *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 at 27 per Dixon J (referring to *Re Lind* and saying; '[A]lthough the matter rests primarily in contract, the prospective right in property which the assignee obtains "is a higher right than the right to have specific performance of a contract," and it may survive the assignor's bankruptcy because it attaches without more *eo instanti* when the property arises and gives the assignee an equitable interest therein.')

<sup>179</sup> [1915] 2 Ch 345 at 357, 358 per Swinfen Eady LJ, at 365 per Phillimore LJ, at 373-74 per Bankes LJ.

<sup>180</sup> However, at one point in his judgment, Swinfen Eady LJ did say, ([1915] 2 Ch 345 at 360-61, and see at 370-71 per Bankes LJ) in answer to an argument that because the debts created by the mortgage were discharged so too was the ancillary contract relating to future property, that; 'The answer is that the mortgagees ... elected to rely upon their security, and not to prove, and therefore as mortgagees they stand outside the bankruptcy; and, moreover, that any contract contained in those deeds for vesting the future property in the mortgagees was ancillary not to the debt, but to the mortgage by which the debt was secured.' See also *Deputy Commissioner of*

**[4.17] Problems with the analysis.** Despite the interest of the assignee prior to the property coming into existence being well settled by case law, the actual characterisation of this right remains problematic.<sup>181</sup> The result does not appear to add up. To say that the assignee's interest is higher than a mere contractual right merely begs the question, 'a higher interest in respect of what'? There is only the agreement to assign. Nevertheless there is little doubt that this analysis provides the desired commercial result as the bankruptcy examples mentioned above show. Moreover, given that the efficacy of 'assignments' of future property is the basis for the development of the floating charge (which depends on a proprietary interest and continues to exist despite having no property below it to which it may attach to at any time), it would appear the 'higher right' analysis is now so well entrenched that it makes little sense spending time critiquing it.

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*Taxation v Government Insurance Office of New South Wales* (1993) 117 ALR 61 at 73 per Hill J and cf at 63 per Jenkinson J.

<sup>181</sup> See Meagher Heydon and Leeming *Meagher, Gummow and Lehane's, Equity: Doctrines and Remedies* (4th ed, 2002) para 6.320. See further Davis 'Floating Rights' [2002] *CLJ* 423.

## 5. *Statutory or Legal Assignments*

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### *(a) Introduction*

**[5.1] Purpose of chapter.** Since the passing of the Judicature Act 1873, it has been said that legal choses in action may now be assigned at law. At the same time, it has also been said that the statutory regime is a procedural provision. It appears to go unnoticed that these statements are entirely inconsistent. The purpose of this Chapter is to explore this inconsistency to determine whether or not there can be a true *legal* assignment of contractual rights at law. Unlike the position with equitable assignments of legal rights, there is no issue here as to whether statutory or legal assignments are true assignments. That is, in the case of contractual rights, if one takes a substantive view of the legal regime then clearly there is a true legal transfer as title is transferred by way of extinction and creation and the right to performance is actually transferred so that the assignee is owed the obligation. If the procedural view is adopted then the analysis of such a transaction would be the same as set out in Chapter Four in the section dealing with equitable assignments of legal rights, that is, there would be a true transfer. There is nothing akin to the 'contract analysis' as discussed in Chapter Four appearing in the cases concerning statutory assignments to complicate the picture. However, clearly there is an issue as to the characterisation of such an assignment. The answer to this lies with resolving this inconsistency. In the result, it is concluded that the statutory regime has a substantive effect rather than being merely procedural in effect so that transactions complying with the regime are true legal assignments.

**[5.2] Structure of chapter.** Apart from this Introduction, the Chapter has three sections. The first sets out the arguments for the procedural view, the second the arguments for a substantive view and finally a conclusion.

**[5.3] Contents of the statutory provisions.** The contents of the various provisions for statutory or legal assignment existing in all Australian states and in England are

essentially the same. The contents of the New South Wales provision are set out here as a reference point for the discussion that follows. It provides:<sup>1</sup>

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

## ***(b) The Procedural View***

**[5.4] Introduction.** The provisions for statutory or legal assignment have their origins in section 25(6) of the Judicature Act 1873. Generally, the Judicature Act brought about certain procedural reforms to the administration of law and equity in England. The history and effect of these reforms has been well documented.<sup>2</sup> As to legal assignments, being part of this reform, it is said that the effect of the statutory regime is merely procedural. By this it is meant that the statutory regime for legal assignment does no more than allow an assignee, who previously could have maintained a claim in the assignor's name (by reason of an equitable assignment of a legal right), to sue the debtor

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<sup>1</sup> Conveyancing Act 1919 (NSW) s12. See also Law of Property (Miscellaneous Provisions) Act 1958 (ACT) s3; Law of Property Act 2000 (NT) s182; Property Law Act 1974 (Qld) ss199(1) & (2); Law of Property Act 1936 (SA) s15; Conveyancing and Law of Property Act 1884 (Tas) ss86(1) & (2); Property Law Act 1958 (Vic) s134; Property Law Act (1969) (WA) s20; Law of Property Act 1925 (UK) s136.

<sup>2</sup> Eg Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (4th ed, 2002) ch 2; Loughlan in Parkinson (ed) *The Principles of Equity* (2<sup>nd</sup> ed, 2003) para 111. See also *Britain v Rossiter* (1879) 11 QBD 123 at 129 per Brett LJ.



in its own name without joining the assignor and give a good discharge. However, if the statutory regime is truly a mere procedural provision then ultimately it must follow that, although the assignee can sue in its own name, the right assigned must still be characterised as equitable. That is, the assigned right is only notionally legal for the purpose of allowing the assignee to bring an action in its own name.

**[5.5] Support for the procedural view.** There is much case support for the view that the statutory regime is merely procedural.<sup>3</sup> That support essentially relies on the procedural nature of the Judicature Act reforms. Moreover, there is some support for taking the procedural analysis to the ultimate conclusion mentioned in the last paragraph. In *Harding Carpets Ltd v Royal Bank of Canada*,<sup>4</sup> it was held that in a priority dispute, a statutory assignee may be postponed to another assignee who gives first notice to the debtor.<sup>5</sup> The reasoning of Morse J in that case was based in part on the

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<sup>3</sup> *Burlinson v Hall* (1884) 12 QBD 347 at 349 per Day J; *Victoria Insurance Co v King* (1895) 6 QJL 202 at 203 (affirmed [1896] AC 250); *Marchant v Morton, Down & Co* [1901] 2 KB 829 at 832 per Channell J; *Torkington v Magee* [1902] 2 KB 427 at 435 per Channell J (reversed on another point [1903] 1 KB 644); *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 676 per Cozens Hardy LJ ([1903] AC 414 at 424 per Lord Lindley); *Walker v The Bradford Old Bank Ltd* (1883) 12 QBD 511 at 515 per Smith J. See also *Snyder's Ltd v Furniture Finance Corp Ltd* [1931] 1 DLR 398 at 313; *Trubenizing Process Corp v John Forsyth Ltd* [1943] 4 DLR 577 at 580; *Slattery v Slattery* [1946] 1 DLR 304 at 313; *Pettit & Johnston v Foster Wheeler Ltd* [1950] 2 DLR 42 at 48-49 (affirmed [1950] 3 DLR 320); *Harding Carpets Ltd v Royal Bank of Canada* [1980] 4 WWR 149 at 157-160. See further Williston 'Is the Right of an Assignee of a Chose in Action Legal or Equitable?' (1916) 30 *Harv LR* 97 at 105; Williston 'The Word "Equitable" and its Application to the Assignment of Choses in Action' (1917-18) *Harv LR* 822 at 833 and cf Cook 'The Alienability of Choses in Action' (1916) *Harv LR* 816 at 821.

<sup>4</sup> [1980] 4 WWR 149.

<sup>5</sup> Generally, from a practical perspective, under Anglo-Australian law this dispute will only arise where there is a prior equitable assignment and a later statutory assignment. If the statutory assignment is first and the equitable assignment second (such as where there is a legal assignment by way of mortgage and the assignor further assigns its equity of redemption), the notice required for the efficacy of the statutory assignment will automatically be notice for the purposes of priority. In *Harding Carpets Ltd v Royal Bank of Canada*, Morse J was of the view that, under the relevant Canadian legislation, notice was not a necessary requirement for a statutory assignment. Thus it was legitimate to speak of a contest between a statutory and equitable assignee prior to any of them giving notice. Under Anglo-Australian law the case

procedural nature of the statutory regime. It was thought that the efficacy of a statutory assignment was based on equity, that is, it did not transfer to the assignee any rights recognised by the common law.<sup>6</sup> This suggests that Morse J was of the view that the assignee's rights were equitable.<sup>7</sup> In addition, although not stated, it would appear to follow from his judgment that he sought to apply the rule in *Dearle v Hall*<sup>8</sup> to resolve the priority dispute. The application of this rule to resolve a priority dispute between an equitable and a legal assignee carries the weight of judicial support,<sup>9</sup> and arguably further suggests that the statutory assignee's interest is equitable as the rule applies to priority disputes between competing equitable assignments.<sup>10</sup> Morse J also based his decision on that part of the statutory regime which states that the assignee takes 'subject to all equities which would have been entitled to priority over the right of the assignee'.<sup>11</sup> It was thought that these words did not merely govern the relationship between the assignee and debtor but also the assignee and competing third parties.

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would be understood as a competition between a prior equitable assignee and a later statutory assignee.

<sup>6</sup> [1980] 4 WWR 149 at 158.

<sup>7</sup> See also Williston *A Treatise on the Law of Contracts* (3<sup>rd</sup> ed, 1960) vol 3 para 447.

<sup>8</sup> (1828) 3 Russ 1, 38 ER 475.

<sup>9</sup> The authorities usually relied upon for this point are *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150 at 162-163 per Phillips J; *Harding Carpets Ltd v Royal Bank of Canada* [1980] 4 WWR 149 and *Marchant v Morton, Down & Co* [1901] 2 KB 829 per Channell J (but cf the powerful arguments put forward by Oditah that these cases are not strong authorities for this point and, in any case, should be rejected in terms of principle, see Oditah 'Priorities: Equitable Versus Legal Assignments of Book Debts' (1989) 9 *OJLS* 513 at 517 and Oditah *Legal Aspects of Receivables Financing* (1991) para 6.15). See also *Compaq Computer Ltd v Abercorn Group Ltd* [1993] BCLC 602 at 620-621 per Mummery J. See further Marshall *The Assignment of Choses in Action* (1950) at 104-105; Williston *A Treatise on the Law of Contracts* (3<sup>rd</sup> ed, 1960) vol 3 para 438; Ziegel 'The Legal Problems of Wholesale Financing of Durable Goods in Canada' (1963) 41 *Can BR* 54 at 109; Biscoe *Credit Factoring* (1975) at 132-137; McLauchlan 'Priorities and Equitable Tracing Rights and Assignments of Book Debts' (1980) 96 *LQR* 90; Goode *Legal Problems Of Credit and Security* (2<sup>nd</sup> ed, 1988) at 80-81; Sykes and Walker *The Law of Securities* (5<sup>th</sup> ed, 1993) at 870-872.

<sup>10</sup> *Compaq Computer Ltd v Abercorn Group Ltd* [1993] BCLC 602.

<sup>11</sup> Eg Conveyancing Act 1919 (NSW) s12.

More recently, Lord Goff in *Pan Ocean Shipping Co Ltd v Creditcorp (The Trident Beauty)*,<sup>12</sup> also appears to have adopted a procedural view of the statutory regime. That case concerned an action by a debtor against a defendant assignee to recover a payment made on the ground of total failure of consideration. The assignment appears to have fulfilled all the requirements of the statutory regime. In discussing the role restitution should play in cases involving third parties, Lord Goff characterised the case as one in which the plaintiff had conferred a benefit on the defendant (assignee) in the course of performing an obligation to a third party (assignor).<sup>13</sup> However, if the effect of a statutory assignment was substantive, the assignee would own the assigned right outright and the obligor's duty would be owed only to the assignee and not in part to the assignor.<sup>14</sup> The assignor would only stay in the picture if it still had duties to perform. It is only if the statutory regime is procedural that the obligor would continue to owe its duty in part to the assignor.<sup>15</sup>

### **(c) The Substantive View**

**[5.6] Primary argument for the substantive view.** Perhaps the primary argument for the statutory regime having a substantive effect flows from the words of the provision. The relevant provision in each jurisdiction has words to the effect that the assignment shall be 'effectual in law ... to pass and transfer the legal right to such debt or thing in action.'<sup>16</sup> On its face this clearly suggests that the assignee takes the assignment at law not in equity and that it obtains a legal right and not an equitable right. In *Read v*

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<sup>12</sup> [1994] 1 WLR 161. Cf his remarks at first instance in *Ellerman Lines Ltd v Lancaster Maritime Co Ltd (The Lancaster)* [1980] 2 Lloyd's Rep 497 at 503 (where he refused to apply the rule in *Dearle v Hall* to a competition between a legal assignee and an equitable assignee holding that the legal assignee 'ranks before any equitable interest, even a prior equitable interest, unless the [legal] assignee had actual or constructive notice of the equitable interest at the time of the assignment.')

<sup>13</sup> [1994] 1 WLR 161 at 166.

<sup>14</sup> Perhaps not too much should be read into this statement of Lord Goff's as it may be that he only meant to express the point that in the case of an assignment of a contractual right, what the assignee purchases is a right to a contractual obligation owed to the assignor, see [3.7].

<sup>15</sup> [4.10].

<sup>16</sup> Eg Conveyancing Act 1919 (NSW) s12.

*Brown*,<sup>17</sup> it was argued that 'legal right' as it appears in the provision meant the same thing as 'legal and other remedies' as it appears later in the section. Lord Esher MR (with whom Fry and Lopes LJ agreed) said:<sup>18</sup>

It is said that [the statutory regime] only affects procedure... [T]he words mean what they say; they 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 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 in his own name.

**[5.7] The argument against the literal view: applicability of the regime to equitable choses in action.** There is an argument that suggests that the literal view of the provision cannot be sustained. This argument is not itself directly concerned with the substantive/procedural issue being discussed here but rather with whether the provision applies to the equitable assignment of equitable interests. One point that fuels this argument is the reference to a 'trustee' in the provision. If the provision applies to the assignment of equitable interests, it becomes non-sensical to construe it literally. Under this argument, the better construction of the provision is that it was intended to capture those rights which before the Act were capable of lawful assignment.<sup>19</sup> The High Court of Australia, (in obiter) has adopted this view of the provision.<sup>20</sup>

**[5.8] In defence of the literal view.** There are, however, a number of arguments that suggest the provision was not intended to apply to the equitable assignment of equitable interests.<sup>21</sup>

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<sup>17</sup> (1888) 22 QBD 128. See also *Durham Brothers v Robertson* [1898] 1 QB 765 at 773 per Chitty LJ; *Bacon v Yatchaw Irrigation and Water Supply Trust* (1898) 23 VLR 485 at 487-488 per Williams J; *Fitzroy v Cave* [1905] 2 KB 364 at 373 per Cozens-Hardy LJ; *Herkules Piling Ltd v Tilbury Construction Ltd* (1992) 61 BLR 107 at 116, 118 per Hirst J.

<sup>18</sup> (1888) 22 QBD 128 at 131-132.

<sup>19</sup> The equivalent New Zealand provision now expressly provides that it applies to equitable choses in action, see Property Law Act 1952 (NZ) s130(1).

<sup>20</sup> *FCT v Everett* (1980) 143 CLR 440 at 447 per Barwick CJ, Stephen, Mason and Wilson JJ. See also Marshall *The Assignment of Choses in Action* (1950) at 167.

<sup>21</sup> See also *Robinson v The State of South Australia* (1928) SASR 42 at 49-50 (the relevant statutory provision in South Australia at the time referred to 'any chose in action' rather than

[5.8.1] First, the provision applies to the assignment of any 'debt or other legal thing in action'. There is no mention of equitable choses in action. Moreover, if the provision does apply to equitable assignments of equitable interests then on its face it transfers the 'legal right'.<sup>22</sup> That cannot be correct unless it is limited to legal rights that are consequent on an equitable right. That is, under the statute rather than the assignor continuing to hold any consequent legal rights on trust for the benefit of the assignee if the assignment satisfies the statute such consequent legal rights are also assigned.<sup>23</sup>

[5.8.2] Second, the language of the provision is mandatory. There can be no legal assignment of a legal interest unless its requirements are made out. That mandatory language would need to be ignored in the case of an equitable assignment of an equitable interest.<sup>24</sup> If not it would lead to the result that it is easier to assign a legal chose in action in equity than an equitable chose in action.<sup>25</sup> That is, it would make notice to the obligor an essential ingredient<sup>26</sup> and the assignment would not take effect until the time of notice.<sup>27</sup> In addition, writing requirements would become more stringent as the assignment would need to be under the hand of the assignor.<sup>28</sup> In this

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'legal chose in action'; however it conferred on the assignee the 'legal rights of such chose in action'; this apparent incongruity was resolved by Murray CJ (at 49-50) by reasoning that the provision 'does not touch and concern equitable choses in action'. See further Austin 'The Conveyancing Act, 1919 (As Amended): Section 12 and Equitable Choses in Action' (1974) 7 *Syd Uni L Rev* 394 at 396-7, 397-8. See also *Cronk v M'Manus* (1892) 8 TLR 449.

<sup>22</sup> There is authority to this effect, see *Re Pain* [1919] 1 Ch 38 at 44-45 per Younger J; *Harding v Harding* (1886) 17 QBD 442 at 445 per Wills J.

<sup>23</sup> Heydon and Loughlan *Cases and Materials on Equity and Trusts* (6<sup>th</sup> ed, 2002) para 7.27.

<sup>24</sup> Heydon and Loughlan *Cases and Materials on Equity and Trusts* (6<sup>th</sup> ed, 2002) para 7.27.

<sup>25</sup> See Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's, Equity: Doctrines and Remedies* (4<sup>th</sup> ed, 2002) paras 6.030-6.040.

<sup>26</sup> Cf *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 5 where Atkinson J suggests that it would be strange if the effect of the legislation was that an absolute assignment given for consideration without notice was effective in equity, but an absolute assignment given without consideration and without notice was not, but in the latter, this was instantly cured by the giving of notice.

<sup>27</sup> [4.10].

<sup>28</sup> Alternatively, if the writing requirements under this section and the writing requirements under the various equivalents of the Conveyancing Act 1919 (NSW) s23C(1)(c) are to be kept separate it may be necessary to draw distinction (which is probably fictional) between 'equitable choses

regard, the law appears to be clear, the statutory regime does not in any way impair the efficacy of equitable assignments.<sup>29</sup>

[5.8.3] Third, the decision most often cited as authority for the provision applying to equitable assignments of equitable interests is *Torkington v Magee*.<sup>30</sup> In that case, Channell J said:

'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.'<sup>31</sup>

An equitable chose in action would obviously fall into this category. Such a conclusion, however, appears to miss the point that Channell J was making. He observed that the statutory regime originated in a subsection of section 25 of the Judicature Act. He noted that although the first 10 subsections (of which the relevant provision was contained in section 25(6)) contained specific provisions, it was important to look at section 25(11) which provided that where there was a conflict between the rules of equity and the rules of the common law the rules of equity were to prevail. He said: 'This seems to me to shew that sub-s 6 is one of the matters particularly mentioned in which the rules of equity and common law had conflicted or varied in reference to the same matter, and this gives the clue to the meaning of any doubtful expression.'<sup>32</sup> That is, the resolution of such conflicts was the basis for section 25's existence. It must then follow that since the common law did not deal with equitable interests there could be no conflict and therefore the section does not apply to equitable interests. The only conflict that existed was that equity recognised the assignment of legal choses in action and the common law did not. Moreover, *Torkington's* case concerned the assignment of a contractual right

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in action' as per s12 and an 'equitable interest or trust subsisting at the time of disposition' as per s 23C(1)(c). It may also be necessary to distinguish an absolute assignment as per s12 from a 'disposition' as per s23C(1)(c), see Heydon and Loughlan *Cases and Materials on Equity and Trusts* (6<sup>th</sup> ed, 2002) para 7.27.

<sup>29</sup> *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 461 per Lord Macnaghten.

<sup>30</sup> [1902] 2 KB 427 (reversed on another point [1903] 1 KB 644).

<sup>31</sup> [1902] 2 KB 427 at 430-31 (reversed on another point [1903] 1 KB 644).

<sup>32</sup> [1902] 2 KB 427 at 430 (reversed on another point [1903] 1 KB 644).

and not the assignment of an equitable right and it was the common law's approach to the assignment of legal rights that Channell J was directing his comments to. He thought the assignment fell within the regime because, in line with his understanding of the provision set out above, it concerned a right the assignment of which would have been recognised by a Court of Equity prior to the passing of the Judicature Act.<sup>33</sup>

In addition, the quotation set out above and relied on for the argument that the provision includes equitable choses in action appears in a part of his judgment where he attempted (famously) to define the meaning of 'choses in action'. He came to the conclusion that the phrase had a wide meaning and would capture rights clearly not meant to be covered by the provision. He gave the example of a transfer of shares. He then makes the abovementioned statement in an attempt to limit the reach of the provision rather than widen it.

[5.8.4] Fourth, another judgment often cited for the view that the provision is intended to capture those rights which before the Act were capable of 'lawful' assignment whether in law or equity is that of Griffith CJ in the Queensland Supreme Court in *King v Victoria Insurance Co Ltd*.<sup>34</sup> In that case Griffith CJ said, 'the test to be applied for determining the validity of an assignment of a 'choses in action', which is in accordance with ... [the Act], is whether the subject matter of the assignment and the circumstances under which it is made are such that before the Act a court of law or equity would have considered the assignment a lawful one, and would have given in respect of it such relief as, according to the practice of the court, was appropriate.'<sup>35</sup> However, that statement was not made for the purposes of clarifying the section but rather to negative an argument that the section had done away with the rule preventing the assignment of bare rights to litigate. The answer to that argument was that the statutory regime

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<sup>33</sup> [1902] 2 KB 427 at 432 (reversed on another point [1903] 1 KB 644). See Austin 'The Conveyancing Act, 1919 (As Amended): Section 12 and Equitable Choses in Action' (1974) 7 *Syd L Rev* 394 at 397.

<sup>34</sup> (1895) 6 Q LJ 202 ([1896] AC 250). See also *Manchester Brewery Co v Coombs* [1901] 2 Ch 608 at 619 per Farwell J; *Re Pain* [1919] 1 Ch 38 at 44 per Younger J. See also the discussion of *King v Victoria Insurance Co Ltd* in *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 at 116-121 per Roskill J.

<sup>35</sup> (1895) 6 Q LJ 202 at 204.

requires the assignment to be 'lawful' and not against public policy.<sup>36</sup> Later, the Privy Council said that they did not wish to expressly dissent from the views of the Court below as to the construction of the Judicature Act but preferred to express no opinion on what, if any, limitation should be placed on the meaning of phrase 'legal chose in action'.<sup>37</sup>

[5.8.5] Fifth, perhaps the case with the strongest statement that the statutory regime applies to the assignment of equitable choses in action is contained in *Re Pain*.<sup>38</sup> In that case Younger J said:<sup>39</sup>

[T]he assignments in the present case do fall within the section; for, although prior to that Act the interest of the plaintiff in this case, being properly recoverable only in a Court of Equity, was strictly a "chose in equity", not cognisable in a Court of Law, the expression in the section "legal choses in action" includes chose in equity within its scope. These, since *King v Victoria Insurance Co* - although the Privy Council decision there merely indicated negative approval of a view of the Colonial Court on an analogous Colonial statute - have been treated as including "all rights the assignment of which a Court of law or Equity would before the Act have considered lawful"; or, in the words of Channell J in *Torkington v Magee*, as including a "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".

It can be seen, however, that the authority relied upon by Younger J was that of *Torkington v Magee* and *King v Victoria Insurance Co Ltd*, both of which, as noted, cannot stand as authority for this point.

[5.8.6] Sixth if the provision was meant to be merely procedural with its purpose being to allow the assignee to sue without joining the assignor, then an equitable assignee of an equitable interest could already do that by an absolute assignment before the

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<sup>36</sup> See Austin 'The Conveyancing Act, 1919 (As Amended): Section 12 and Equitable Choses in Action' (1974) 7 *Syd L Rev* 394 at 395. See also *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 at 121.

<sup>37</sup> [1896] AC 250 at 256. The Privy Council held that the assignment did not savour of maintenance and therefore did not have to resolve this issue.

<sup>38</sup> [1919] 1 Ch 38.

<sup>39</sup> [1919] 1 Ch 38 at 44-5.



provision was enacted. It therefore adds nothing to the efficacy of equitable assignments of equitable rights.

[5.8.7] Seventh, it makes perfect sense to confine the word 'trustee' to the trustee in bankruptcy and this may be what the drafter had in mind as he was mainly concerned with the assignment of debts.<sup>40</sup>

**[5.9] Further arguments for the substantive view.** Five further reasons may be raised against the statutory regime being merely procedural.

[5.9.1] First, the provision clearly allows for the assignment of interests in circumstances where prior to its enactment, the assignment would not be upheld by equity for lack of consideration.<sup>41</sup> In *Re Westerton*,<sup>42</sup> Sargant J suggested that the legislation had improved the position of the assignee procedurally by allowing the assignee to sue at law in its own name. At the same time he appeared to recognise a substantive improvement to the assignee in the relaxation of the need for consideration. He said:<sup>43</sup>

It does seem to me that the aim of the sub-section was to reform procedure and to make it unnecessary for an assignee who had an out and out assignment to go through the double process that was formerly necessary in the case of an unwilling assignor.... To that extent, ... the position of the assignee as a question of procedure was improved; he could come at once to law, and come not in the name of the assignor but in his own name as assignee. But if that is so and by means of that simplification of procedure the assignee has been relieved from taking preliminary proceedings in equity, there seems to me to be nothing very startling in the further conclusion, that the assignee has also been relieved from the terms which equity imposed as a condition of assisting him in obtaining the legal right, if at law the question of consideration was regarded as wholly immaterial; and I think that it must have been so regarded for this reason, that at law the action was brought in the name of the assignor, so that there was no question at all of any transaction between the assignor and the assignee under which the question of consideration could arise. If that be so and if since the Judicature Act 1873, the assignee can

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<sup>40</sup> See Austin 'The Conveyancing Act, 1919 (As Amended): Section 12 and Equitable Choses in Action' (1974) 7 *Syd L Rev* 394 at 398-9.

<sup>41</sup> *Cossill v Strangman* [1963] NSWLR 1695 at 1698-1699.

<sup>42</sup> [1919] 2 Ch 104 at 111.

<sup>43</sup> [1919] 2 Ch 104 at 113-114.

come directly in his own name and sue as effectually as he could have done in the name of the assignor, it appears to me that there is no reason for continuing against the assignee those terms which were imposed by equity as a condition of granting relief. The position of the assignee has in this respect been improved once and for all by the sub-section of the Judicature Act in question, which has conferred on him a legal right to sue, and in my judgment I ought not to consider that legal right as being in any way dependent upon the question whether the assignment was made for valuable consideration or not, provided it complies with the express conditions of the sub-section.

**[5.9.2]** Second, under a statutory assignment the assignor retains no interest in the right assigned and therefore has no cause of action if the obligor fails to perform the relevant obligation.<sup>44</sup> As noted earlier, in the case of an equitable assignment of a legal right the assignor maintains a cause of action because the obligation is still owed to the assignor at law.<sup>45</sup>

**[5.9.3]** Third, despite the Judicature Act reforms being said to be procedural in nature, it must be recognised that section 25, the section in which the assignment provision was contained, was aimed at resolving conflicts between law and equity. Generally, it resolved those conflicts in favour of the equitable rule. This is, it is suggested, intended to have substantive consequences.<sup>46</sup> In addition, the only conflict it could have been resolving in respect to assignments was the fact that the common law generally did not recognise the assignment of legal choses in action and equity did. Moreover, the argument that the provision is procedural dictates that the only change was to allow an assignee to bring an action in its own name without joining the assignor. However, the requirement that the assignor be joined was a rule of equity, so it can hardly be argued that by dropping that requirement the section was allowing a rule of equity to prevail.

**[5.9.4]** Fourth, the idea that the provision is procedural in the sense that it only changed procedure to allow an assignee to bring an action in its own name, may only have

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<sup>44</sup> *Read v Brown* (1888) 22 QBD 128 at 132 per Lord Esher MR; *Durham Bros v Robertson* [1898] 1 QB 765 at 773 per Chitty LJ; *Bacon v Yatchaw Irrigation and Water Supply Trust* (1898) 23 VLR 485; *Re Pain* [1919] 1 Ch 38 at 49 per Younger J; *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101.

<sup>45</sup> [4.6].

superficial appeal. The argument that this evidences the pure procedural nature of the provision is that prior to the provision, if an assignee wished to enforce the assigned right it was required to get the consent of the assignor to lend its name to the suit at law or if that was not forthcoming, obtain an order from equity forcing the assignor to lend its name to the suit at law. The provision is said to have merely done away with either having to get consent or having to get such an order.<sup>47</sup> However, as noted earlier, prior to the Judicature Act, the common law courts had already stopped requiring the assignee obtaining such an order and allowed the assignee to bring an action in the name of the assignor.<sup>48</sup> Thus, the real change brought about by the provision was the ability of the assignee to bring an action in its own name. This can only be explained on the basis that the provision is substantive in nature in that it passes the legal title to the assignee. In fact, the provision says nothing about joinder nor does it expressly state that the assignee can bring an action in its own name. The relevant words are, 'Any absolute assignment shall be ...effectual in law to pass and transfer the legal right ... and all legal and other remedies ...and the power to give a good discharge ... without the concurrence of the assignor'. The reference to the 'concurrence of the assignor' can only be qualifying the issue of discharge and the accepted ability of the assignee to bring an action in its own name must come from the previous words which are clearly directed to vesting legal title in the assignee. There is no need to mention the issue of joinder because the assignee owns the legal right and so, of course, it need not join the

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<sup>46</sup> Meagher, Gummow and Leeming *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (4th ed, 2002) paras 2.065, 2.115.

<sup>47</sup> As noted earlier, [4.11.4], it has been argued by some commentators that the provision is procedural in the sense that prior to its enactment the common law had come to recognise the assignment of choses in action and this provision did away with the need to join the assignor. This is, with respect, a strange position to adopt. The whole purpose of the Judicature Act was to infuse common law procedure with equitable procedure. One such procedure was equity's approach to joinder which required all interested parties, legal and equitable to be before the court. This was a procedure that was now to be adopted throughout the English High Court. It seems remarkable that there would then be one provision in the Act implying that this procedural rule need not apply to one particular type of action, namely the assignment of choses in action, when, if the common law truly accepted the assignability of choses in action, this would never have been a rule in the first place. That is, there would have been no need to do away with a rule that never existed.

<sup>48</sup> [4.8.1].

assignor.<sup>49</sup> Moreover, the fact the assignee can provide a discharge without the concurrence of the assignor is also substantive as it means that, unlike the position prior to this enactment, the obligation must no longer be, in part, owed to the assignor. It is, therefore, suggested that the true essence and limit of the provision's procedural nature is that it did not make anything assignable at law that was not, prior to the enactment, assignable in equity.<sup>50</sup>

[5.9.5] Fifth, and most pragmatically, even if the procedural view is correct, if the view is then taken that the common law has not developed at all since 1873, so that it has never managed to recognise the transfer of legal rights, that result would reflect a rather unsophisticated system of commercial law.

[5.10] **The priorities issue.** Finally, something must be said about the procedural view of the provision and the issue of priorities. According the judgment of Morse J in *Harding Carpets Ltd v Royal Bank of Canada*,<sup>51</sup> there appears to two aspects to this issue.

[5.10.1] The first simply dictates that because the provision is merely procedural the interest of the assignee is equitable and therefore in any priority dispute the rules governing competing equitable assignments operate.<sup>52</sup> That is, priority goes to the party first giving notice rather than applying the first in time rule and/or the bona fide

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<sup>49</sup> This is also why the provision makes notice a requirement of the assignment and limits its operation to the assignment of the assignor's entire interest. An express reference to joinder may be required if the provision was to extend to partial assignments because then the assignee would hold legal title to part of a debt and could bring an action in its own name. Joinder here would be necessary as a procedural safeguard, cf Property Law Act 1969 (WA) s20(3).

<sup>50</sup> See *Compania Colombiana de Seguros v Pacific Steam Navigation Co* (1965) 1 QB 101 at 114-121 per Roskill J.

<sup>51</sup> [1980] 4 WWR 149. See [5.5].

<sup>52</sup> See also *Compaq Computer Ltd v Abercorn Group Ltd* [1993] BCLC 602 at 620 per Mummery J (in this case Mummery J also rejected the argument that the rule in *Dearle v Hall* only applies to transactions involving equitable interests and not transactions that involve equitable dealings with legal interests).

purchaser rule.<sup>53</sup> This argument is simply met with the points put forward above that suggest that the provision is not procedural but substantive. Thus the starting point for this argument is undermined.

[5.10.2] The second aspect is more sophisticated, it dictates that because the provision expressly adopts, as a priority rule (for a competition between an equitable assignee and a statutory assignee), the rule that applies between competing equitable assignees, then the interest of the statutory assignee must be equitable and therefore the provision must in turn be merely procedural in nature. The argument for the provision adopting this priority rule is said to lie in the words that the assignee takes 'subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed'.<sup>54</sup>

The problem with this argument is that it is not entirely clear that these words are meant to operate as a priority provision. Apart from this reference to the word 'priority' the provision only deals with the tripartite relationship between the assignor, assignee and obligor/debtor. It may have been thought by the legislator that because the right vested in the assignee is legal then to ensure that the rule that an assignee takes subject to the equities the obligor has against the assignor prior to receiving notice of the assignment continues to apply to such assignments, it was necessary to expressly state this. However, unfortunately, the word chosen was 'priority' which is generally used to describe disputes between competing assignee's.

[5.10.3] Oditah has pointed out that the statutory legal assignee only takes 'subject to equities having priority over the right of the assignee'. He goes on to state that because the right of the assignee is legal it would not be every prior equitable assignment that

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<sup>53</sup> There is some authority for applying the bona fide purchaser rule, eg *Ellerman Lines Ltd v Lancaster Maritime Co Ltd (The Lancaster)* [1980] 2 Lloyd's Rep 497 at 503 per Goff J; *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 at 19 per Viscount Finlay; *Ward v Duncombe* [1893] AC 369 at 392 per Lord Macnaghten. See also Oditah 'Priorities: Equitable Versus Legal Assignments of Book Debts' (1989) 9 *OJLS* 513 at 529-531. Cf *Compaq Computer Ltd v Abercorn Group Ltd* [1993] BCLC 602 at 621 per Mummery J.

<sup>54</sup> Eg Conveyancing Act 1919 (NSW) s12.

would take priority.<sup>55</sup> However, the original provision, still reflected in section 12 of the Conveyancing Act 1919 (NSW) (but not any other Australian jurisdiction and not in England) said that the assignee takes 'subject to equities having priority over the right of the assignee *if this Act had not passed*'. It is suggested that these final words are important. If we assume that this provision is meant to govern priorities (as well as defences the obligor may have against the assignor) then these words tend to suggest that the effect of the provision is in fact substantive. That is, they suggest that for the purposes of priority it is necessary to consider what the position of the assignee would have been if the Act was not passed. If the Act was not passed, the assignee's interest would have been equitable and so you apply the rules governing competition between competing equitable interests. There would have been no need to expressly state this if, in fact, the provision was procedural because in that case the assignee's interest would only have ever been equitable. Therefore, even if it is accepted that the provision is intended to govern priorities and that it expressly adopts the rules governing competing equitable assignees, this does not prove the argument that the provision is procedural. In fact, as noted, it can equally be seen as strengthening the case against the procedural view.

**[5.10.4]** In the result, it is difficult to come to any firm conclusion as to whether or not the provision was meant to govern priorities. It is suggested that in any case, the correct priority rule to apply between a statutory assignee and an equitable assignee should be determined by the policies underlying priority rules and not a strained or questionable construction of this provision. There is certainly a strong case that this aspect of the regime should be made clear.

### ***(d) Conclusion***

**[5.11] Conclusion.** For the reasons set out above, it is suggested that the statutory provisions for legal assignment, which have as their genesis section 25(6) of the Judicature Act 1873, are substantive in effect. They provide for the transfer of legal interests so that the assignee becomes the owner at law of the subject chose in action.

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<sup>55</sup> Oditah 'Priorities: Equitable Versus Legal Assignments of Book Debts' (1989) 9 *OJLS* 513 at 516.

The assignor retains no interest and no cause of action against the obligor.<sup>56</sup> The provisions are procedural only to the extent that they do not make assignable anything that prior to the enactment could not have been assigned in equity.

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<sup>56</sup> Of course where the assignment is by way of mortgage the assignor will obtain an equity of redemption. Moreover, when claiming redemption, the assignor, despite there being a legal assignment, may be a necessary party to any suit that is on foot between the assignee and obligor, *Re Pain* [1919] 1 Ch 38 at 49-50.

## **PART 3**

# **ASSIGNMENT OF CONTRACTUAL RIGHTS**



## 6. *Assignable Contractual Rights*

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### (a) Introduction

**[6.1] Purpose of part.** This Part investigates the process of assigning contractual rights. It consists of two chapters, the first deals with the identification of assignable contractual rights and the second deals with the characterisation of the rights vested in the assignee. In a text dealing with the assignment of contractual rights, it would be logical to include a chapter in between these two chapters that dealt with the formalities of assignment. However, the issue of formalities falls outside this dissertation.

**[6.2] Purpose of chapter.** The first issue that must be addressed when deciding to assign a right is to determine whether or not the right is assignable. This Chapter is concerned with that issue. This is a topic that raises a large number of points, however, the main focus here is on the relevance of the principle of transfer to the rules governing the assignability of contractual rights.

As noted in Chapter One, the rules governing the assignment of contractual rights do overlap however, those rules that are most concerned with assignability are:

1. The assignor can assign no greater right than it has nor can an assignee obtain a right greater than that held by the assignor.
2. Only non-personal contractual rights may be assigned.
3. It is not possible by assignment to increase or vary the obligations or burdens of the obligor.
4. It is only possible to assign rights and not obligations.

At the outset it is possible to very briefly deal with rule one. This rule is clearly a statement of the *nemo dat* rule which is the hallmark of the legal concept of transfer. This Chapter therefore will focus on rules 2, 3 and 4. In addition, other issues relevant to assignability will be mentioned for completeness but dealt with briefly except where they raise difficult issues on the specific topic of the assignment of contractual rights which have not been dealt with by other writers. To a significant degree the

identification of assignable contractual rights is best approached by reference to restrictions on assignment and a large portion of this Chapter investigates such restrictions.

**[6.3] Structure of chapter.**<sup>1</sup> The first requirement for an assignable contractual right is that it be a chose in action. This issue does not cause much controversy today and is dealt with briefly in the next section. Closely associated with the need for a chose in action and, in fact, overlapping with it, is the requirement that the subject matter be present property. The process of distinguishing present and future property is therefore outlined in this Chapter. This is not an issue that is unique to the assignment of contractual rights, however, as will be seen, the distinction between present and future property gives rise to such issues as the meaning of assigning the fruits of a contract and the extent to which contractual rights may be separated or divided. It is therefore necessary to introduce these topics by providing some background on the assignment of future property. The issue of the division and separation of contractual rights is then dealt with. The notion of assigning the fruits of a contract is left to Chapter Seven. After this there follows a long section on restrictions.<sup>2</sup> The first part of this section deals with the notion of personal contractual rights. The second part looks at contractual provisions dealing with assignment. The third part ties parts one and two to the transfer thesis. The fourth defends the transfer thesis. The fifth part looks at the rule which prohibits an assignment from varying or increasing the obligations or burdens of the obligor so far as that rule relates to assignability. Finally, the sixth part looks at the assignment of contractual burdens.

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<sup>1</sup> It should be noted that certain specialised contracts have certain requirements for assignment which are not dealt with here. For example, generally, to assign an insured's right to performance under a general insurance contract, the assignee must have an interest in the insured property. In addition, an assignment of rights under a contract of guarantee must generally be accompanied by an assignment of the benefit of the underlying contract.

<sup>2</sup> Of course, it is possible to view the requirement of a present chose in action as a restriction on assignability, however, the restrictions dealt with in the restrictions section of this chapter are more concerned with the placing of positive *restrictions* on assignment as opposed to positive *requirements* of assignability.

## (b) The Requirement of a Chose in Action

**[6.4] Contractual rights as choses in action.**<sup>3</sup> For a contractual right to be assignable it must first be characterised as a chose in action. The meaning of 'chose in action' was dealt with in Chapter Two.<sup>4</sup> This is not an issue that today calls for much comment.

**[6.4.1]** In the case of debts, apart from being expressly made assignable under the statutory regime,<sup>5</sup> a contractual debt whether it is payable immediately or not, is a chose in action<sup>6</sup> and may be assigned.<sup>7</sup>

**[6.4.2]** An accrued right to sue for damages for breach of contract is also a chose in action.<sup>8</sup> Some older cases have suggested that a mere right to sue for breach of contract is not a chose in action because, if it were, it would be assignable and that would be at odds with the law of maintenance and champerty.<sup>9</sup> However, the better view is probably

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<sup>3</sup> In this dissertation, I do not separately consider the position of a third party beneficiary of a contract. It may be that the right vested in such a person can be considered a chose in action and in some cases an assignable chose in action. However, it is less likely that such a right can be considered a contractual right. Therefore, the third party is not vested with the same interest as an assignee of a contractual right. In any case, the issues governing the assignment of such a right will generally be the same as that governing the assignment of contractual rights, see Lumsden 'Contract, Rights of Third Parties' Act 1999 (the 'Act'): Its Impact on Financiers' Assignments of Contracts' [2000] *JIBL* 160 (which addresses some of the practical problems facing promisees attempting to assign their contractual rights where the contract is a third party beneficiary contract. See also Law Commission for England and Wales *Privity of Contract: Contracts for the Benefit of Third Parties* (1996) Law Com No 242 (1996) paras 2.17, 14.6.

<sup>4</sup> [2.2]-[2.3.1].

<sup>5</sup> [5.3].

<sup>6</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 574 per Lord Goff.

<sup>7</sup> An issue can, however, arise as to whether or not a debt or fund exists, eg *Tooth v Brisbane City Council* (1928) 41 CLR 212.

<sup>8</sup> It has also been held that a right to relief against forfeiture is a chose in action which will vest in a trustee in bankruptcy and is assignable by the trustee, see *Howard v Fanshawe* [1895] 2 Ch 581. Query whether the extent to which such an order is discretionary would dictate that all the assignor really has is a right to approach a court for an order granting relief against forfeiture, cf *Newbolt v Bingham* (1895) 72 LT 852; *Gill v Lewis* [1956] 2 QB 1.

<sup>9</sup> Eg *May v Lane* (1894) 64 LJQB 236 at 238 per Rigby LJ; *Dawson v Great Northern and City Railway Co* [1905] 1 KB 260 at 270-1 per Stirling LJ.

that the law does not deny the character of a chose in action to a right to bring an action for breach of contract but recognises that the assignability of that chose in action is subject to overriding public policy considerations. Generally, an assignment will not be considered as savouring of maintenance or champerty if the assignee has a 'genuine and substantial' or 'genuine and commercial' interest in the subject matter.<sup>10</sup> It cannot be correct that the degree of interest *the assignee* has in the subject matter of the assignment can affect the nature of that subject matter as a piece of property. That interest can only go to the issue of assignability to that assignee.<sup>11</sup> Therefore, a conclusion that a right is a bare right of action and therefore not assignable does not necessarily deny that the right may still be a chose in action, it is merely a conclusion that the right is either not a chose in action or, more likely, is a chose in action but is not assignable for public policy reasons.<sup>12</sup> In addition, if the secondary right to damages for breach of contract were not a chose in action, the recognised ability of liquidators and trustees in bankruptcy to assign such rights would be anomalous.<sup>13</sup>

[6.4.3] The benefit (or right to performance) of a contract is also a chose in action.<sup>14</sup> In fact, the assignment of a right to receive the benefit of contractual performance is clear evidence that it is no longer necessary for a right to be a chose in action that it be only capable of enjoyment by action.<sup>15</sup> A right to receive contractual performance satisfies the modern enforceability requirement of a chose in action as it is capable of

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<sup>10</sup> *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 at 694 per Lord Wilberforce, at 703 per Lord Roskill.

<sup>11</sup> Cf the view that a bare right of action is a personal chose in action, [2.3].

<sup>12</sup> See *Deputy Commissioner of Taxation v Government Insurance Office of New South Wales* (1993) 117 ALR 61 at 70 per Hill J.

<sup>13</sup> Eg *Ogdens Ltd v Weinberg* (1906) 95 LT 567. Cf *Re Oasis Merchandising Services Ltd* [1998] Ch 170.

<sup>14</sup> *Torkington v Magee* [1902] 2 KB 427 at 431 per Channell J; *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 at 420 per Lord Macnaghten. It is important to distinguish the right to performance from the subject matter of the contract. For example, in the context of sale of goods, generally when a buyer enters into an agreement for sale no immediate equitable interest in the goods vests in the buyer. Nevertheless, there is still scope for the buyer to assign its right to performance.

<sup>15</sup> *Torkington v Magee* [1902] 2 KB 427 at 431 per Channell J. Cf *Simmons v Harvey* [1965] Tas SR 84 at 94 per Neasey J.

enforcement by action.<sup>16</sup> Moreover it does not matter whether a present right to performance is conditional or unconditional so far as its characterisation as a chose in action is concerned.<sup>17</sup> However, the extent to which the contract is executed or executory will impact on the ability of the assignee to enforce performance.<sup>18</sup> Clearly, however, such a contractual right cannot be assigned if its correlative obligation has been fully performed so as to discharge the right.<sup>19</sup>

The assignment of contractual rights is not limited to rights in respect of some positive performance obligation. For example, a contractual promise in restraint of trade which is otherwise enforceable is a chose in action and is assignable unless, on construction, it is personal to the assignor.<sup>20</sup> A contractual right of pre-emption has been held to be an assignable chose in action.<sup>21</sup> In addition, an option is a chose in action<sup>22</sup> and is capable

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<sup>16</sup> [2.2.3]. See also *Loxton v Moir* (1914) 18 CLR 360 at 379 per Rich J.

<sup>17</sup> Eg *Hughes v Pump House Hotel Co Ltd* [1902] 2 KB 190. See also *Tooth v Hallett* (1869) LR 4 Ch App 242; *Brice v Bannister* (1878) 3 QBD 569; *G and T Earle Ltd v Hemsworth Rural District Council* (1928) 44 TLR 758 at 760 per Scrutton LJ.

<sup>18</sup> [8.7]. It has also already been noted that where, at the time of the assignor's bankruptcy, the assignor's consideration for the obligor's counter-performance is still executory, then if the trustee performs that obligation the counter-performance is earned by and for the trustee and not for the assignee. If it were otherwise, the assignor would have assigned a right greater than the one it had, see [4.9.5] note 73. Thus, an assignee's right is conditional on the assignor or its agent performing and not some other independent third party.

<sup>19</sup> Similarly an indemnity given to the assignor cannot be assigned if there is no further liability under the indemnity, for example, when the assignor ceases to exist, see *Rendall v Morphew* (1914) 84 LJ Ch 517; *Taylor v Sanders* [1937] VLR 62. See also *Housing Guarantee Fund Ltd v Yusef* [1991] 2 VR 17.

<sup>20</sup> *Elves v Croffs* (1850) 10 CB 241, 138 ER 98; *Baines v Geory* (1887) 35 Ch D 154; *Townsend v Jarman* [1900] 2 Ch 698; *Welstead v Hadley* (1904) 21 TLR 165; *Automobile Carriage Builders Ltd v Sayers* (1909) 101 LT 419. See also *Torrington Creamery v Davenport* (1940) 12 A 2d 780; *Mail-Well Envelope Co v Saley* (1972) 497 P 2d 364; *Saliterman v Finney* (1985) 361 NW 2d 175; *Alexander & Alexander v Koelz* (1987) 722 SW 2d 311; *Pino v Spanish Broadcasting System of Florida Inc* (1990) 564 So 2d 186. Cf *Davies v Davies* (1887) 36 Ch D 359 at 394 per Bowen LJ.

<sup>21</sup> *Dear v Reeves* [2002] Ch 1.

<sup>22</sup> *Griffith v Pelton* [1958] Ch 205 at 225; *Re Button's Lease* [1964] Ch 263; *Snape v Kiernan* (1988) 13 NSWLR 88 at 95 per Mahoney JA; *Westgold Resources NL v St George Bank Ltd* (1998) 29 ACSR 396 at 433 per Anderson J (affirmed [2000] WASCA 85).

of assignment unless, on construction, it is personal to the grantee.<sup>23</sup> A contractual right of indemnity has been classified as a chose in action, although, often, such rights (as opposed to the fruits of such rights) are construed as personal and not assignable.<sup>24</sup> It has also been held that a right to rectification is a chose in action and assignable.<sup>25</sup> Finally, the benefit of a contractual arbitration provision is a chose in action and is assignable.<sup>26</sup>

[6.4.4] As regards a right to rescind a contract, it was suggested by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,<sup>27</sup> that such rights are not choses in action. Lord Hoffmann there was dealing with a right to rescind a mortgage and suggested that such a right is not transferable separately from the mortgage property. Professor Treitel has suggested that the reason for this result is that rescission is merely a remedy and therefore not a chose in action.<sup>28</sup> It is true that in understanding choses in action it is necessary to distinguish the right from the remedy, however, today, particularly in the case of claims for rescission which derive from equity, the claimant has, at most, a right to approach the court for an order of rescission.

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<sup>23</sup> *County Hotel and Wine Co Ltd v London and North Western Railway Co* [1918] 2 KB 251 (affirmed [1919] 2 KB 29); *Wright v Morgan* [1926] AC 788; *Griffith v Pelton* [1958] Ch 205. See also *Whiteley Ltd v Hilt* [1918] 2 KB 808; *Taita Hotel Ltd v Spelman* [1963] NZLR 206; *Briargate Developments Ltd v Newprop Co Ltd* [1990] 1 EGLR 283 and see *Castle Barnsley's Land Options* (2nd ed, 1992) pp 65-6. For an example of an option that was construed as personal see *Clayman v Goodman Properties Inc* (1973) 518 F 2d 1026. Generally, if an option is not personal and is assignable it will also be able to be exercised by the personal representatives of the offeree, see *Carter v Hyde* (1923) 33 CLR 115 and *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57. See further *Re Cousins* (1885) 30 Ch D 203.

<sup>24</sup> *Eg British Union & National Insurance Co v Rawson* [1916] 2 Ch 476.

<sup>25</sup> *Majestic Homes Pty Ltd v Wise* [1978] Qd R 225 at 232.

<sup>26</sup> *Rumput (Panama) SA v Islamic Republic of Iran Shipping Lines (The Leage)* [1984] 2 Lloyd's Rep 259; *Socony Mobil Oil Co Inc v The West of England Ship Owners Mutual Insurance Association (London) Ltd (The Padre Island)* [1984] 2 Lloyd's Rep 408; *Montedipe SpA v JTP-ROJugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep 11.

<sup>27</sup> [1998] 1 WLR 896 at 916.

<sup>28</sup> Treitel *The Law of Contract* (10<sup>th</sup> ed, 1999) at 621. It may be that Treitel understood Lord Hoffmann to be taking this view of rescission because when Lord Hoffmann defined a 'chose in action' he was careful to expressly distinguish remedies and stated that they are not property in themselves, see [2.3].

Therefore, there is probably nothing heretical in speaking of a 'right' to rescind.<sup>29</sup> The real question is whether or not that right is a chose in action.

In *Booth v Commissioner of Taxation*,<sup>30</sup> Mason CJ pointed to the example of an owner of land having a right to the income from that land. He suggested that such a right is merely an abstract right, it is not a chose in action, although its fruits may be dealt with by contract and it may give rise to a chose in action if infringed. Such a right would be enjoyed by anyone buying the subject land as it is inherent in the concept of ownership. Perhaps Lord Hoffmann was making a similar claim to a right to rescind, not to the extent that a right to rescind is inherent in every contract, but, when it does exist, it has such a relationship to the rest of the contract and the continued existence of the contract that it makes no sense to have the contract vested in one person while the right to rescind that contract is vested in another and therefore it is best seen as an abstract right.<sup>31</sup> It may be questioned, however, whether Lord Hoffmann would have had a problem with a declaration of trust over a right to rescind. If not, then it must be property<sup>32</sup> and this would suggest that its non-assignability really results from a presumption that the parties would not (without very clear words to the contrary) have intended such a right to be vested in one person while the right to the benefit of the contract was in another. On this view, the right to rescind is an assignable chose in action but the manner of assignment is controlled by the intention of the parties so that it may only be assigned to a person taking the general benefit of the contract.<sup>33</sup> That it is transferable appeared to be envisaged by Lord Hoffmann as he acknowledged that it

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<sup>29</sup> In fact Lord Hoffmann referred to a 'right to rescind' and stated that 'a claim to rescission is a right of action', see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 916.

<sup>30</sup> (1987) 164 CLR 159 at 165, 166.

<sup>31</sup> See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 916 per Lord Hoffmann.

<sup>32</sup> Cf Parkinson 'Reconceptualising the Express Trust' [2002] CLJ 657.

<sup>33</sup> For an example of a contractual right that could only be assigned to a limited class see *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414. See also *CB Peacocke Land Co Ltd v Hamilton Milk Producers Co Ltd* [1963] NZLR 576 at 584. See further *Doe v Reid* (1830) 10 B & C 849, 109 ER 664; *Clegg v Hands* (1889) 44 Ch D 503 at 520; *White v Southern Hotel Co* [1897] 1 Ch 767; *Birmingham Breweries Ltd v Jameson* (1898) 67 LJ Ch 403; *Manchester Brewery Co v Coombs* [1901] 2 Ch 608.

could be transferred with the subject property. This analysis makes some sense because a right to rescind a contract is a mere equity which is an interest capable of binding third parties taking with notice. It is therefore doubtful that it can be expressed to be a mere abstract right.<sup>34</sup>

The above analysis suggests that there is in fact no doctrinal problem with assigning a right to rescind to one person while the right to performance is with another. It is suggested, however, that there does exist such a doctrinal problem and that problem concerns the ability of parties to separate *certain* distinct rights under a contract and assign those rights while keeping back other rights. This is dealt with in detail later.<sup>35</sup> For the purposes of this section, however, it is suggested that a right to rescind a contract is a distinct chose in action.

**[6.5] Rights arising as incidents of a contract.** It is generally not possible to assign a 'right' to a duty that arises only as an incident of a contract rather than as a term of the contract. Perhaps the best example of this is the duty of utmost good faith that is owed by both an insured and an insurer under an insurance contract. That duty is considered to be a legal duty rather than a contractual duty. Therefore, breach of this duty does not give rise to a right to damages. Often, as security for an advance a financier will take a mortgage over certain property and, in addition to requiring that property to be insured, will require an assignment of the fruits of that insurance policy or a charge over the contract of insurance.<sup>36</sup> Since the duty of utmost good faith exists merely as a legal

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<sup>34</sup> In *Gross v Lewis Hillman* [1969] 3 All ER 1476 at 1482, it was held that a purchaser's right to rescind a contract for the sale of land for misrepresentation was personal and not assignable. However, in that case, it was recognised that a vendor's right to rescind a contract of sale for fraud by the purchaser is assignable, see also *Dickinson v Burrell* (1866) LR 1 Eq 337.

<sup>35</sup> [6.10].

<sup>36</sup> Eg *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1990] 1 QB 818. Often the secured creditor requires that it be named in the contract of insurance and that it be shown a copy of the insurance certificate prior to it advancing funds. Generally, however, the better analysis is that there is no intention to actually assign the right to the proceeds rather the financier is given a charge over the proceeds. In this way, any funds recovered by the financier from the insurer which are in excess of the liability of the debtor would be handed to the debtor and this better reflects the intention of the parties, *Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd* [1995] 1 WLR



incident, the financier cannot expect to enjoy the benefit of that right under an assignment as it is not a contractual right nor is it a chose in action. However, there are cases where the assignment of rights under an insurance contract are given to allow the assignee to take over the entire contract. Usually this means the assignee will also take over the burden of the contract. Where such an assignment is valid, the view has been expressed that the assignee should get the benefit of the insurer's obligation of utmost good faith.<sup>37</sup> It is doubtful that this result flows from the 'right' to the duty suddenly becoming a chose in action that is assignable. A better analysis of this scenario is that the 'assignment' is really a novation and in such a case there would be no problem with the duty arising as an incident of the new contract. Thus, the result flows from the relationship that now exists between the insurer and the 'assignee'. Ultimately, perhaps this legal incident should best be viewed as involving mutual duties rather than a right to a duty.

## **(c) The Requirement of Present Property**

### **(i) Introduction**

**[6.6] Outline of section.** Strictly it is only possible to assign present property. A pre-requisite of assignability therefore is that the subject matter of the assignment must be present property.

The main concern of this section is with the identification of such present property as distinguished from future property. As will be seen this gives rise to two important issues for the assignment of contractual rights. The first involves the meaning of assigning the 'fruits' of a contract and this is dealt with in Chapter Seven. The second involves the extent to which it is possible to break up or divide a contractual right and

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1140 Where the intention is to actually assign the right to the proceeds then the assignee would be able to keep all the proceeds as it owns the right to them even if those proceeds are in excess of the amount owed by the assignor to the assignee.

<sup>37</sup> *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Burmuda) Ltd (The Good Luck)* [1990] 1 QB 818 at 890 citing the decision of Hobhouse J at first instance, see [1988] 1 Lloyd's Rep 514 at 547.

assign it in parts, and the ability to separate or sever distinct contractual rights and assign them individually. This issue is dealt with here.

## **(ii) *The distinction between present rights and future property***

**[6.7] Distinguishing present and future property.** The distinction between present and future property is usually not a difficult issue. When such a matter comes before a court it usually concerns the distinction between the assignment of pure future property and the assignment of some present right to receive some property or performance in the future. The latter is not an assignment of future property and is therefore immediately assignable unless some other inhibiting factor persists.

The distinction between future property and a present right to some future performance is evidenced in two, now famous, contrasting decisions of the High Court of Australia, namely, *Norman v Federal Commissioner of Taxation*<sup>38</sup> and *Shepherd v Federal Commissioner of Taxation*.<sup>39</sup> In *Norman v Federal Commissioner of Taxation*, the assignor attempted to assign, without consideration, his rights to interest which would accrue under a loan which was repayable at will and without notice, as well as his rights to dividends which might be declared on certain shares he had an interest in as a residuary beneficiary. During the period of this second assignment, that is, Jan 1957 to June 1958, shares from the relevant estates were transferred to the assignor and dividends were declared. However, at the beginning of the relevant tax year, that is, 1 July 1957, no interest had accrued and no dividends had been declared and therefore no fund for these amounts existed. The Commissioner of Taxation took the view the assignment concerned future property which required consideration to be upheld as a valid agreement to assign and therefore loan repayments made and dividends declared were income in the hands of the assignor. He assessed tax accordingly. The majority of the High Court (McTiernan and Windeyer JJ dissenting) took the view that the right to interest was future property, the borrower could repay the loan at any time and therefore

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<sup>38</sup> (1963) 109 CLR 9.

<sup>39</sup> (1965) 113 CLR 385.

there was no present right to interest that may accrue in the future.<sup>40</sup> Later, in *Shepherd v Federal Commissioner of Taxation*, Kitto J said of this decision:<sup>41</sup>

[I]t is necessary to remember that in respect of the future year the loan agreement recorded the terms which should apply to the relationship of borrower and lender so long as such a relationship should exist, but it left the borrower free to decide whether such a relationship should exist, in the relevant year. It gave the lender no right in any possible event to insist upon there being a loan in existence in that year.

As to the right to dividends, the court unanimously rejected the assignment on the ground that this was a mere expectancy as no dividends may be declared during any particular tax year, and, until such a declaration was made there was no present right capable of assignment.<sup>42</sup> That is, mere title to shares does not carry with it an immediate right to dividends. Such a right only arises when dividends are declared as it is then that a debt comes into existence. Thus, although it may be common to speak of having a right to the income from the ownership of shares, that right is merely an abstract right and not capable of immediate assignment separately from the transfer of the shares themselves.<sup>43</sup>

In *Shepherd v Federal Commissioner of Taxation*, the assignor granted a manufacturer an indefinite licence to use a patent in return for a royalty which was based on a percentage of the sale price of the items manufactured. Later the assignor assigned, without consideration, his rights to ninety percent of the royalties which may accrue during the following three years. The Commissioner of Taxation took the view that royalties received were income in the assignor's hands, the assignment being invalid as an assignment of future property made without consideration. It was true that whether a royalty was paid or not was contingent upon the manufacturer making and selling items using the patent. However, a majority of the High Court took the view that on

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<sup>40</sup> Query an employee's assignment of its right to wages given that the employment relationship may be determined at any time.

<sup>41</sup> *Shepherd v FCT* (1965) 113 CLR 385 at 396.

<sup>42</sup> See also *Bergmann v Macmillan* (1881) 17 Ch D 423; *Cotton v Heyl* [1930] 1 Ch 510; *Williams v IRC* [1965] NZLR 395; *Wreckair Pty Ltd v Emerson* (1991) 5 ACSR 576.

<sup>43</sup> See *Archibald Howie Pty Ltd v Commissioner of Stamp Duties* (1948) 77 CLR 143 at 157 per Williams J; *Re Russell* [1968] VR 285 at 300 per McInerney J. See also [6.8].

construction, the assignor had not assigned a mere expectancy, that is, payments that might accrue, instead he had assigned part of his existing contractual rights which included an entitlement to receive royalties. That right was a present right and whether it ever bore fruit or not was beside the point. Therefore, there was a valid assignment of a present right. Kitto J said;<sup>44</sup>

[T]here existed ... [at the date of the assignment] ... a contractual relationship between the [assignor] and the [manufacturer] which by its terms must continue throughout the ensuing three years, whether [the manufacturer] should wish it to continue or not. [The assignor], therefore, had a vested right in respect of those three years...[T]he existence of the [assignor's] contractual right would be unaffected, though the quantum of its product might be. The tree, though not the fruit, existed at the date of the assignment as a proprietary right of the [assignor] of which he was competent to dispose; and he assigned ninety per centum of the tree.

It has been suggested that these examples show the importance of careful drafting, for although the 'fruits' may not yet exist and may be contingent on some event, there may be some present right flowing from the relationship of the parties which can be the subject of an assignment without having to comply with the rules for assigning future property.<sup>45</sup>

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<sup>44</sup> (1965) 113 CLR 385 at 396. See also *Hughes v Pump House Hotel Co Ltd* [1902] 2 KB 190; *Hambleton v Brown* [1917] 2 KB 93; *G and T Earle Ltd v Hemsworth RDC* (1928) 44 TLR 605 (affirmed (1928) 44 TLR 758); *McLeay v Commissioner of Inland Revenue* [1963] NZLR 711; *Re Brush Aggregates Ltd* [1983] BCLC 320; *McIntyre v Gye* (1994) 122 ALR 289.

<sup>45</sup> Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (4th ed, 2002) para 6.235. It can also be difficult to determine whether there is an intention to assign future property. For example, an assignment of 'debts due or to become due' probably only relates to present property in the form of unconditional and conditional obligations to pay, or, if more emphasis is placed on the word 'debt', only unconditional obligations to pay that may or may not yet be payable. However, it would appear that once a reference is made to debts which 'might become due and owing' or 'may become due and payable', then the provision captures assignments of future property, see *The Australian Guarantee Corp Ltd v Balding* (1930) 43 CLR 140 at 156-57 per Starke J; *Tailby v The Official Receiver* (1888) 13 App Cas 523; *Yeandle v Wynn Realisations Ltd* (1995) 47 Con LR 1; *Flood v Shand Construction Ltd* (1996) 54 Con LR 125. See also *Bakewell v The Deputy Federal Commissioner of Taxation (South Australia)* (1937) 58 CLR 743 at 768 per Dixon and Evatt JJ ('Due and owing' does not necessarily mean due and payable... But the expression does require that an obligation to pay shall have accrued.')

The notion of assigning the fruits of a contract is also ambiguous but often used in practice. It is important to understand its meaning in any given context as that will impact on the nature of the right vested in the assignee. This is properly an issue of characterisation and is dealt with in Chapter Seven.

Another example closer to the assignment of contractual rights, arose in *Australian Guarantee Corp v Balding*.<sup>46</sup> Here rights under certain hire-purchase agreements were assigned to secure certain advances.<sup>47</sup> Hire was payable in advance, and the hirer had the right to elect, prior to the start of each hire period, to end the bailment. As issue arose as to whether the assignment was an assignment of book debts that was void for want of registration. The relevant legislation included within the meaning of 'book debts', 'future debts ... although not incurred or owing at the time of the assignment'. The main argument raised in defence was that no debt ever arose due to the hirer having to pay in advance. This contention was easily rejected, that is, if the hirer did not exercise its right to terminate an obligation to pay (albeit in advance), would arise.<sup>48</sup> Moreover, Starke J<sup>49</sup> and Dixon J,<sup>50</sup> clearly saw the transaction as involving the assignment of future property, that is, the fruits of the agreement for hire which were dependent upon the hirer not electing to terminate the bailment. Isaacs J agreed but alternatively added that the assignment could also be construed as an assignment of a present contractual right which 'on the happening of an event, namely the non-determination of the hiring, which meant necessarily the continuance of the hiring, it would be paid for at the rate stipulated.'<sup>51</sup> That is, a present contractual right to a future debt that was contingent upon the hirer not electing to terminate the bailment.

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<sup>46</sup> (1930) 43 CLR 140.

<sup>47</sup> The assignment of the rights in the hire-purchase agreements did not give the assignee any property in the chattels nor in the contractual right to seize and repossess the chattels.

<sup>48</sup> The position at common law without a provision to the contrary was that an obligation to pay only arose at the end of a period of hire, see (1930) 43 CLR 140 at 152 per Isaacs J.

<sup>49</sup> (1930) 43 CLR 140 at 157.

<sup>50</sup> (1930) 43 CLR 140 at 160.

<sup>51</sup> (1930) 43 CLR 140 at 154.

### ***(iii) Division and separation of contractual rights***

**[6.8] Division or separation.** The distinction between the assignment of a present contractual right and the assignment of the fruits of a contract raises another issue of assignability, namely, the extent to which it is possible to divide up a chose in action (that is, here a contractual right) and assign the parts and the ability to assign distinct choses in action arising under a contract separately from other choses in action arising under the same contract. In addition, there is the issue of fractional assignment, that is, the assignment of part of a whole single right.<sup>52</sup>

Whether a transaction involves a question of division or separation falls to be determined by whether or not the 'right' in question is merely part of a right (or a right within a right) or a distinct right itself. This can often be a difficult question. For example, in Australia it has been held that a partner's entitlement to partnership profits is not a separate right from his or her interest in the partnership and is therefore incapable of being separated and immediately assigned.<sup>53</sup> It is merely an abstract right that cannot be separated from the other bundle of rights representing the partner's interest in the partnership. However, an interest in a partnership is capable of partial or fractional assignment in equity. Similarly, as already noted, the right of an owner of land to enjoy the income from that land is an abstract right and cannot be separated from the ownership of the land<sup>54</sup> and a right to a dividend from a share would appear to be an abstract right prior to the declaration of a dividend.<sup>55</sup> It is suggested that the right to terminate a contract for breach or repudiation, which is inherent in the right to performance, is another example of an abstract right.

**[6.9] Divisional and fractional assignments.** It is possible to deal with divisional and fractional assignments briefly. Generally, where such assignments are upheld they are

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<sup>52</sup> As opposed to the whole of a part of a single right as in a division.

<sup>53</sup> However, a partner could enter into a contract to deal with his or her future profits thus binding those profits (fruits) when they are derived, but could not separately assign the right to the fruits as that does not exist as a distinct present right, see *FCT v Everett* (1980) 143 CLR 440 at 490-50. Cf *Hadlee v Commissioner of Inland Revenue* [1991] 3 NZLR 517 (affirmed [1993] AC 524). See further *Federal Commissioner of Taxation v Galland* (1986) 162 CLR 408.

<sup>54</sup> [6.4.4].

<sup>55</sup> [6.7].

upheld as equitable assignments of legal rights not assignable at law since they would not be sufficiently absolute for the purposes of a legal assignment. Therefore the assignee must be the proper plaintiff to bring an action to enforce the interest. However, it must follow that equity would not uphold such an assignment when it has no means to protect the interest of the assignee or where it is not possible to identify the subject matter of the assignment. This is a case where equity will only recognise a right if it can protect that right. It follows that it would be very rare for equity to uphold the partial assignment of a right to performance. It is unlikely that such an assignee could claim specific performance and it may be difficult to identify the portion or fraction of the right assigned.<sup>56</sup> Moreover, it is suggested that this result would follow even if the right to performance in question is a right to payment. For example, assume that under a lump sum building contract the contractor sub-contracts certain work and attempts to assign to the sub-contractor a part or fraction of the right to payment. Such an assignment cannot be upheld as it is not possible identify what part of the obligation to pay relates to that part of the work.<sup>57</sup>

The result in the above example would have been different if the assignment was of a part or fraction of amounts due or to become due under the contract. There has always been an exception in the case of debts because where they are fractionally assigned, equity can enforce the assignee's rights as an equitable creditor. Similarly, equity can enforce the rights that are assigned upon a debt being divided. For example, the single debt that is created upon the making of an advance under a loan is one chose in action, however, it is possible to separate the right to capital repayments and the right to payment of interest and assign each of these separately.

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<sup>56</sup> Perhaps there remains an argument that it is possible to recognise the assignment and protect the interest of the assignee by way of charge over the entire right to performance.

<sup>57</sup> *Delaware County Commissioners v Diebold Safe and Lock Co* (1890) 133 US 473. In addition, the fact the obligation to pay is not apportioned to work done under the contract would be an important factor in pointing to an intention that the obligation to pay was personal so that the correlative right to payment was not assignable. The result would be different if sums were apportioned to work done under the contract. Thus, there is no doctrinal difficulty under a loan participation agreement for the lead bank to assign to participants the right to part of the borrower's obligation to repay.

It may be argued that a divisional or fractional assignment of a contractual right to performance cannot be upheld because it would result in varying the obligation of the obligor which is at odds with the principle of transfer. This rule is dealt with in more detail later.<sup>58</sup> It is suffice to say here that in any given case this may be the result of upholding such an assignment, however, for reasons put forward later,<sup>59</sup> it is important to distinguish where the obligor would be worse off in law by reason of an assignment and where the obligor would be worse off in fact. Generally, there will only be a variation of the obligor's obligation sufficient to prevent an assignment if the obligation is varied at law. If a right to performance cannot be easily broken down into distinct parts, then to recognise a divisional or fractional assignment would be to create two rights to performance out of one right to performance. This would put the obligor in a worse position at law by reason of the assignment. This would breach the principle of transfer and therefore the attempted assignment cannot stand.

It is suggested that even if the doctrinal impediments to such an assignment could be overcome, such an assignment is likely to have limited commercial appeal. Moreover, it will usually be the case that the parties never envisaged that the right to performance could be assigned in this manner and for that reason a court will not uphold the assignment.<sup>60</sup>

**[6.10] Separation of contractual rights.** Where an assignment involves the assignment of separate choses in action all deriving from the one contract, then presumably such an assignment is capable of being a legal assignment as the statutory regime only requires an absolute assignment of a complete chose in action and not an absolute assignment of a contract.<sup>61</sup>

Where there are such distinct rights, whether or not it is possible to assign them separately will depend on the nature of those rights, their relationship to other rights

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<sup>58</sup> [6.27].

<sup>59</sup> [6.27].

<sup>60</sup> [6.10].

<sup>61</sup> Cf *The Mercantile Bank of London Ltd v Evans* [1899] 2 QB 613.



(and duties) and the intention of the parties.<sup>62</sup> Therefore, to a certain extent this is an issue of construction. However, this is a different construction process to the determination of whether or not a right is personal. Here, intention is directed towards the manner of assignment and not so much assignability. Despite a right being an assignable chose in action, a court generally will not allow its assignment if the vesting of that right in one assignee, while other rights continue to be vested in the assignor or other assignees, could not have been in the reasonable contemplation of the obligor.<sup>63</sup>

The more difficult issue is identifying any rights that by their nature are incapable of being separated. Perhaps the most problematic example here concerns whether or not it is possible to separately assign the right to performance under a contract and the right to damages for breach of contract. Clearly, this may be a matter upon which public policy and party intention may dictate that no such separation be allowed. However, the principal issue here is whether or not such a separation is doctrinally possible.

There can be little doubt that when a right to damages has accrued it is a distinct right from the right to performance. If this were not the case, it would not survive the discharge of the right to performance. The right to bring an action for damages is a secondary right which arises when another party breaches a contract by failing to perform a primary obligation and comes under a secondary obligation to pay damages.<sup>64</sup> A contract is not an agreement to pay damages on breach.<sup>65</sup> The right to damages is

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<sup>62</sup> *Don King Productions Inc v Warren* [2000] Ch 291 at 318-19 per Lightman J (affirmed [2000] Ch 291). Eg *The President of the Shire of Benalla v Turner* (1881) 7 VLR 200 (here a contractor assigned the benefit of a contract to the assignee and it was held that this did not extend to the right to recover a deposit upon completion of the work which was paid by the contractor to the employer at the time of contract).

<sup>63</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 105-6 per Lord Browne-Wilkinson.

<sup>64</sup> As to the secondary obligation to pay damages see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848 per Lord Diplock. As to the secondary right to damages see *Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd* [1993] 1 WLR 138 at 152 per Hoffmann J, [1995] Ch 152 at 163, 165 per Sir Thomas Bingham MR, at 169 per Beldam LJ, at 171-2 per Saville LJ (CA). See also *Flood v Shand Construction Ltd* (1996) 54 Con LR 125 at 131.

<sup>65</sup> *Grein v Imperial Airways Ltd* [1937] 1 KB 50 at 69 per Green LJ; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 849 per Lord Diplock.

therefore not a performance right, it merely secures performance. Therefore, until there is a breach, the 'right' to damages is contingent. However, once a breach occurs, if the contract remains on foot, clearly there will be a distinct right to performance and a distinct right to damages.

The difficult question is whether it is possible, prior to any breach, to agree to assign the right to claim damages as distinct from the right to receive performance.<sup>66</sup> Clearly such an assignment would need to be for value as it would be an agreement to assign future property.

To reach an answer to this issue it is convenient to start with the reverse scenario, that is, is it possible to assign the right to contractual performance divorced from the right to damages? It is suggested that despite some authority to the contrary,<sup>67</sup> it is not possible to hold back such secondary rights. Although secondary rights are, once they accrue, distinct rights, they are intended to secure the right of performance and therefore must vest in the person with the right to performance. A present right to damages does not

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<sup>66</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1992) 57 BLR 66 at 99 per Sir Michael Kerr.

<sup>67</sup> See *Flood v Shand Construction Ltd* (1996) 54 Con LR 125 (here it was held that where a prohibition on assignment made an exception to allow the assignment of sums due and payable or which may become due and payable under the contract, it merely allowed for the assignment of a fixed or liquidated amount and this did not extend to 'all of the fruits of performance' which would include a cause of action for damages for non-payment; however, the resulting debt from a judgment could be claimed; it is suggested, however, that although this assignment was a true assignment of the fruits of the contract, ultimately, it was also an assignment of the primary right to performance (payment) which is secured by a secondary right to damages upon breach). See further *Yeandle v Wynn Realisations Ltd* (1995) 47 Con LR 1. These decisions could perhaps be explained on the basis that the effect of the prohibition was to deal with the strength of the assignee's right, see [7.5.1]. However, the statutory regime for legal assignment dictates that along with the chose in action go 'all legal and other remedies for the same', and so there is very limited scope to mould the strength of a right in the case of a legal assignment. It could be argued that the right to performance and the right to damages are two distinct rights rather than one being a right and the other a remedy. Therefore, the 'right' to damages is not caught by this provision. It is suggested that this is drawing too fine a distinction for the purposes of this provision. Damages are a remedy for breach of contract and therefore, along with the right to performance, must go the right to damages under this provision. For similar reasons it would not be possible to assign the right to performance and keep back a right to rescind the contract.

follow the right to performance because it is an abstract right, it is clearly (subject to overriding policy concerns) an assignable chose in action and flows with the right to performance because, upon payment, damages are intended to replace some lost performance.

The same result may be reached from another direction; if the assignor assigns the right to performance but keeps back the right to enforce that right to performance then, what the assignor is attempting to assign cannot be a chose in action because a chose in action must be capable of being enforced.<sup>68</sup>

However, it does not necessarily flow from the above analysis that it is impossible to agree to assign the right to damages and hold back the right to performance. Clearly, if there is a breach of contract and a right to damages comes into existence, then that right may be assigned subject to overriding policy concerns. It should be no different if the assignor agrees, for value, to assign the right to damages prior to any breach of contract. The assignee should be vested with an immediate interest when a breach occurs.

Nevertheless, despite this theoretical possibility, a number of impediments remain. First, it is arguable that there will always be a public policy limitation where the assignee has no interest whatsoever in the right to performance under the contract. Second, it needs to be asked, what happens to the right to performance that remains either vested in the assignor or a later assignee? It may be tempting to conclude that upon breach, the now existing right to damages replaces that right to performance although not in the sense that it vests in the assignor, rather, the right to performance is extinguished to the extent that the right to damages replaces some lost performance. The fault in this reasoning is that the notion that the right to damages replaces the right to performance, although often referred to, is not entirely precise. It is only when damages are paid that the right

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<sup>68</sup> This route is not as satisfactory as the first because it may be argued that the availability of an order for specific performance would be sufficient to render the right a chose in action albeit an equitable one, see *Letts v IRC* [1957] 1 WLR 201. Moreover, in the case of debts, it may be sufficient to say that so long as the assignee has the right to sue for the debt they have vested in them a chose in action. However, as already noted, query whether that would be sufficient for the statutory regime which requires that all legal remedies must follow the assignment of the chose in action, see further [7.6.5].

to performance, which is compensated for by those damages, is extinguished. When a breach of contract occurs, the obligation to pay damages that arises upon that breach co-exists with the obligation to perform and that obligation to perform is only discharged if the contract is terminated (assuming the performance obligation has not unconditionally accrued at the time of discharge)<sup>69</sup> or if damages in respect of that breach are paid. This is why it is possible for the innocent party to both apply for an order of specific performance and claim damages. Therefore, it must follow, that despite the assignee having the right to claim damages, the assignor, or second assignee, could still demand performance and seek specific performance. Given that possible scenario, it is unlikely that a court would ever consider it as being within the contemplation of the assignor and obligor that the relevant contractual rights could be assigned in this manner.<sup>70</sup> It may be that in any given case where there is an assignment of the 'right to damages', whether that right has accrued or not, a court may find that the presumed intention of the parties was to assign all contractual rights correlative to the subject obligation. Thus, the assignee would have the right to damages and the right to performance. However, because, as noted, many practical problems may arise if there is merely an assignment of one particular right, this construction, in most cases, could only apply if it can be said that there was an intention to assign the entire benefit of the contract. Similarly, it is unlikely that a court would uphold an assignment of a right to rescind a contract while

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<sup>69</sup> However, it may be noted that just because a right is unconditionally accrued at the time of discharge, does not necessarily mean the right is enforceable after discharge. For example, under a contract for the sale of land where the price is payable in instalments, if an obligation to pay accrues prior to discharge, this obligation will be an unconditional obligation but the vendor cannot sue for that payment if it remains unpaid at the time of discharge. Moreover, where after discharge an action in debt does lie and the innocent party instead elects to sue in damages, then the sum ordered to be paid will in fact consist of two parts, first an amount representing the debt and second a sum representing damages for the loss suffered by reason of the payment being late. Therefore, the damages only replace the lost performance.

<sup>70</sup> There may be further doctrinal impediments to separately assigning contractual rights. For example, if rights are held as joint tenants, the parties will hold undivided interests in the whole of the subject property. Therefore, one joint tenant cannot separate and assign its interest so as to constitute the assignee a joint tenant. Such a result can only be achieved by the establishment of a new joint tenancy. However, a joint tenant can sever the joint tenancy so as to create a distinct interest in the subject matter and, if the subject matter is otherwise transferable, assign that interest so that the assignee takes as tenant in common, see *Corin v Patton* (1990) 169 CLR 540 at 575 per Deane J.

the assignor held back the right to performance. Despite being distinct rights, the parties generally would not have intended rights to be assigned in such a manner that the right to performance and a right that could effectively end performance were vested in different people.<sup>71</sup>

## **(d) Restrictions on the Assignment of Contractual Rights**

### ***(i) Introduction***

**[6.11] Rules governing restrictions on assignment.** The following section investigates the 'rules of assignment' that dictate that personal contractual rights may not be assigned and that it is not possible by assignment to vary the obligations of the obligor. In addition, it looks at the related issue of the extent to which parties may expressly prohibit assignment.

The aim of this section is to first explain the formulation and application of these rules and second, to suggest a reason as to why these rules exist. It will be suggested that the transfer thesis predicts the existence of these rules.

For the purposes of completeness it is necessary to mention one further restriction on assignment, namely, public policy.<sup>72</sup> This is not dealt with in any detail as it falls outside this dissertation. However, clearly public policy may impact upon assignability. For example, it is probably on the grounds of public policy that certain assignments have been held ineffective if the assignment increases the risk that the obligor will not receive its promised performance.<sup>73</sup> Thus, it is against the public interest to allow a public officer to assign his or her unearned salary as that increases the risk that the

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<sup>71</sup> Cf the view expressed above ([6.8]) regarding the right to terminate a contract for breach where it was suggested that such a right was an abstract right.

<sup>72</sup> Admittedly, this is one 'restriction' that could alternatively be classified as a positive requirement, that is, an assignment must not breach public policy. However, not much turns on how this is classified.

<sup>73</sup> This is distinct from the situation where the assignment increases the risk that the obligor will have to perform, see [6.27].

officer will not then render the required performance in respect of that salary.<sup>74</sup> In addition, an assignment of wages or salary which would deprive employees of the sole means of maintaining themselves and their families may be prohibited.<sup>75</sup> There are also numerous statutory provisions limiting or prohibiting assignments which are best explained on the basis of public policy.<sup>76</sup>

The most important area of public policy for the law of assignment are the prohibitions against maintenance and champerty and statements as to the modern extent of these prohibitions can be found in most contract law texts.<sup>77</sup>

## ***(ii) Personal Contractual Rights***

**[6.12] Personal rights and the relevance of intention.** It is a rule of assignment that personal contractual rights may not be assigned without the consent of the obligor.<sup>78</sup> This is the 'personal rights' rule.<sup>79</sup>

<sup>74</sup> *Stone v Lidderdale* (1795) 2 Anst 533, 145 ER 958; *Wells v Foster* (1841) 8 M & W 149, 151 ER 987; *Re Huggins* (1882) 21 Ch D 85 at 91 per Jessel MR; *Lucas v Lucas* [1943] P 68. Cf the position for non-public officers, see *Feistel v King's College Cambridge* (1847) 10 Beav 491, 50 ER 671; *Re Mirams* [1891] 1 QB 594. See also *Re Robinson* (1884) 27 Ch D 160; *Watkins v Watkins* [1896] P 222; *Paquine v Snary* [1909] 1 KB 688 (unsecured maintenance payments) and cf *Harrison v Harrison* (1888) 13 PD 180 (secured maintenance payments). Public officer pensions given in respect of past services may be assigned unless specific statutory provisions prohibit assignment, see *Willcock v Terrell* (1878) 3 Ex D 323; *Crowe v Price* (1889) 22 QBD 429. See further *Krasner v Dennison* [2001] Ch 76 at 99 per Chadwick LJ. In the private sector express prohibitions may appear in contracts for the purpose of securing the employee's performance, see *Sacks v Neptune Meter Co* (1932) 258 NYS 254 at 260 per Utermeyer J.

<sup>75</sup> *King v Michael Faraday and Partners Ltd* [1939] 2 KB 753.

<sup>76</sup> Eg Army Act 1955 (UK) s203(1); Superannuation Act 1972 (UK) s5(1); Social Security Administration Act 1992 (UK) s187; Reserve Bank Act 1959 (Cth) s 25(c) Superannuation Act 1976 (Cth) s118; Social Security (Administration) Act 1999 (Cth) s 60. See also *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd* (1995) 132 ALR 514.

<sup>77</sup> Eg Carter and Harland *Contract Law in Australia* (4<sup>th</sup> ed, 2002) paras 1629, 1630. Generally, although the criminal offences in relation to maintenance and champerty have been abolished in most jurisdictions, the public policy rule still applies, eg Maintenance, Champerty and Barratry Abolition Act 1993 (NSW).

<sup>78</sup> It has been suggested that if a right is personal it cannot be rendered, after contract, impersonal and assignable merely by obtaining the consent of the obligor; if consent is obtained what results

It appears to be generally accepted that, subject to a statutory provision to the contrary, the parties may inhibit the assignability of a contractual right as a matter of contractual intent.<sup>80</sup> One way this can be done is to make the right personal,<sup>81</sup> that is, in general terms, the obligor must evince an intention that he or she only wishes to perform for the other party to the contract.<sup>82</sup> It follows that whether a contractual right is personal or not as a matter of contractual intent is an issue of construction.<sup>83</sup> The presumed intention as to the nature of any particular right must be derived by construing the entire contract in light of its surrounding circumstances and its own subject matter.<sup>84</sup>

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in a novation, see *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1018 per Viscount Simon LC. This is no doubt right where it is the intention of the parties that the assignee take over the burden of the contract. However, the suggestion of Viscount Simon LC may go further and reflect the view posited later in this dissertation that the intention of the parties as expressed at the time of contract also characterises the contractual rights in their nature as choses in action. If that is correct, then the non-assignability of a right which results from it being personal cannot be changed (in its nature as a chose in action) post contract without a formal re-negotiation of the contract. However, as noted later, a right may be intended to be personal only for a certain period or until the occurrence of a certain event such as the performance of a condition or the occurrence of a contingency, see [7.5.2]. See further *Orlando Orange Groves Co v Hale* (1935) 161 So 284; *Schweiger v Hoch* (1969) 223 So 2d 557.

<sup>79</sup> In addition, a contractual obligation may not be vicariously performed if it is considered personal.

<sup>80</sup> *Fitzroy v Cave* [1905] 2 KB 364 at 368 per Collins MR; *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 673 per Collins MR; *Davies v Collins* [1945] 1 All ER 247 at 250 per Lord Greene MR. Cf Keeton & Sheridan *Equity* (3<sup>rd</sup> ed, 1987) at 229, who suggest that the statutory regime dictates that a chose in action is assignable and therefore intention can play no part in the issue of assignability. They also adopt the position that a prohibition on assignment could never prevent an assignment. It would appear that the authors would reject the notion that intention shapes the character of the right as a chose in action.

<sup>81</sup> Express prohibitions are dealt with at [6.15]-[6.17].

<sup>82</sup> *Lumley v Gye* (1853) 2 E & B 216, 118 ER 759; *Boston Ice Co v Potter* (1877) 25 Am Rep 9.

<sup>83</sup> *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 ([1902] 2 KB 660, CA); *National Carbonising Co Ltd v British Coal Distillation Ltd* (1936) 54 RPC 41; *Australis Media Holdings Pty Ltd v Telstra Corp Ltd* (1998) 43 NSWLR 104 at 118-9.

<sup>84</sup> *Shayler v Woolf* [1946] 1 Ch 320 at 322 per Lord Greene MR; *Davies v Collins* [1945] 1 All ER 247 at 249 per Lord Greene MR; *Fitzroy v Cave* [1905] 2 KB 364; *J Miller Ltd v Laurence and Bardsley* [1966] Ll L Rpts 90.

As a general statement it may be said that a right will not be personal if, *on construction*, 'it can make no difference to the person on whom the [corresponding] obligation lies to which of two persons he is to discharge it'.<sup>85</sup> This is the essence of the investigation.<sup>86</sup> The focus is not as to whether the parties contemplate assignment but rather whether it can reasonably be presumed that they contemplated that rights are personal.<sup>87</sup>

It is important, however, to recognise that although a contract is construed at the time of formation, it may be the intention of the parties (at the time of formation) that a right will only be personal up to a certain point of time. For example, a conditional right to performance may become unconditional and this may change its intended assignability. In addition, if the presumed intention of the parties was that the assignor's right was made personal solely for the purpose of securing the assignor's performance, then it may be that the right becomes assignable once the assignor performs the relevant obligations.

There is much that could be said of the various factors that courts take into account in determining whether a right is personal or not. However, most of the factors themselves are well known and, being a matter of construction, such analysis falls outside this dissertation.<sup>88</sup> The concern here is with the genesis of the personal rights rule. It is appropriate here, however, to deal with the leading case on this construction point,

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<sup>85</sup> *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 668-9 per Collins MR.

<sup>86</sup> It also follows that an obligation will not require personal performance if, *on construction*, it can make no difference to the person having the corresponding right which of two persons performs it. Here the focus of the investigation is again on whether the parties contemplated personal performance and not whether they contemplated vicarious performance.

<sup>87</sup> If the right is not held to be personal and is assignable, intention may still be important in determining the manner of assignment. For example, on construction it may be found that it was not in the contemplation of the parties that the assignor could assign certain rights of performance and keep back others creating a situation whereby the obligor is bound to account to both the assignor and assignee, see [6.10].

<sup>88</sup> Eg personal confidence; reliance on skill, taste, judgment or expertise of the other party; length of time over which the contract is to run and the linking of obligations to the personal requirements of the assignor.



namely *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd*,<sup>89</sup> as it is also arguably the leading case in the entire field of assignment of contractual rights and will be referred to many times throughout the rest of this dissertation.

**[6.13] *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd*.** In *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd*,<sup>90</sup> Tolhurst owned certain land that contained chalk quarries. He sold part of the land to the Imperial Portland Cement Company for the purpose of that company establishing a cement works on the land. The parties also entered into a contract on terms providing that Tolhurst would, for a term of fifty years, or for such shorter period (not being less than thirty-five years) as he shall be possessed of chalk available and suitable and capable of being quarried, supply to the company, and the company would take and buy at least 750 tone per week, and so much more, if any, as required by the company for the whole of their manufacture of cement upon the land. Later the Imperial Portland Cement Company assigned this right to the Associated Portland Cement Manufacturers Ltd together with a sale of the land works and business. The Imperial Cement Company went into voluntary liquidation and ceased to carry on business. Tolhurst claimed that he was no longer bound by the contract due to the assignor's attempted assignment and liquidation.

The House of Lords held by a majority that Tolhurst was bound by the contract. The Earl of Halsbury LC thought that the duration of the contract, the persons involved and the nature of the contract itself led to this conclusion.<sup>91</sup> Lord Macnaghten, with whom Lord Shand agreed, thought that it could not 'make the slightest difference to anybody who the proprietors of the cement works or the actual manufacturers may be, provided they are in a position to carry out the terms of the original contract'.<sup>92</sup> Ultimately this answer depended<sup>93</sup> 'simply and solely on the true meaning and effect of the contract' and in this regard he thought it was not right to construe the contract literally, limiting it to the named parties. The factors giving rise to this interpretation were that the contract

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<sup>89</sup> [1903] AC 414.

<sup>90</sup> [1903] AC 414.

<sup>91</sup> [1903] AC 414 at 416.

<sup>92</sup> [1903] AC 414 at 417.

<sup>93</sup> [1903] AC 414 at 417.

was intended to run for up to 50 years and at least for 35 years and the cement company had set up business right next to the quarry. He thought that it was the plain intention of the parties that the reference in the contract to Tolhurst and the reference in the contract to the company should be read as including, the heirs, executors, administrators and assigns, owners and occupiers of the quarries and the successors and assigns, owners and occupiers of the cement works.<sup>94</sup> Lord Lindley agreed that the rights and obligations on their face did not call for any personal confidence or personal skill but based his ultimate decision on a construction of the entire contract. He said that the 'nature of the agreement and the time it was to last negative the idea that it was confined to the parties to it. The word 'assigns' does not occur in the agreement. But this does not shew that the benefit of the contract is not assignable. An agreement for a lease, and even an option to require a lease or a renewal of a lease, is assignable in equity even although there is no mention of executors, administrators, or assigns'.<sup>95</sup>

The result in the case was that the obligor had not contracted to supply the personal needs of the assignor, rather, on construction, he had contracted to supply the needs of any person taking over the cement works who took an assignment of the right. Thus, as a matter of intention, it made no difference to the obligor who he supplied. The obligation to supply was limited by the extent of his quarry and the extent of any cement works that could be constructed on the relevant land.<sup>96</sup> This meant the obligor was required to act on the orders of the assignee. It is important to note that by construing the contract to be one that had a clause to the effect that there existed within it a reference to 'assigns' the House of Lords did not hold that the contract was made with such an assign (whether the assignee was known or unknown at the time of contract) from its inception. The effect of such a provision, be it express or implied, is that contractual rights are not personal and are therefore assignable.

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<sup>94</sup> See also *National Carbonising Co Ltd v British Coal Distillation Ltd* (1936) 54 RPC 41. Cf *Dr Jaeger's Sanitary Woollen System Co Ltd v Walker and Sons* (1897) 77 LT 180 at 183, 184 per Kekewich J. See further *Birmingham Breweries Ltd v Jameson* (1898) 67 LJ Ch 403.

<sup>95</sup> [1903] AC 414 at 423. Lord Robertson at 421-22, dissented on the ground that the assignment varied the obligation of the obligor, see [6.28].

<sup>96</sup> See *CB Peacocke Land Co Ltd v Hamilton Milk Producers Co Ltd* [1963] NZLR 576 at 584.

This decision is often contrasted with *Kemp v Baerselman*.<sup>97</sup> In that case, in return for an exclusive dealing arrangement, a farmer agreed to supply a baker with all the eggs the baker required for one year. In due course the baker sold his business to a large company and attempted to assign his rights in the contract to the company. The farmer refused to supply eggs to the company and the court upheld his action. One of the reasons for the decision was based on construction. It was thought that the existence of the exclusive dealing arrangement made the right personal. Since the baker's duty to deal exclusively with the farmer could not be assigned the company would take the right without being burdened by an important term of the bargain. This suggested that the right was itself personal. This decision shows not only why it is important to look at the contract as a whole, but how a party's obligations may impact upon the nature of other rights.<sup>98</sup>

**[6.14] Is the 'personal rights' rule misconceived?** Arguably, an assignment of a contractual right could have one of three effects. First, the effect may be that the obligor is by virtue of the assignment required to perform not only to and for the benefit of the assignee but to follow the orders or satisfy the needs of the assignee. This type of assignment is rare, usually it is not possible by assignment to require the obligor to follow the instructions or satisfy the personal needs of the assignee. However, *Tolhurst's* case is a clear example that an assignment may have this effect and the reasons for this are discussed later.<sup>99</sup>

Second, the effect of an assignment of a contractual right may be that the obligor must perform to and for the benefit of the assignee, but is only required to perform the obligation it promised the assignor and is only required to perform it to the standard promised to the assignor.

However, there is a third possibility. If under an assignment of a contractual right the assignee purchases title to a right which the assignor has against the obligor and if an assignment does not to create privity of contract between the obligor and assignee, then

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<sup>97</sup> [1906] 2 KB 604. See also *Moore v Collins* [1937] SASR 195; *Proctor v Union Coal Co* (1923) 137 NE 659.

<sup>98</sup> See also *Don King Productions Inc v Warren* [2000] Ch 291 at 319 (affirmed [2000] Ch 291).

<sup>99</sup> [6.28].

arguably the effect of an assignment should be that the obligor continues to perform *to* the assignor but *for* the assignee in the sense that it is the assignee who owns the benefit of the right to performance and it is the party who can sue for breach of contract if the obligor fails to perform to the assignor.<sup>100</sup> This is not to say that only the contingent right to damages has been assigned, the primary right to performance is now owned by the assignee, but that performance obligation remains an obligation to be performed to the assignor. Arguably any other result would change the promise made by the obligor to the assignor in breach of the transfer principle. That is, the promise must remain a promise to the assignor. If this is right, then the personal nature of a right becomes irrelevant because in all cases the obligor continues to perform to the assignor. A further point may be that even if this is not the necessary legal effect of all assignments of contractual rights, is it one that the assignor and assignee can agree to where the assignment would otherwise be ineffective as an assignment of a personal contractual right.

This third possible effect, if correct, would not only put the 'personal rights' rule in jeopardy but arguably the entire institution of assignment of choses in action. Very often in commercial assignments, the assignment is given because the assignor is going to cease to exist or cease to be interested in the contract. For example, in the case of building contracts, an assignment of the rights under such a contract by the owner of the relevant property is usually made where, at the same time as the assignment, the owner/assignor sells the land to the assignee. In that case, it would be nonsense to suggest the obligor must still perform to the assignor and that the assignee, in owning that right to performance, would then be getting the benefit of that performance. Moreover, at a doctrinal level, it is suggested that this result need not and cannot follow. The fact that an assignee, when taking an assignment of a contractual right, buys title to a right to a duty owed by the obligor to the assignor does not lead to the result that the assignee can only expect the obligor to perform to the assignor.<sup>101</sup> In fact, rather than this result being dictated by the transfer principle, it is totally at odds with it. That is, to say that the obligor must continue to perform to the assignor gives no effect whatsoever to the idea that the right to performance has been transferred (that is an actual transfer).

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<sup>100</sup> This view is supported by Corbin, see *Corbin on Contracts* (1963) Vol 4 para 865.

<sup>101</sup> That characterisation may be relevant in determining the value of the right vested in the assignee and the standard of performance the assignee can expect, [8.9.2].

Therefore, not only must the obligor perform to and for the assignee directly, this result cannot be drafted around by the assignee and assignor in an attempt to circumvent the personal rights rule.<sup>102</sup> That is, unlike contracts for the sale of goods where it is possible to transfer title and leave the seller in possession, it is not possible to do this in the case of a contractual right because it is not possible to have a 'transfer of title to the right' without an actual transfer of right itself.<sup>103</sup> However, an equivalent result can be achieved, for example, if the obligor is not given notice of the assignment or is required by the assignee to perform to the assignor. Here, the obligor will obtain a good discharge by continuing to perform to the assignor. However, this results from the rules regulating the obligor/assignee relationship, whereas the obligation to perform to and for the benefit of the assignee flows from the effect of the principle of transfer which governs the assignor/assignee relationship. It may be noted that the mere fact the obligor may have knowledge of an assignment will generally not prevent the obligor performing to the assignor and obtaining a discharge and often, for example, where a bank securitises its loans, this is what is expected of the obligor.

One decision appears to stand in the way of the above conclusion. The decision is that of Chitty J in *Western Wagon and Property Co v West*.<sup>104</sup> This case concerned the assignment of rights by a borrower under a loan contract. Notice of the assignment was given to the lender, however, when the borrower made a call under the loan agreement the lender made the advance to the borrower. The assignee brought an action against the lender/obligor for the amount of the advance or alternatively damages for breach of contract. The assignee's action failed and this can only be correct if the assignment was not effective, otherwise, it would appear that the obligor could continue to perform to the assignor.

It is accepted law that an agreement for a loan does not create a debt and therefore any attempt to immediately assign a debt will fail.<sup>105</sup> However, there is a contract in

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<sup>102</sup> To achieve this effect the assignor would have to assign only the contingent right to damages. As to that possibility, see [6.10].

<sup>103</sup> In the case of a sale of goods the seller's possession probably results by virtue of a constructive delivery to the buyer and a bailment back to the seller.

<sup>104</sup> [1892] 1 Ch 271.

<sup>105</sup> *May v Lane* (1894) 64 LJQB 236.

existence and if the right to performance is considered assignable (which was not really questioned by the court), then the only right that could possibly be assigned is the right to make a call for an advance. If that is the case, it appears nonsensical to suggest that the lender can continue to conform to the demands of the assignor. Chitty J's reasoning for rejecting the efficacy of the assignment is not convincing. First, he focused on the point that equity would not compel a lender/obligor to make an advance and would leave the parties to their contract law remedy, that being damages for breach of contract.<sup>106</sup> Thus at no point of time could the assignee compel the lender to pay the assignee. He recognised that it was important not to base assignment on the availability of specific performance and on one view he does not do this because under the remedial model for equitable assignments, when an assignment is upheld by reason of the protection equity will afford, that generally relates to remedies the assignee has against the assignor. However, on another view, Chitty J does appear to base the efficacy of the assignment on the availability of specific performance. Many contractual rights to performance are unlikely to be the subject matter of an order for specific performance due to the adequacy of damages, but this does not mean they are not assignable (at law or in equity) or that the obligor need only perform to the assignor. This then was not a good reason for rejecting the assignment, the assignee should have had an action for damages for breach of contract.

Chitty J's second line of reasoning was that the contract was not to lend out of a particular fund and so no money in the hands of the lender was ever owned by the assignee or assignor prior to the lender parting with it.<sup>107</sup> This reasoning appears to be based on the requirement that the subject matter of an assignment must be identifiable and the assignment failed to sufficiently identify the property. However, as Chitty J notes, this was not an assignment of a right to a fund but an assignment of a right to some contractual performance. If the assignment failed on this ground then it is difficult to see how any assignment of a contractual right to performance can be upheld. This reasoning cannot therefore be sustained.

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<sup>106</sup> [1892] 1 Ch 271 at 275.

<sup>107</sup> [1892] 1 Ch 271 at 276.

Chitty J could have reached his desired result by a much easier route, that is, by simply holding that all the rights of the borrower under the loan agreement were personal and not assignable as they were granted by the lender because of the confidence it placed in the borrower's ability to repay and in the probability of the obligor repaying. That probability is reduced if the right to performance is vested in an assignee while the unassignable duty to repay stays with the assignor. This, of course, is distinguishable from where a borrower gives a lender a direction to pay. This may occur where the loan is for the purpose of purchasing goods or land. In fact, where the lender intends to take security over the subject property, it will usually insist on paying the money directly to the owner of the property. It may be that Chitty J's reference to specific performance was aimed at this point, that is, he may have reasoned that the contract was too personal to be the subject of an order for specific performance and therefore the rights under the contract were too personal for assignment.

### ***(iii) Contractual Provisions Dealing With Assignment***

**[6.15] Introduction.** An express contractual provision may allow for the assignment of a right which otherwise may have been construed as being personal and not assignable.<sup>108</sup> This is simply an application of the rule that the personal nature of a contractual right is a question of construction. Usually, however, contractual provisions attempt to limit or prohibit assignability.<sup>109</sup> This section investigates such provisions in respect of voluntary assignments made by a solvent assignor.

The efficacy of prohibitions on assignment has not been the subject of much commentary in Anglo-Australian law. In the case of the personal rights rule, although

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<sup>108</sup> See *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* (1993) 113 ALR 225 at 235.

<sup>109</sup> There are various commercial reasons why a party may wish to inhibit assignability and why another party would demand assignability. For example, a party may only wish to deal with the party it contracts with because of the co-operative nature of that person or because of the leverage the obligor has over the assignor. It may be that the obligor does not wish its rights of set-off to be inhibited by receiving notice of an assignment. On the other hand, if one of the parties is a bank, it would not want to be in the position that it could not transfer its loan assets for the purposes of financing the bank or if for any reason it becomes illegal for it to keep such assets, see further McKnight 'Contractual Restrictions on a Creditor's Right to Alienate Debts: Part 1' [2003] *JIBL* 1 at 3. See also Epstein 'Why Restrain Alienation' (1985) *Columbia L Rev* 970 at 982.

the proper genesis of that rule remains unclear (although it will be suggested below that it is based on the principle of transfer), its operation is generally well understood. However, in the case of prohibitions on assignment, although it would appear that the current weight of authority would uphold such provisions, it is still not clear how they operate from a doctrinal perspective. It will be suggested that the answer to this issue depends on whether such provisions merely operate as a matter of contract or whether they impact on the nature of the relevant contractual right as a chose in action. It is also unclear what the rights of all the parties are in the case of a breach of a prohibition. Finally, it is not clear what the relationship is between such provisions and personal contractual rights.

It follows that there is much that could be said about such provisions. However, this section concentrates on aspects that are relevant to this dissertation. Notwithstanding this focus, because this is an area that has only recently come under the spotlight in Anglo-Australian law, it is necessary to make a number of preliminary points for the purpose of setting the scene.

[6.15.1] First, in England, pursuant to the decision of the House of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*,<sup>110</sup> full effect will be given to a prohibition on assignment.

[6.15.2] Second, in Australia, a majority of the High Court in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd*,<sup>111</sup> approved the analysis of the effect of a breach of such a prohibition contained in *Don King Productions Inc v Warren*<sup>112</sup> and *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd*.<sup>113</sup> *Don King Productions* concerned the application of certain aspects of the *Linden Gardens* case and the reference to it may suggest a broader acceptance of the approach generally adopted in *Linden Gardens* to such clauses. In *Devefi* too, the analysis adopted by the Full Federal Court, although handed down prior to *Linden Gardens*, appears to be in line with *Linden Gardens* at least to the extent of recognising the efficacy of such clauses. There are more problematic aspects of the

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<sup>110</sup> [1994] 1 AC 85.

<sup>111</sup> (2000) 202 CLR 588 at 601.

<sup>112</sup> *Don King Productions Inc v Warren* [2000] Ch 291 at 319 (affirmed [2000] Ch 291).

<sup>113</sup> (1993) 113 ALR 225 at 234-7.



decision in *Devefi* that will be referred to later. Finally, there are now a number of decisions of Australian courts that have expressly adopted the reasoning in *Linden Gardens* and it is reasonably safe to conclude that until the High Court has a chance to look at the issue the reasoning of the House of Lords will be applied by Australian courts.<sup>114</sup>

[6.15.3] Third, there are, however, two decisions of the High Court of Australia that appear to stand in the way of adopting the approach taken by the House of Lords in *Linden Gardens* and which would require further analysis before it can be said without question that such provisions are efficacious in Australia. The first concerns a statement made by Dixon CJ in *Hall v Busst*<sup>115</sup> to the effect that a contractual restraint on alienation can only give rise to a right to damages.<sup>116</sup>

The second case is *Cowell v Rosehill Racecourse Co Ltd*.<sup>117</sup> In this case it was held that a revocation of a contractual licence is effective even if stated to be irrevocable. On its face there appears little difference between holding that an irrevocable contractual licence may always be revoked and a contractual right expressed to be unassignable may still be assigned.<sup>118</sup> However, it may be that comparing such distinct areas is

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<sup>114</sup> Eg *Minister for Land and Water Conservation v NTL Australia Pty Ltd* [2002] NSWCA 149; *Australian Olympic Committee Inc v The Big Fights Inc* [1999] FCA 1042; *Westgold Resources NL v St George Bank Ltd* (1998) 29 ACSR 396 at 415 (affirmed [2000] WASCA 85); *Re Turner Corp Ltd (in liq)* (1995) 17 ACSR 761 at 767; *International Polymers Pty Ltd v Custom Credit Corp Ltd* (1995) 8 ANZ Insurance Cases 61-234; *Caboche v Ramsay* (1993) 119 ALR 215; *Modern Weighbridge and Scale Services Pty Ltd v Australian National Railways Commission* (Supreme Court, Sth Australia, 6 Sept 1995 per Millhouse J). See also *Starelec (Qld) Pty Ltd v Kumagai Gumi Co Ltd* [2002] QSC 137.

<sup>115</sup> (1960) 104 CLR 206 at 217.

<sup>116</sup> Gummow J in *Caboche v Ramsey* (1993) 119 ALR 215 at 232 suggested that this statement was restricted to restraints involving interests in land. See also *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* (1993) 113 ALR 225 at 236 to similar effect. Cf *Reuthlinger v MacDonald* [1976] 1 NSWLR 88 at 97 per Needham J (affirmed *Reuthlinger v MacDonald* unreported, New South Wales Court of Appeal, 20 Oct, 1976).

<sup>117</sup> (1937) 56 CLR 605. Cf *Forbes v NSW Trotting Club Ltd* (1979) 25 ALR 1.

<sup>118</sup> This is not the position in England where it is clearly recognised that equity may grant an injunction to restrain the revocation, see Gray and Gray *Elements of Land Law* (3<sup>rd</sup> ed, 2001) at 181. There has also been mention in Australian cases of the possibility of an injunction issuing to

problematic. For example, it is generally accepted that if a customer of a bank contractually agrees not to countermand a payment order, then any such countermand will be of no effect. Similarly an irrevocable letter of credit cannot be revoked without the consent of the issuing bank, the confirming bank and the beneficiary.

[6.15.4] Fourth, the argument has been raised that such provisions are not enforceable because they are fundamentally problematic. If correct then such provisions can have one of two effects, either they are completely without effect or, despite an assignment in the face of such a provision being valid, the promise not to assign may still be recognised thus putting the assignor in breach of contract with the obligor.

The principal argument propounds that such clauses cannot be upheld because they constitute an improper restraint on alienation. The argument was raised and rejected by the House of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*.<sup>119</sup> Lord Browne-Wilkinson rejected the argument on the basis of both authority and principle. In terms of authority he simply referred to the line of cases upholding such clauses.<sup>120</sup> As to principle he took the view that the restraints doctrine was limited to land because it is a finite resource. He thought there was no public policy reason overriding a prohibition on the alienation of tangible property and no public need for a market in choses in action.<sup>121</sup>

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prevent revocation, see *Bingham v 7-Eleven Stores Pty Ltd* [2002] QSC 209; *Cathay Developments Pty Ltd v Laser Entertainment Pty Ltd* [1998] NSWSC 82. In at least one case the decision in *Cowell* was explained away on the basis that the result was dictated by the separation existing in 1937 between law and equity in New South Wales, see *Leonard George Munday v ACT* [1998] SCACT 62 at para 172.

<sup>119</sup> [1994] 1 AC 85 at 106-7. See also *Sacks v Neptune Meter Co* (1932) 258 NYS 254 at 261-2 per Utermeyer J. Approved in *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* (1993) 119 ALR 216 at 234-7.

<sup>120</sup> See note 143 below.

<sup>121</sup> [1994] 1 AC 85 at 107. See also *Hendry v Chartsearch Ltd*, *The Times*, September 16, 1998 per Millett LJ (as between the parties to it, an ordinary commercial contract is not property but obligation and therefore there is no objection to making the benefit of the contract non-assignable). See further, *Re Turcan* (1888) 40 Ch D 5; *Helstan Securities Ltd v Hertfordshire*

Lord Browne-Wilkinson's latter statement is itself problematic. Market economies need credit and so there is a very real need for a market in debts. Thus international conventions dealing with factoring and receivables financing have express provisions overriding any such prohibitions.<sup>122</sup> Moreover, whatever may have been the true historical basis for the restraints on alienation rule, it is clear that part of the thinking behind these convention provisions is that such prohibitions would be at odds with the principle against restraints on alienation. Moreover, but to a lesser extent, the restraints rule was one factor influencing the insertion of provisions in the Restatement of Contracts 2d<sup>123</sup> and Uniform Commercial Code,<sup>124</sup> to restrict the effect of such prohibitions. It may be that in these instances, although the restraints rule was referred to, what was really meant was some broader notions of public policy than the repugnancy principle that underlies the restraints doctrine.<sup>125</sup> It is not necessary to resolve these issues here, however, clearly, this is a matter that must be addressed more completely before the efficacy of such provisions can be taken for granted.<sup>126</sup> In terms

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*County Council* [1978] 3 All ER 262; *Reed Publishing Holdings Ltd v Kings Bench Investments Ltd* (unreported 25 May 1983 Court of Appeal England).

<sup>122</sup> Eg UNIDROIT Convention on International Factoring, Article 6; United Nations Convention on Assignment of Receivables in International Finance, Article 11.

<sup>123</sup> Section 322 and note official comment (a).

<sup>124</sup> Sections 2-210, 9-406.

<sup>125</sup> The 'repugnancy' principle is not without its critics and it has been argued that the law should acknowledge that public policy underlies it, see Williams 'The Doctrine of Repugnancy' (1943) 59 *LQR* 343, (1944) 60 *LQR* 69, 190; Schnebly 'Restraints Upon the Alienation of Legal Interests' (1935) 44 *Yale LJ* 961, 1186, 1380. See further Mackie 'Contractual Restraints on Alienation' (1998) 12 *JCL* 255.

<sup>126</sup> Arguably the focus of the repugnancy principle is the situation where A absolutely transfers property to B and in that transfer there is a condition aimed at preventing B transferring the property to a third party. Here after the transfer to B, A drops out of the picture (it being an absolute transfer) and there are therefore good reasons why A should have no say in what B does with the property. In the case of an assignment of a contractual right the person in the position of A, that is, the obligor, remains in the picture and therefore does have a vested interest in the identity of the person it performs for. Moreover, in the case of a contract, it is only at a very theoretical level that it can be said that upon the formation of a contract one party transfers its promise to the other party, cf Weinrib 'The Juridical Classification of Obligations' in Birks (ed) *The Classification of Obligations* (1997) at 52-3; Benson 'The Unity of Contract Law' in Benson (ed) *The Theory of Contract Law* (2001) ch 4 and see [3.8]. That is, there is no initial grant which is made the subject of a condition restraining alienation. The only time such a transfer

of public policy, there may be an argument that such prohibitions should not be upheld when they relate to debts or at least certain types of debts.<sup>127</sup> It would also appear to be at odds with public policy to uphold a provision that seeks to control the power of a person to deal with the fruits of a contract once they are in the hands of that person.<sup>128</sup> That is, it may be possible to restrict the transfer of rights under a contract but not the subject matter of the contract.<sup>129</sup> However, if the view were adopted that such clauses are completely at odds with the restraints rule and therefore ineffective, this would appear to be inconsistent with the position that personal contractual rights are not assignable which, as already discussed, is determined by intention.<sup>130</sup> That is, if prohibitions are not enforceable, this rule could be circumvented by simply stating in the contract that the right in question is personal. Perhaps the better view is that the

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occurs is where one party actually receives the fruits of the contract. Prior to this point, as between the parties to the contract, there only exists personal rights and obligations albeit that those rights may be considered choses in action for the purposes of transfer. Therefore, the subject matter being dealt with is not the same as that to which the repugnancy principle applies.

<sup>127</sup> There may also be an argument that public policy should inhibit the efficacy of such clauses when the obligor has no legitimate reason for preventing the assignment. If this is the case, then it should also apply to the personal rights rule and arguably this is a matter that could be resolved by analogies with the restraint of trade doctrine, see *Oakdale (Richmond) Ltd v National Westminster Bank plc* [1997] 1 BCLC 63; *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702 (affirmed [2001] FCA 1040).

<sup>128</sup> See Goode 'Inalienable Rights' (1979) 42 *MLR* 553. In *Linden Gardens* Lord Browne-Wilkinson expressed no concluded view on this point, see [1994] 1 AC 85 at 107, but his statement to the effect that there are no public policy arguments against restrictions on the transfer of tangible property other than land would appear to be against it.

<sup>129</sup> More problematic in terms of public policy is the efficacy of a clause that seeks to prohibit the assignment of accrued rights under the contract, particularly an accrued right to payment, where at the time of the assignment the obligation to pay has accrued (conditionally or unconditionally) but where the payment has not been made to the assignor. Alternatively, the situation may be that the assignor has paid the full contract price and now wishes to assign the right to counter-performance. In some cases the actual assignment may be entered into before the counter-performance or payment has accrued but it is arguable that the prohibition should have no effect once the counter-performance or payment has been earned, despite any intention to the contrary, see generally Grismore 'Effect of a Restriction on Assignment in a Contract' (1933) 31 *Michigan L Rev* 299 at 306-7; Goode 'Inalienable Rights' (1979) 42 *MLR* 553 at 555 and see *Linden Gardens trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 105-6 per Lord Browne-Wilkinson.

<sup>130</sup> [6.12].

great weight of public policy limitations relate to debts,<sup>131</sup> that is, obligations to pay rather than other rights to performance under a contract. In this way it may be possible to maintain consistency with the personal rights rule which generally applies to obligations to perform other than obligations to pay.<sup>132</sup> Moreover, it may be that in *Linden Gardens*, Lord Browne-Wilkinson intended his comment that there was no market in choses in action to be limited to the type of transaction before him, namely, an assignment of a right to performance.

[6.15.5] Fifth, it needs to be kept in mind that an effective prohibition can at most merely render the assignment invalid as between the obligor and assignee. There is still a valid agreement between the assignor and assignee. Where the assignor cannot perform that agreement it will be in breach of contract. Moreover, a prohibition against assignment may not prevent the assignor from declaring itself a trustee of the benefit of the contract.<sup>133</sup> In short, there is nothing and there should be nothing to stop a party to a contract and a third party coming to their own arrangements to account for the fruits of the contract once those fruits are in the hands of the assignor.

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<sup>131</sup> However, as noted earlier, there are numerous statutory provisions prohibiting the assignment of unearned wages, see [6.11]. Statutory provisions may also prohibit the assignment of other rights such as certain tenancies, see *Burton v Camden London Borough Council* [2000] 2 AC 399.

<sup>132</sup> One public policy consideration that may override a prohibition dealing with the assignability of a right to performance is that if the right to performance can in any way be used as security it may be that effect should not be given to the prohibition to the extent that it would prevent a party using that right as security. There appears to be no authoritative decision on this point, however, the current authorities appear to treat this issue as simply one of construction. Thus a clause prohibiting assignment is likely to also prohibit a mortgage but perhaps less likely to inhibit charging the right. The current cases are collected and discussed in, Flannery 'Security Over Contractual Rights and Tripartite Agreements' (2002) 13 *JBFLP* 179.

<sup>133</sup> Even where the contract involves personal, skill or confidence, a party may declare itself a trustee of the proceeds for the benefit of a third party, see *Don King Productions Inc v Warren* [2000] Ch 291 (affirmed [2000] Ch 291). See also *Re Turcan* (1888) 40 Ch D 5. See further *Spellman v Spellman* [1961] 1 WLR 921 at 925 per Danckwerts LJ cf at 928 per Willmer LJ; *Pincott v Moorstons Ltd* [1937] 1 All ER 513 at 516; *Swift v Dairywise Farms Ltd* [2000] 1 WLR 1177 at 1184. For the possibility of a provision prohibiting equitable assignments but not legal assignments, see [7.5.2].

In addition, prior to determining the legal effect of a prohibition, it is necessary to determine its extent. This is part of the process of determining its meaning, for example, a prohibition on construction may only prohibit legal assignments, thus still allowing an equitable assignment.<sup>134</sup> However, unless expressly stated, such a construction it is suggested would be rare.<sup>135</sup> In practice, the most relevant issue here is whether the prohibition merely seeks to prohibit the assignment of rights that have not yet been earned under the contract or whether it seeks to prohibit the assignment of any rights under the contract.<sup>136</sup>

**[6.15.6]** Sixth, another aspect of the meaning of a prohibition concerns its form. Prohibitions against assignment come in three principal forms and more than one form may be used in the one contract. First, the parties may promise that they will not assign their rights under the contract (or only assign them to a limited group).<sup>137</sup> This is usually expressed as the parties 'shall not assign' or the parties 'shall not assign without the consent of the other party' or 'this contract is not to be assigned'.<sup>138</sup> Second, a

<sup>134</sup> *Spellman v Spellman* [1961] 1 WLR 921 at 925 per Danckwerts LJ, cf at 928 per Willmer LJ.

<sup>135</sup> See *R v Chester & North Wales Legal Aid Area Office* [1998] 1 WLR 1496. Anyone taking the view that an equitable assignment only operates between the assignor and assignee (cf [4.9.4], [4.10]) is, however, more likely to find such a construction.

<sup>136</sup> See *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85; *R v Chester and North Wales Legal Aid Area Office (No 12)* [1998] 1 WLR 1496. See also *Foamcrete (UK) Ltd v Thrust Engineering Ltd* [2002] BCC 221.

<sup>137</sup> Often this limitation results from the nature of the subject right, eg *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414. Query whether the other party to the contract is excluded from the group of potential assignees of the right to performance. Arguably the effect of such an assignment would be to extinguish liability rather than being doctrinally impossible, see *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214. However, if the liability of obligors is joint and several, then arguably the obligee, in order to keep the obligation to perform alive, may assign the right to performance to one of the joint and several obligors, see *Banco Santander SA v Bayfern Ltd* [2000] 1 All ER (Comm) 776 at 779 per Waller LJ.

<sup>138</sup> Eg *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85; *United Dominions Trust (Commercial) Ltd v Parkway Motors Ltd* [1955] 1 WLR 719 (the result in this case was overruled in *Wickham Holdings Ltd v Brooke House Motors Ltd* [1967] 1 WLR 295); *Belize Motor Supply Company v Cox* [1914] 1 KB 244. See also *Burck v Taylor* (1894) 152 US 634 (cf [6.17]); *Portuguese-American Bank of San Francisco v Welles* (1916) 242 US 7; *Fortunato v Patten* (1895) 41 NE 572; *City of Omaha v Standard Oil Co* (1898) 75 NW 859.

prohibition may be drafted to negate the power to assign. These may be expressed in terms that the parties 'cannot assign' or contract rights are 'not assignable' or 'any assignment is void' or the parties 'shall not be entitled to assign'.<sup>139</sup> Clearly there may be some fine lines between these first two groups and often a provision may combine them.<sup>140</sup> Third, a provision may simply state that in the event of any assignment the other party has a right to 'terminate' the contract. These may be coupled with a forfeiture provision. Where the assigned right is not an unconditionally accrued right, such a clause effectively gives power to the innocent party to stop the assignment by electing to terminate the contract. Such provisions may be drafted in a form that suggests that contractual rights are automatically forfeited upon assignment.<sup>141</sup> However, it is suggested, that the better construction is that the assignment merely gives the obligor a right to elect to terminate the contract, otherwise, the law would have provided the assignor with a method of getting out of the contract by taking advantage of its own wrong.<sup>142</sup> Within these categories there can be many variations, however, ultimately the meaning of a clause is a question of construction.<sup>143</sup>

**[6.15.7]** Seventh, a prohibition may not wholly prohibit assignment but merely require the consent of the obligor.<sup>144</sup> Usually such consent is expressed in terms that it is not to be unreasonably withheld or such a condition may be specified by legislation in some

<sup>139</sup> Eg *Wickham Holdings Ltd v Brooke House Motors Ltd* [1967] 1 WLR 295; *Hendry v Chartsearch Ltd* *The Times*, September 16, 1998; *Allhusen v Caristo Construction Corp* (1952) 103 NE 2d 891.

<sup>140</sup> Eg *Wickham Holdings Ltd v Brooke House Motors Ltd* [1967] 1 WLR 295.

<sup>141</sup> Eg *Hoddart & Tolley Ltd v Cornes* [1923] NZLR 876.

<sup>142</sup> See also *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702 at 735 (affirmed sub nom *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* [2001] FCA 1040); *Hodder & Tolley Ltd v Cornes* [1923] NZLR 876. See further *Attwood & Reid Ltd v Stephens Excavators Ltd* [1932] NZLR 1332.

<sup>143</sup> See *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 106 per Lord Browne-Wilkinson. See also *Circuit Systems Ltd v Zuken-Redac (UK) Ltd* [1997] 1 WLR 721 (affirmed on another point [1999] 2 AC 1); *Herkules Piling Ltd v Tilbury Construction Ltd* (1992) 61 BLR 107; *Yeandle v Wynn Realisations Ltd* (1995) 47 Con LR 1; *Flood v Shand Construction Ltd* (1996) 54 Con LR 125. See further *ANC Ltd v Clark*, *The Times* 31 May 2000. Cf *City of Omaha v Standard Oil Co* (1898) 75 NW 895 at 896.

<sup>144</sup> Whether this is stated or not, clearly any prohibition may be set aside with consent, that is, by a re-negotiation of the contract, see [6.12] note 77.

instances.<sup>145</sup> Where the clause states that there is to be no assignment without consent with no reference to consent not being unreasonably withheld, the effect of the attempted assignment will be the same as if the clause was a simple prohibition on assignment. Where consent is not to be reasonably withheld and the assignor fails to seek consent in circumstances where the obligor could reasonably withhold that consent, the assignment will be ineffective as between the assignee and obligor. Where the assignor fails to seek consent in circumstances where the obligor could not have reasonably withheld that consent, it was suggested by Evans LJ in *Hendry v Chartsearch Ltd*,<sup>146</sup> that the assignment may be effective. He distinguished the position with respect to leases of land where the view is taken that consent is not withheld if it is not asked for.<sup>147</sup> Millett LJ on the other hand was prepared to follow the line of authority dealing with leases although he distinguished a commercial contract from a lease on the basis that as between the parties such a contract is not generally viewed as property but obligation. In his view it was ‘wrong in principle to entertain the hypothetical question whether the defendants could have objected to the assignment if they had been asked for it’. Henry LJ also took a different view to that of Evans LJ, he suggested that ‘prior consent never applied for is never withheld or refused (whether reasonably or otherwise)’.

**[6.15.8]** It is now possible to move onto the issue of the legal effect of such prohibitions. This is an issue that directly brings into focus the transfer thesis.

**[6.16] The legal effect of prohibitions on assignment.** Assuming that prohibitions on the assignment of contractual rights are efficacious, then, like the meaning of such a

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<sup>145</sup> Eg Conveyancing Act 1919 (NSW) s 133B. See Butt *Land Law* (4<sup>th</sup> ed, 2001) para 1594ff.

<sup>146</sup> *The Times*, September 16, 1998.

<sup>147</sup> See *Eastern Telegraph Co Ltd v Dent* [1899] 1 QB 835; *Barrow v Isaacs & Son* [1891] 1 QB 417; *McMahon v Docker* (1945) 62 WN(NSW) 155. A lease creates an interest in land and it is not possible to wholly deprive the lessee of its ability to assign that property. The assignor may, however, take a covenant against assignment with a right of re-entry for breach. An assignment in breach of the covenant is effective to vest the legal title but that title is defeasible; *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales & Hire Ltd (No 2)* [1979] 1 WLR 1397; *Williams v Frayne* (1937) 58 CLR 710 at 731 per Dixon J (citing *Williams v Earle* (1868) LR 3 QB 739). If the lessor unreasonably refuses consent, the lessee may assign without it.



provision, its legal effect must be determined by construction.<sup>148</sup> In any given case, a prohibition may be intended to have one of the following legal effects:<sup>149</sup>

1. The clause may invalidate the assignment but the agreement to assign may still be valid so that the assignor is liable to the assignee for breach of contract in failing in its promise to immediately assign.<sup>150</sup>
2. The assignment may be valid but the assignor will be liable to pay damages for breach of contract to the obligor.
3. The assignment may not be valid but at the same time the assignor may not be in breach of contract with the obligor.<sup>151</sup>
4. The attempted assignment may amount to a breach of contract or repudiation giving the obligor the right to terminate performance and thus defeat an assignment even if it were valid.

**[6.16.1]** At present, although prohibitions on assignment have cropped up in a number of cases over time,<sup>152</sup> the legal effect of such clauses has not been the subject of much judicial analysis. However, there is a history of such clauses being upheld.<sup>153</sup> Generally,

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<sup>148</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85; *Bawejem Ltd v MC Fabrications Ltd* [1999] 1 All ER (Comm) 377.

<sup>149</sup> Clearly, a prohibition cannot affect an assignment of a right which occurred prior to the parties agreeing to the prohibition, see *Foamcrete (UK) Ltd v Thrust Engineering Ltd* [2002] BCC 221.

<sup>150</sup> In such a case, the contract between the assignor and assignee may still be recognised as an agreement to assign in the sense of a bilateral assignment between the assignor and assignee so that any property which is the subject of the assignment coming into the hands of the assignor is held for the benefit of the assignee. A related question arises as to whether the assignor is in breach of contract with the obligor in attempting to assign the subject right.

<sup>151</sup> In this case, as in legal effect one, there will still be the issue of the efficacy of the agreement to assign between the assignor and assignee.

<sup>152</sup> Eg *Abbott v Philbin* [1961] AC 352, [1960] 1 Ch 27, [1959] 2 All ER 270; *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142 at 160 per Slade J; *Showa Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) 34 NSWLR 548.

<sup>153</sup> Eg *In re Turcan* (1888) 40 Ch D 5; *United Dominions Trust (Commercial) Ltd v Parkway Motors* [1955] 1 WLR 719 (overruled [1967] 1 WLR 295); *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262 at 264-65; *Reed Publishing Holdings Ltd v Kings Reach Investments Ltd* (unreported 25 May 1983 Court of Appeal England); *Linden*

it is suggested that the presumed intention of the parties in most cases is likely to be reflected in legal effect one and most of the following discussion focuses on that effect. This was the result in the leading case of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*.<sup>154</sup> The assignment in that case concerned the assignment of certain rights to performance under a contract. The relevant clause stated:

The employer shall not without the written consent of the contractor assign this contract...[and] ...the contractor shall not without the written consent of the employer assign this contract, and shall not without the written consent of the architect...sublet any portion of the works.

It was argued that the clause had the legal effect set out in two above. This was rejected in favour of legal effect one. Lord Browne-Wilkinson (with whom the other Law Lords agreed) said:<sup>155</sup>

[A] prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent the 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....[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.

The result in the case was that the prohibition was intended to invalidate any tripartite assignment.<sup>156</sup> However, the contract between the assignor and assignee was valid and

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*Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85. See also *Brice v Bannister* [1878] 3 QB 569 at 580-1 per Bramwell LJ.

<sup>154</sup> [1994] 1 AC 85.

<sup>155</sup> [1994] 1 AC 85 at 108. See also *Burck v Taylor* (1894) 152 US 634 (cf [6.17]); *City of Omaha v Standard Oil Company* (1898) 75 NW 859. The principal English case to the contrary, *Tom Shaw and Co v Moss Empires Ltd* (1908) 25 TLR 190 was explained away as an example of a prohibition not being able to invalidate an accounting between assignor and assignee once the fruits of the contract are in the hands of the assignor - if this explanation was not acceptable Lord Browne-Wilkinson (at 108) said that *Tom Shaw* was wrongly decided.

<sup>156</sup> [1994] 1 AC 85 at 104 per Lord Browne-Wilkinson.

breached because the assignor has failed to perform its promise to immediately assign.<sup>157</sup>

[6.16.2] What remains unclear from the decision in *Linden Gardens* is that Lord Browne-Wilkinson made no statement as to whether the assignor was liable to the obligor for breach of contract in attempting to assign its rights under the contract other than what may be implied from his statement that legal effects two and four are unlikely to ever represent the intention of the parties.<sup>158</sup> This issue was later addressed by Millett LJ in *Hendry v Chartsearch Ltd.*<sup>159</sup> That case concerned a clause stating that the relevant party shall not be 'entitled' to assign. It was not like the clause in *Linden Gardens* that was in the form of a promise not to assign. Millett LJ said that a clause must take effect according to its tenor. He thought the assignment was effective as between the assignor

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<sup>157</sup> Despite Lord Browne-Wilkinson's reference to clear words being necessary to invalidate the contract between the assignor and assignee, it is difficult to see how the transaction between the assignor and obligor can in any way impact upon the efficacy of the contract between the assignor and assignee, see further Odith *Legal Aspects of Receivables Financing* (1991) para 8.7 at 260-61 and cf Meagher Heydon and Leeming *Meagher Gummow and Lehane's Equity, Doctrines and Remedies* (4<sup>th</sup> ed, 2002) para 6.465 - query, however, an application of *De Mattos v Gibson* (1858) 4 De G & J 276, 45 ER 108, see [6.34]. However, Lord Browne-Wilkinson did note that even with clear words such a provision could be against public policy. At most, such a provision may be recognised as a valid restraint of trade provision, however, although that may enable an obligor to obtain an order preventing the assignor breaching such a provision, contracts between the assignor and assignee that have already been entered into and discharged by performance would presumably not be rescinded. Moreover, there is little doubt that in any given case equity may still give effect to that contract as a bilateral agreement to assign which would operate as an assignment upon property coming into the hands of the assignor unless the assignee has already recovered damages for breach of that contract. This is a distinct (although related) point to the ability of the assignor and assignee to agree that the assignor will account to the assignee for the fruits of the contract when received by the assignor. This view was later adopted by Millett LJ in *Hendry v Chartsearch Ltd*, *The Times*, September 16, 1998, where he recognised an assignment between the assignor and assignee but said that as between the assignor and obligor it was without effect. It must then follow that the assignee's claim to any property coming into the hands of the assignor which forms part of the subject matter of the attempted assignment, must be a superior claim to anyone claiming through the assignor, see Goode 'Inalienable Rights?' (1979) 42 *MLR* 553 at 556.

<sup>158</sup> [1994] 1 AC 85 at 104.

<sup>159</sup> *The Times*, September 16, 1998.

and assignee but was ineffective to create a breach of contract between the assignor and obligor. He thought the assignment did not amount to a repudiatory breach of contract as between assignor and obligor and that as between the assignor and obligor was simply without effect. It followed that there was no tripartite assignment.

[6.16.3] There is a certain logical appeal in this. If the clause states that a party 'shall not assign' its rights that is, a promise not to assign, and if it is thought that such a clause prevents any attempted assignment being efficacious (as was held in *Linden Gardens*) then how can it be said the assignor has breached its obligation to the obligor because the end result is that it has not assigned the contract. However, perhaps the more logical result is that an attempted assignment in the face of a 'promise not to assign' would still be a valid assignment but would put the assignor in breach of contract with the obligor.<sup>160</sup> On the other hand an attempted assignment in the face of a clause stating that the assignor 'cannot assign' would render the attempted assignment ineffective but would not create a breach of contract between the obligor and assignor as there is no breach of promise.<sup>161</sup> The distinction here may be that a clause stating that a party 'cannot assign' renders the contractual right personal and not capable of assignment whereas a mere 'promise not to assign' amounts to a personal assumption of obligation not to do that which one would otherwise be empowered to do.

[6.16.4] An issue which then arises is whether the law should draw such a fine doctrinal distinction between a 'promise not to assign' and a clause preventing assignment, that is, a true prohibition on assignment. Arguably, if the legal effect of a provision is dependent on construction then the distinction is a real one and may represent the intention of the parties. It is this distinction that in fact would allow for the different legal effects set out in one and two above. In addition, as previously discussed, whether or not a right is personal is a matter of intention and arguably there is not much difference between the designation of a right as personal and an express provision negating the power to assign. The designation of a right as personal is not analogous to

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<sup>160</sup> *Fortunato v Patten* (1895) 41 NE 572. See also *MacDonald v Robins* (1954) 90 CLR 515 at 520 per Dixon CJ.

<sup>161</sup> There is a line of American cases that have held that such a clause does negate the power to assign, see Grismore 'Effect of a Restriction on Assignment in a Contract' (1933) 31 *Michigan L Rev* 299 at 305-6 and see *Sacks v Neptune Meter Co* (1932) 258 NYS 254 at 262 per Utermyer J.

a promise not to assign. Moreover, there does not appear to be any reported case where an attempted assignment of a right, which was in turn determined to be personal, resulted in the assignor being liable to pay damages to the obligor for breach of contract. Thus, arguably, this distinction is in fact already being drawn.

Finally, it is not possible to characterise a chose in action in the form of a contractual right to performance without taking into account the intention of the parties. The terms of the contract mould the characteristics of the chose in action. Therefore, if the parties state that a right is personal or incapable of assignment then such provisions define the chose in action so that its non-transferability is not merely a matter of contract, that is, a matter of mere promise, but rather an inherent flaw in the chose. Thus, although it is no doubt correct to suggest that contract operates through promises, it arguably does not follow that any prohibition on assignment, no matter how it is drafted, must amount to a mere promise not to assign. This would no doubt be the case if a prohibition only operated as a matter of contract but arguably it is not the case where the prohibition characterises the chose.

This is an important point for this dissertation and a misunderstanding of it can lead to error. For example, the Court in *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd*,<sup>162</sup> approving a statement of Utermoyer J in *Sacks v Neptune Meter Co*,<sup>163</sup> suggested that prohibitions on the assignment of contractual rights did not impeach the rule against restraints on alienation because such provisions merely condition the obligation to perform rather than the right itself.<sup>164</sup> That is, because the contractual restraint

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<sup>162</sup> (1993) 119 ALR 216 at 234-7.

<sup>163</sup> (1932) 258 NYS 254 at 262.

<sup>164</sup> (1993) 113 ALR 225 at 235. If that approval is seen as a general approval of his judgment then it is important to note that Utermoyer J drew a distinction between a provision that seeks to negate the power to assign and a provision containing a promise not to assign. The latter he held only gives rise to a right to damages and does not impact upon the efficacy of the assignment. This is inconsistent with the approach in *Linden Gardens*. A conservative reading of the judgment in *Devefi* would not go so far because, as already noted, later Gummow J (who was one of the members of the Full Court in *Devefi*) in *Caboche v Ramsey* (1993) 119 ALR 215 at 232, referred to the statement of Dixon CJ in *Hall v Busst* (1960) 104 CLR 206 at 217, to the effect that a contractual restraint on alienation can only give rise to a right to damages, and said of that statement that it was restricted to restraints involving interests in land and where 'the restraint is

conditions the obligation to perform it does not affect the alienability of the right.<sup>165</sup> This is perhaps one explanation as to why a prohibition may inhibit a tripartite assignment but does not inhibit the assignor and assignee coming to their own arrangements as regards the subject matter of the contract.

One can see the logic in this explanation of prohibitions from a contract perspective. As already noted, whether or not a right is personal depends upon whether the obligor intended to perform only for the benefit of the assignor. However, at the heart of this explanation appears to be the notion that contract may inhibit transferability as a matter of contract but contract cannot change the inherent characteristics of a right of property as a matter of property. Thus, if a right of property has the characteristic of being inherently transferable, the parties to the contract may inhibit that as between themselves as a matter of contract but this does not change the fact that that right has that inherent characteristic. There is no doubt that this argument has a logical appeal, however, it is suggested that it cannot be sustained.<sup>166</sup> The fact that the personal nature of a right depends in part upon the construction of the correlative obligation shows that there is a relationship between the right and obligation that cannot be separated. Clearly, whether or not a right is property is a matter to be determined by those principles and policies that determine the existence property. However, when a right owes its existence to an agreement between parties, such as a contractual right, it must be correct that the contract itself can define the characteristics of that right both in terms of contract and property.

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imposed upon dealings with debts or other choses in action, or with the benefit of performance of contracts involving personal skill and confidence, further, more detailed, principles apply both as to the interpretation and efficacy of such provisions.' For this proposition he referred to the decision in *Devefi and Linden Gardens*.

<sup>165</sup> A similar argument is that as between the parties to a contract, the contract is not considered property but obligation and therefore there can be no objection to the parties inhibiting transferability, see [6.15.4], [6.15.7].

<sup>166</sup> A further problem with this explanation is that it appears to suggest that the presence of a prohibition allows the assignor to transfer title to the right to performance without transferring the actual right to performance. As already noted, this result can be achieved as between the assignor and assignee as a matter of contract but it cannot be achieved from the perspective of property because the nature of contractual rights as choses in action does not allow a transfer of title without a transfer of the actual right, see [6.14]

The above distinction provides a neat analytical way forward. Clauses that negate the power to assign and contracts that on construction (express or implied) contain personal rights, have the effect of robbing the chose of its characteristic of transferability. Clauses in the form of promises not to assign operate merely at the level of contract leaving the obligor with a remedy of damages if the other party to the contract assigns the subject right.

[6.16.5] There are, however, arguments that a distinction between promises not to assign and true prohibitions on assignment should not be drawn.<sup>167</sup> Unless very well advised, contractual parties themselves are unlikely to appreciate this distinction for it to represent their presumed intentions. In addition, in many cases, the language of promise and the language of prohibition may be difficult to distinguish and both may appear in a provision. Moreover, the issue here is analogous to that arising in the case of options. An option may be explicable either on the basis of an offer coupled with a contract not to revoke or a conditional contract. Logically, a revocation of an option under the irrevocable offer theory would still be effective (as there is only a promise not to revoke) but would amount to a breach of contract not to revoke whereas such a revocation under the conditional contract theory would be totally ineffective and not amount to a breach of contract.<sup>168</sup> However, in *Goldsbrough Mort v Quinn*<sup>169</sup> Isaacs J, who appeared to prefer the irrevocable offer theory to that of conditional contract,<sup>170</sup> said that a revocation was nevertheless ineffective and in any case the court could order specific performance.<sup>171</sup> In his view, the revocation was ineffective at law.<sup>172</sup> However, at another point, he did state that what was sold was the option and not merely the promise to give an option,<sup>173</sup> that is, the subject matter of the contract and not merely the contractual right. O'Connor J was also of the view that no matter what theory was

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<sup>167</sup> Cf *Allhusen v Caristo Construction Corp* (1952) 103 NE 2d 891. See also Grismore 'Effect of a Restriction on Assignment in a Contract' (1933) 31 *Michigan L Rev* 299.

<sup>168</sup> See *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57 at 76 per Gibbs J.

<sup>169</sup> (1910) 10 CLR 674.

<sup>170</sup> (1910) 10 CLR 674 at 690-92.

<sup>171</sup> Cf (1910) 10 CLR 674 at 679 per Griffith CJ.

<sup>172</sup> (1910) 10 CLR 674 at 691.

<sup>173</sup> (1910) 10 CLR 674 at 692.

used, the court could order specific performance.<sup>174</sup> That is, in his view, whether or not the revocation was valid at law giving rise merely to a right to damages, equity would still order specific performance making the revocation ineffective. This would suggest that such fine distinctions will not be drawn if that would defeat the purpose of the transaction or provision.<sup>175</sup>

[6.16.6] Clearly, the decision in *Linden Gardens*, which involved a promise not to assign, did not draw this distinction and this must represent the law in England for the time being.<sup>176</sup> Moreover, as noted earlier, the position in Australia at present appears to be in line with the decision in *Linden Gardens*. Thus the position would appear to be that an attempted assignment in the face of either a promise not to assign<sup>177</sup> or a provision which attempts to negate the power to assign will be ineffective. It is suggested that the reason for this is that no matter how the prohibition is drafted, unless there are clear words to the contrary, the intention behind such a provision is to invalidate any attempted assignment. That is, the intended effect is, as Lord Browne-Wilkinson held in *Linden Gardens*, that of legal effect (1) above. In short, such promises, however drafted, characterise the contractual right as a chose in action and rob it of its transferability.

[6.16.7] Two questions then arise. First, is it the case that no matter how a prohibition is drafted, from a contractual perspective will it still be sufficiently promissory to give rise to

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<sup>174</sup> (1910) 10 CLR 674 at 686.

<sup>175</sup> However, it is quite clear, if a party does not simply attempt to revoke an option but rather sells the legal interest in the subject property to a third party, that third party may, if it does not have notice of the option, get good title and the optionee will be left with an action for damages against the optionor, see *Blacktown Municipal Council v Doneo* [1971] 1 NSWLR 157 at 162 per Taylor AJA. See further Farrands *The Law of Options* (1992) at 26-34.

<sup>176</sup> Cf *Barker v Stickney* [1919] 1 KB 121 (discussed [6.34.2]) where a publisher promised not to assign copyright except subject to the conditions of the contract between the author and publisher. It was held in that case that an assignment of that right was valid and the assignee was not required to pay the author royalties. The point was not taken that this provision amounted to a prohibition and perhaps this was because everyone assumed it was a mere promise not to assign which could not prevent the transfer.

<sup>177</sup> For American authorities making the same point as regards promises not to assign, see *Burck v Taylor* (1894) 152 US 634 (see [6.17]); *City of Omaha v Standard Oil Company* (1898) 75 NW 859. See also Grismore 'Effect of a Restriction on Assignment in a Contract' (1933) 31 *Michigan L Rev* 299 at 303 note 10. Cf *Fortunato v Patten* (1895) 41 NE 572.



a breach of contract by the assignor vis-à-vis the obligor by reason of the attempted assignment? Second, if the answer to the first question is in the affirmative, then how is it possible to distinguish prohibitions on assignment from personal contractual rights given that an attempted assignment of the latter does not appear to result in a breach of contract giving rise to an obligation to pay damages?

In the case of a promise not to assign, it will not be difficult to imply an obligation that the parties will not attempt to assign. This would simply flow from a co-operative construction of the promise not to assign. If that is right, then the attempt to assign gives rise to a breach of contract making the assignor liable in damages, to the obligor.<sup>178</sup> Such damages will be nominal as the assignment is ineffective so that the obligor has suffered no substantial loss. However, unless the assignee wishes to argue that the 'assignment' should take effect as an agreement to assign as between the assignor and assignee then any consideration paid by the assignee to the assignor should be recoverable on the basis of total failure of consideration if the contract between them is discharged.

There may also be an argument that a clause in the form that the parties 'cannot assign', that is, a prohibition, may still imply a promise not to attempt to assign which would give rise to an action for breach if such an attempt is made. If not, the law is straightforward, an attempted assignment in the face of such a prohibition or in the face of a contract containing personal rights is ineffective and does not give rise to a breach of contract.

If this is not the case a distinction needs to be drawn. It may be that a difference arises in the fact that a right is generally found to be personal by virtue of construing the entire contract. That is, the personal nature of the right is usually implied by construction rather than being found in an express provision. Moreover, the process of construction determines whether the right is personal rather than whether it was intended to be assignable. This may dictate that any attempted assignment of such a right would not amount to a breach of contract as it is difficult to imply from this a promise not to attempt to assign.

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<sup>178</sup> See *John Young & Co Kelvinhaugh Ltd v the Rugby Group Plc* (Queens Bench Division, HT 00/337, 19 December 2000, at para 24 per Judge Richard Seymour QC).

What then of an express provision making a right personal? On one view this should be subject to the same analysis above as regards personal rights implied by construction as it addresses the personal nature of the right rather than expressly addressing assignability. However, perhaps when an express personal rights provision is incorporated into a contract, it is reasonable to conclude that the contracting parties would see the relationship between this and a true prohibition. What other reason could there be for making a right expressly personal?<sup>179</sup> In fact, often a clause will state that rights are personal and then go on to state that rights are not assignable.<sup>180</sup> If that is right, then where the right is made personal by reason of an express provision, then a right to damages should flow from an attempted assignment if such a right to damages also flows from an attempted assignment in the face of a true prohibition.

Strictly, however, there is no distinction between the effect of non-compliance with an obligation that is express and one that is implied. That is, even if an obligation is found to exist by being implied by construction, its existence as a contractual obligation must be because it is an express or implied term of the contract which gives rise to a right to damages upon breach. Thus whether a right is personal by reason of an express provision or implied by construction the results that flow from of an attempted assignment should be the same. In any case, since the assignment is ineffective, the damages of the obligor are only going to be nominal and in fact it would be difficult in most cases to identify any loss.

**[6.16.8]** Finally, something must be said about effects two to five. At the outset, since the legal effect of such provisions depends on construction, it is possible to have any number of possible effects. For example, as regards legal effect two, if the owner of land upon which there exists an ice works enters into a contract with a neighbour to supply ice for a period of years, there is no doubt that the owner of the land still has a right to sell his or her land. The contract for the supply of ice does not act as a prohibition on such a sale (assignment). However, the effect of the sale may be to repudiate the supply contract making the owner liable in damages for breach of

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<sup>179</sup> One reason may be that there is confusion between the ideas of assignment and vicarious performance and the intention was merely to prohibit vicarious performance.

<sup>180</sup> Eg *ANC Ltd v Clark The Times* 31 May 2000.

contract.<sup>181</sup> In addition, clearly if a clause merely gives the obligor a right to terminate the contract upon assignment and it does not do so, the assignment would be valid but there may still be a breach of contract by the assignor. However, for the reasons discussed in detail above, it would be rare for a simple prohibition to have been intended to have the effect outlined in legal effect two.

The possibility of legal effect three requires full effect to be given to a true prohibition. That is, the assignment is invalid and the prohibition lacks any promissory element to give rise to a breach of contract between the assignor and obligor.<sup>182</sup>

Both Lord Browne-Wilkinson in *Linden Gardens* and Millett LJ in *Hendry v Chartsearch Ltd* have suggested that an assignment or attempted assignment in the face of a prohibition (whether promissory or prohibitory) will not amount to a repudiatory breach of contract.<sup>183</sup> It may be true that if the assignment is not valid there may not be a repudiatory breach. Moreover, the fact that damages will always be nominal would point to the conclusion that any breach is not a breach of condition, a sufficiently serious breach of an intermediate term or a repudiation. In addition, it would be difficult to identify a repudiation when the assignor is merely dealing with its rights. Nevertheless, since the issue of repudiation is dependent upon the facts of each case and given that the terms of a clause may state that an attempted assignment will amount to a repudiation, then this possible effect cannot be simply written off.<sup>184</sup> Finally, the possibility of a court finding a repudiation must be increased if the right in question is one of those rare instances where the burden is also transferred because here there would be evidence that the assignor was, by its conduct, evincing an intention to be no longer bound by the contract.

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<sup>181</sup> *Proctor v Union Coal Co* (1923) 137 NE 659. See also *Roadshow Entertainment Pty Ltd v ACN 053 006 269 Pty Ltd* (1997) 42 NSWLR 462.

<sup>182</sup> See *Hendry v Chartsearch Ltd*, *The Times*, September 16, 1998.

<sup>183</sup> This point was left open in *Westgold Resources NL v St George Bank Ltd* (1998) 29 ACSR 396 at 431 per Anderson J (affirmed [2000] WASCA 85).

<sup>184</sup> The example given above concerning the ice works, is an example of where a repudiation might arise.

A refinement of this issue has been suggested by the authors of *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies*. The authors have suggested that to determine the effect of a prohibition it is important to determine whether the prohibition amounts to a condition, warranty or intermediate term.<sup>185</sup> The argument put forward is that if a prohibition merely amounts to a warranty, then although the assignor would be liable in damages for breach of contract to the obligor, this construction would evidence that the obligor did not place sufficient importance on the clause to prevent the assignment itself being upheld.<sup>186</sup> In addition, even where the clause is construed as a condition, the efficacy of the assignment will only be impaired if the obligor elects to terminate its contract with the assignor for the breach. The flaw in this reasoning is simply that the tripartite classification is only relevant in determining whether or not there exists a right to terminate. It has nothing to do with the efficacy of the assignment except to the extent, as noted above, that an election by the obligor to terminate its contract with the assignor for breach or repudiation may extinguish the assignee's rights if those rights have not unconditionally accrued by the time of discharge.<sup>187</sup>

**[6.17] Who can enforce a prohibition?** The general position taken in cases appears to be that a prohibition exists for the benefit of the obligor<sup>188</sup> and neither the assignor (or anyone claiming through the assignor)<sup>189</sup> could raise it to defeat an assignment.<sup>190</sup> There

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<sup>185</sup> See Meagher Heydon and Leeming *Meagher, Gummow and Lehane's, Equity: Doctrines and Remedies*, (4<sup>th</sup> ed, 2002) para 6.465.

<sup>186</sup> See Meagher Heydon and Leeming *Meagher, Gummow and Lehane's, Equity: Doctrines and Remedies*, (4<sup>th</sup> ed, 2002) para 6.465.

<sup>187</sup> [6.15.6].

<sup>188</sup> *Portuguese-American Bank of San Francisco v Welles* (1916) 242 US 7. However, a prohibition may not necessarily be for the benefit of the obligor, see Restatement of Contracts 2d (1979) Art 322 official comment (d).

<sup>189</sup> *Re Griffin* [1899] 1 Ch 408; *Anning v Anning* (1907) 4 CLR 1049; *Re Westerton* [1919] 2 Ch 104 (all these cases ignored the existence of a prohibition in a dispute between an assignee and successors in title to the assignor). Similarly this would apply to the judgment creditor of the assignor, see *Hodder & Tolley Ltd v Cornes* [1923] NZLR 876 and *Attwood & Reid Ltd v Stephens Excavators Ltd* [1932] NZLR 1332 (although in *Hodder & Tolley* it was reasoned that a chose in action cannot be made inalienable by a contractual prohibition but a provision that monies owing are forfeited upon an assignment was valid and operable if the obligor elects to exercise that right of forfeiture; *Attwood* followed *Hodder & Tolley* on this point).

are perhaps three explanations for this result. The first is that the prohibition is purely contractual and only the party to the contract, for whose benefit the provision is provided, can enforce that provision. This explanation can only be accepted if a prohibition, no matter how it is drafted, only operates as a matter of contract. This was rejected above.<sup>191</sup> Second, and related to the first explanation, is that being merely contractual it characterises the obligation to perform and does not impact on the character of the assignor's contractual right as a piece of property having the characteristic of being transferable. Therefore, the right remains transferable as a chose in action. This explanation was also rejected above.<sup>192</sup> The third explanation, and it is suggested the best explanation, is that contract can define contractual rights in their character as choses in action and in any given case the obligor may only intend to deal with assignability as between itself and the assignor so that if the right inherently carries the characteristic of being transferable, it will continue to do so. That is, there is no reason to see assignability as an all or nothing issue. Such a result is a far too simplistic analysis of property rights. In short, the non-assignability of a chose in action (that would normally be transferable) only goes so far as is intended.<sup>193</sup>

One important authority which, it is suggested, clearly reflects the third explanation is the decision in *Burck v Taylor*.<sup>194</sup> A much simplified version of the facts in that case is that a construction contract (for a new capital building in Texas) contained a promise not to assign without consent. The assignor, with consent, assigned an interest in the contract to an assignee, and later, without consent, assigned an interest to a second assignee. The first assignee took over the burden of the contract and completed the work and was paid the contract price. The second assignee then claimed against the first

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<sup>190</sup> Of course, it does not follow from this that as between an obligor and assignee the assignment is valid unless the obligor elects to avoid it. Its intended effect is automatic in relations between the obligor and an assignee no matter what analysis is applied to prohibitions. See further Allcock 'Restrictions on the Assignment of Contractual Rights' [1983] *CLJ* 328 at 334-35 and cf Oditah *Legal Aspects of Receivables Financing* (1991) para 87 at 262.

<sup>191</sup> [6.16.4].

<sup>192</sup> [6.16.4].

<sup>193</sup> This is why a prohibition may only limit assignment for some purposes or may limit assignment only while the assignor has not earned the relevant counter-performance or may limit equitable assignments but not legal assignments or vice versa.

<sup>194</sup> (1894) 152 US 634.

assignee for a part of the contract price. The Court held that the assignor could not assign any right without the consent of the obligor and all the second assignee obtained was a right against the assignor.<sup>195</sup> Thus, only the first assignment was valid and on completion of the work by the assignee, it alone was entitled to the contract price even though the obligor made no complaint about the second assignment. Later in *Fortunato v Patten*,<sup>196</sup> another case involving a promise not to assign without consent, it was held that such a provision is solely for the benefit of the obligor and cannot be raised by competing assignees. The decision in *Burck* was distinguished on the basis that:<sup>197</sup>

[It] dealt with a contract made by an individual with the state of Texas, which contained an absolute, unqualified covenant that it should not be assigned ... [whereas in the present case] ... the covenant is that, if the contract, or any of the moneys due under it, are assigned without consent, no claim can be asserted by virtue thereof.... [Here] no absolute assignment has been made of the contract, but all transfers were of moneys due thereunder as collateral to secure the payment of a debt. There is a wide difference between assigning moneys due under a contract, and an absolute assignment of the contract itself, as the latter act disturbs that relation of personal confidence which exists between one desiring work done that requires a high order of skill and intelligence and the contractor he may have selected as possessing these necessary qualifications.

This passage appears to draw a distinction between the assignment of a right to performance and an assignment of the fruits of a contract and in the case of the latter, the prohibition cannot be raised by competing assignees. However, in both cases the right assigned was a right to a payment under the contract and it was assigned prior to it being earned. Thus both cases concerned the assignment of rights to performance.

The decision in *Fortunato* appears to suggest that in *Burck*, the ‘assignee’ was taking over the contract, in the sense of taking over the assignors’ obligations to the State and not the assignor’s obligations to any other ‘assignees’. Thus what was in fact intended was a novation.<sup>198</sup> However, the facts in *Burck* were that the original ‘assignment’ to the

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<sup>195</sup> [6.15.7].

<sup>196</sup> (1895) 41 NE 572.

<sup>197</sup> (1905) 41 NE 572 at 573.

<sup>198</sup> The Court in *Burck* at one point do seem to make this determination, see (1894) 152 US 634 at 650, but cf at 651 and this was the understanding of the decision in *Portuguese-American Bank of San Francisco v Welles* (1916) 242 US 7.

first assignee was only a three-quarter interest in the contract, the second assignee was intended to take the one quarter interest left vested with the assignor.<sup>199</sup> Moreover, the Court in *Burck* made the point that the second assignee may have had a claim against the assignor for any monies it had earned under the contract, but as it was the first assignee who in fact did all the work and earned the entire contract price, the assignor earned nothing to which the second assignee could make a claim against.<sup>200</sup> The decision of the Court on this point seems akin to the position of a trustee in bankruptcy taking over the contract<sup>201</sup> and appears to be based on principles of assignment rather than novation. The Court stated that ‘when the contract, being wholly executory, is transferred to a third party who is accepted by the promisor in lieu of the original contractor, such third party enters upon the performance of the contract free from any disposition of the profits made by the original contract or before the substitution.’<sup>202</sup> More importantly, the Court in *Burck* expressly dealt with the submission that the prohibition was only for the benefit of the obligor and found, on the facts, that that was not the case because the clause in question did not merely involve a promise not to assign but rather it dealt with the effects of such an assignment and stated that such a transfer shall ‘annul the contract’. Thus what really occurred in *Burck* was, putting aside the assignment of burdens point, that the prohibition incorporated into the contract sought to completely characterise the relevant right both as a matter of contract and as a chose in action so that unless consent was obtained it did not have its inherent characteristic of transferability so that an ‘assignee’ could not claim it was transferable even where the obligor made no formal objection to the transfer.<sup>203</sup> Here the obligor did not intend to characterise its obligation (and the correlative right) only as between the obligor and assignor. It intended to maintain that character even as between competing assignees whereas this was not the intention in *Fortunato*. It is difficult to see how these variations can be achieved by adopting the view that prohibitions merely operate

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<sup>199</sup> Thus if there was a novation it must have been based on an acceptance of the ability of parties to agree to discharge part of a contract while leaving the rest intact.

<sup>200</sup> (1894) 152 US 634 at 652-53.

<sup>201</sup> [4.9.5].

<sup>202</sup> (1894) 152 US 634 at 653.

<sup>203</sup> See also (1894) 152 US 634 at 651 where the Court says the result would be the same without the provision as the right assigned was a personal right which could not be assigned without consent.

through contract. Contract has a limited ability to benefit or burden third parties and where this is required or where this is the result, then property is a legal concept better suited to explain such results.

#### ***(iv) The principle of transfer as it relates to the personal rights rule and contractual provisions dealing with assignment***

**[6.18] Introduction.** In the discussion above, it was seen that presumed party intention or construction, is the guiding principle determining the personal or impersonal nature of a right. As noted, the relevance of party intention also flows through to express provisions dealing with assignment. It still remains necessary to state not only why the personal rights rule exists but why it is an intention driven rule.

**[6.19] Relevance of transfer.** It is suggested that the principle of transfer explains the existence of the personal rights rule. The proof that the principle of transfer gives rise to the 'personal rights' rule is in fact very simple and straightforward. As noted earlier,<sup>204</sup> one of the most important aspects of transfer is that it is not possible to assign a right greater than that vested in the assignor, that is, the *nemo dat* rule. If the parties to a contract expressly or impliedly make a right personal then, if that right were allowed to be assigned there would be a breach of the *nemo dat* rule as the assignor would have managed to assign a right greater and different to the one vested in the assignor. That this is the case flows from the point made a couple of times in this Chapter namely, that contractual rights both in their nature as personal contractual rights and as choses in action owe their existence and characteristics to the intention of the parties. If that intention is to make a right personal then this represents one of the important characteristics that define that right as a chose in action. If the assignor could then assign an 'impersonal' right it would have effectively assigned a chose in action it does not have title to, that is, a chose in action that has the characteristic of transferability. The intention of the parties is to rob the right of its inherent transferability. Thus the principle of transfer dictates the existence of the personal rights rule and the intention driven version of the rule. This same reasoning explains the efficacy of express provisions dealing with assignment. However, if the personal rights rule and the

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<sup>204</sup>

[3.9].



efficacy of express provisions dealing with assignment were merely based on contract then the existence of the rule and the efficacy of such provisions could not be explained by reference to the principle of transfer.

### ***(v) A defence of the principle of transfer***

**[6.21] Introduction.** The personal rights rule has come under intense criticism from one commentator (Larry A DiMatteo). The basis of that criticism is that it inhibits assignability when there is (according to DiMatteo) a need for greater assignability. As noted in Chapter One, there is no intention here to enter the debate over the possible need for greater assignability. However, although DiMatteo does not make the link between the personal rights rule and the principle of transfer, his criticism unintentionally directly attacks, if not the correctness of the transfer thesis, the continued worth of the transfer thesis. This flows from the fact that he argues for an end to the personal rights rule, the existence of which is predicted by the transfer thesis. Therefore, it is convenient at the end of this section dealing with the personal rights rule to set out his views and subject them to criticism for the purpose of reinforcing the transfer thesis.

**[6.22] DiMatteo's call for change.** Professor DiMatteo has called for a review of the non-assignability of personal service contracts.<sup>205</sup> He suggests that such a review is necessary due to the change in the nature of personal service contracts and their increasing popularity.<sup>206</sup> DiMatteo's concern is to bring the *per se* non-assignability rule in personal service contracts in line with what he perceives as a pro-assignment 'trend'.<sup>207</sup> His thesis is that rights should be considered assignable even if the parties intend the rights to be personal so long as the benefit to the assignor is considerable and

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<sup>205</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407.

<sup>206</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 407.

<sup>207</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 425, 429-30, 438-42.

the assignment does not cause any appreciable harm to the obligor.<sup>208</sup> It should also be noted that DiMatteo uses the word assignment to include the vicarious performance of duties.

There is little doubt that the number of service contracts entered into and the service industry itself in countries like Australia, England and the United States, has greatly increased in recent years and its importance to the economy recognised. As to the change in the nature of such contracts, DiMatteo points to the increase in the monetary stakes involved, the fact that it is no longer the case that such contracts concern one on one relationships, the standardisation of services,<sup>209</sup> the interchangeable nature of many services which renders such transactions similar to transactions in goods, the increasingly fungible nature of services contracts and the increase in the sophistication of contract parties.<sup>210</sup>

**[6.23] DiMatteo's criticism.** DiMatteo's principal criticism is that there are many conflicting decisions on the personal nature of services despite similar fact patterns. This he suggests shows that there is no consistent underlying jurisprudence.<sup>211</sup> He also criticises the *per se* non-assignability rule on the basis that it does not inquire into the skill of the delegate or whether the delegate is just as worthy of trust or confidence as the contracting party.<sup>212</sup>

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<sup>208</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 424.

<sup>209</sup> That standardisation he suggests (at 436-7) flows from consumer protection laws, implied warranties and licensing laws.

<sup>210</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 408.

<sup>211</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 408.

<sup>212</sup> He cites *Sally Beauty Co Inc v Nexxus Products Co Inc* (1986) 801 F 2d 1001 at 1008 ('When performance of personal services is delegated, the trier merely determines that it is a personal services contract. If so, the duty is *per se* non-delegable. There is no inquiry into whether the delegate is as skilled or worthy of trust and confidence as the original obligor.') Cf *Wetherell Bros Co v United States Steel Co* (1952) 200 F 2d 761 (the court here reasoned in part that the assignment was invalid on the basis that the assignee was not qualified to carry out the delegated duties).

In his review of United States case law he concludes that the courts did initially focus on the perceived intention of the parties to determine whether or not a right or obligation was personal. That is, the approach was one of construction rather than a mere characterisation of the nature of the services.<sup>213</sup> Thus, the services of an opera singer and that of a shoemaker were not viewed differently. He goes on to note that American courts have resorted to the same factors as in Anglo-Australian law to determine whether a right or obligation is personal.<sup>214</sup> However, he criticises the resort to factors such as 'trust and confidence' as most contracts involve some level of trust and confidence. He finds more favour with 'skill', 'knowledge' and 'expertise,' but suggests these should be limited to the learned professions. He also identifies a line of American case law similar to a line of English cases that adopt a view that the nature of the subject matter of certain contracts is inherently personal.<sup>215</sup> It appears from his review that United States law is essentially the same as Anglo-Australian law and if that is so and if DiMatteo's criticism has weight it must also be relevant to Anglo-Australian law.

One important point he raises concerns the change of form of a party to a contract. For example, the withdrawal of a partner or the change in ownership of a company. He suggests the courts in the United States have wavered as to whether such changes amount to an invalid assignment. The more modern cases have held that a change in form does not amount to an invalid assignment. This he suggests are result based determinations.<sup>216</sup> Most business today is done through companies and the *per-se* rule, if applied, he suggests would impede business.<sup>217</sup> There is no doubt that the ability of a

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<sup>213</sup> *Paige v Faure* (1920) 127 NE 898 at 899 ('The intention of the parties to a contract must be ascertained not from one provision, but from the entire instrument'.)

<sup>214</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 418. See [6.12].

<sup>215</sup> See also DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 416. See also *Peters v General Accident Fire & Life Assurance Corporation Ltd* [1938] 2 All ER 267 at 269, 270 per Sir Wilfred Greene MR. As to inherently personal obligations, see *Edwards v Newland & Co* [1950] 2 KB 534.

<sup>216</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 425-9.

<sup>217</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 425-6.

company to vary its management and even its ownership may present problems for persons contracting with them.<sup>218</sup> For example, a company can change its ownership by a sale of shares without a sale of assets. Moreover, the management of the company may completely change, sometimes for the purpose of changing the personality of the company and the way it operates. The management of the company may also be placed in the hands of a receiver or liquidator. In each of these cases, even though there has been no assignment or sub-contracting, one party to the contract has completely changed character.<sup>219</sup>

**[6.24] DiMatteo's suggested approach.** DiMatteo suggests that the United States courts have resolved this problem with companies by use of an effects test.<sup>220</sup> This he suggests should be further expanded to assignment generally. He submits that assignability should depend upon whether or not the assignment 'materially changes' the duty to be performed.<sup>221</sup> If the obligor is not adversely affected by the assignment then the assignment should be upheld.<sup>222</sup> He states<sup>223</sup> that this test was proposed in the Restatement (First) of Contracts<sup>224</sup> and later adopted by the Uniform Commercial

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<sup>218</sup> Hence the inclusion of change of control provisions in contracts which mirror restrictive assignment provisions.

<sup>219</sup> In *Griffiths v Secretary of State for Social Services* [1974] QB 468, a case concerning the assignment of a publishing contract, it was suggested that a company would wish to maintain its good reputation despite changes in members and officers and therefore, despite the fact it could dismiss a manager, an author could act on the assumption it would appoint someone who would maintain the company's reputation if the author entered into the agreement because he or she was impressed with a particular manager.

<sup>220</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 427, 428.

<sup>221</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 431.

<sup>222</sup> Later (at 435) he suggests that in a delegation, if the delegator is to remain primarily liable then it is unlikely that the vicarious performance can have an adverse effect. However, consider this view as it relates to assignment, for example, an equitable assignment of a contractual right. In such a case, the assignor maintains a cause of action and, at law, the obligor's duty is still owed to the assignor. Does that then mean any assignment must be possible as there can never be an adverse effect on the obligor!

<sup>223</sup> (1994) 27 *Akron L Rev* 407 at 432.

<sup>224</sup> Restatement (First) of Contracts (1932) §151 ([An assignment is] effective ... unless [it] ... would vary materially the duty of the obligor, or increase materially the burden or risk imposed

Code.<sup>225</sup> Where it is unclear whether the assignment would work such a material change, he suggests the assignment should be allowed if adequate assurances are given that no such change will result. He adds that courts should also take account of the fungibility of the service being rendered (that is, the extent to which substitute performance is available)<sup>226</sup> and whether the duty being performed involves a degree of supervision and discretion.

Ultimately, DiMatteo's approach attempts to determine assignability by whether or not the assignment should in fact (or at least in the eyes of the court) be of concern to the obligor. It takes no account of whether the assignment does concern the obligor whereas assignability based on contractual intent determines whether or not the obligor is concerned about who it performs its contractual duties for.<sup>227</sup> His thesis boils down to the idea that rights should generally be considered assignable and even if the parties intend rights to be personal, the assignment of those rights should still be upheld if the benefit to the assignor is considerable and the assignment does not cause any appreciable harm to the obligor. However, early in his paper, when first setting out his

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upon him by his contract, or impair materially his chance of obtaining return performance.') See also Restatement (Second) of Contracts (1982) §317(2) ('A contractual right can be assigned unless (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him.') Query, however, whether these provisions are simply making a slight change to the rule that an assignment may not vary the obligation of the obligor. That rule's existence is dictated by the principle of transfer (see [6.26]) and these provisions appear to simply condition it with the notion of a 'material' change. Alternatively, it may be (although it is not clear) that these provisions introduce the notion that the obligor is to be no worse off in fact by virtue of the assignment at least where the detriment is material, cf [6.27]. For a view that the statutory regime for legal assignment in Anglo-Australian law did away with the personal rights rule, see [6.12].

<sup>225</sup> Uniform Commercial Code (1977) Article 2-210(2).

<sup>226</sup> Eg *Pingley v Brunson* (1979) 252 SE 2d 560 (availability of substitute organ players prevented order of specific performance); *In re Da-Sota Elevator Co* (1991) 939 F 2d 654 (elevator maintenance was held a routine commercial function not requiring outstanding genius and not entitled to treatment as a non-transferable personal service contract).

<sup>227</sup> *Boston Ice Co v Potter* (1877) 25 Am Rep 9 (a person may want personal service for no logical reason, but that cannot be inquired into if the intention is clear).

approach, he suggests that the detriment should be based on 'the expectations of the adverse party as to the totality of the bargain at the time of contracting'.<sup>228</sup> That, with respect, reads like an exercise in contract construction, which the rest of his paper is concerned to negate. Finally, DiMatteo suggests that his approach is in line with the 'new spirit of contract' which requires good faith and fair dealing. He states, 'the use of a presumption of assignability would be a way of requiring that the obligee gives a 'good faith' reason for not consenting to an assignment'.<sup>229</sup> However, 'good faith', to the extent it is accepted as a principle of Anglo-Australian law, informs the performance of contractual obligations. Yet DiMatteo appears to require an objective good faith reason, which is outside the four corners of the contract, for objecting to the assignment.<sup>230</sup>

**[6.25] Criticism of DiMatteo's approach.** DiMatteo's major criticism is that this area lacks a jurisprudence. In my conclusions above I suggested that there is a jurisprudence underlying the personal rights rule. That jurisprudence is based on the principle of transfer. It is that principle that dictates that weight be given to the intention of the parties. Moreover, it was shown that courts do not investigate whether contract parties intend rights to be assignable, but rather, whether they were intended to be personal or (in the case of prohibitions) *not* assignable. In this way assignability is in fact promoted, a point that DiMatteo appears to overlook. Moreover, it is suggested that DiMatteo's critique is misconceived for the following reasons.

First, he suggests that the *per se* rule of non-assignability to personal service contracts may have made good sense when all contractual relations were deemed personal.<sup>231</sup> This suggestion evidences a misconception of history. In English common law, all contracts were considered personal for a number of reasons but perhaps principally because of the view that a contract presupposes a personal relationship between the

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<sup>228</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 409.

<sup>229</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 440.

<sup>230</sup> Moreover, the better view is that good faith is a principle that informs the construction of contracts and is therefore intimately tied to the intention of the parties, see Peden *Good Faith in the Performance of Contracts* (2003).

<sup>231</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 424.

parties to the contract.<sup>232</sup> It was this that prevented the common law from recognising contractual rights as assignable choses in action even after choses in action were considered property. This is simply a view taken as to the nature of 'contract'. The personal nature of a contractual right which prevents its assignment as a matter of party intention is a distinct matter and developed when assignment was recognised. Therefore, it is not simply a common law rule, it also governs equitable assignments of contractual rights.

Second, his criticism flows from what he sees as numerous conflicting decisions despite similar facts. He cites<sup>233</sup> with approval, *Pino v Spanish Broadcasting System of Florida Inc.*,<sup>234</sup> for its statement that the foundation of assignability is 'the sanctity of contract and providing uniformity and certainty in commercial transactions'.<sup>235</sup> However, he looks for certainty and uniformity in the wrong place. Where a result is based on construction it is an error to compare results for the purpose of determining whether or not the law is certain and uniform. Certainty and uniformity here depends upon the proper application of principles of construction.<sup>236</sup> In construction cases, the courts are very much in the hands of lawyers and the arguments put to the court. In addition, DiMatteo's approach appears to pay no regard to the reference to 'sanctity' in the above statement. 'Sanctity' here probably means security. An approach that pays no regard to the presumed intention of the parties is hardly in tune with security of contract.

Third, DiMatteo is happy to uphold express prohibitions on assignment as part of freedom of contract and presumes parties are sufficiently informed today to be capable

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<sup>232</sup> [2.4.1].

<sup>233</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 439.

<sup>234</sup> (1990) 564 So 2d 186.

<sup>235</sup> (1990) 564 So 2d 186 at 189.

<sup>236</sup> An example of this in English law is the different results reached on similar facts in *Robson v Drummond* (1831) 2 B & Ad 303, 109 ER 1156 and *British Waggon Co & Parkgate Waggon Co v Lea & Co* (1880) 5 QBD 149. However, if the results are seen to be based on construction they should not be seen as being at odds with each other. See further *Southway Group Ltd v Wolff* (1991) 57 BLR 33 at 43 per Parker LJ; *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1019 per Viscount Simon LC.

of protecting their interests in this way.<sup>237</sup> However, when a court upholds an express prohibition against assignment, it is giving effect to the intention (and expectation) of the parties. Those intentions are derived from construction. Simply because there is an express clause dealing with assignment does not mean its meaning and legal effect are not determined by construction. All the terms of a contract whether express or implied must be construed to determine their meaning and legal effect. It must then be the same where the parties' intentions are not as obvious. DiMatteo's support for upholding express prohibitions is at odds with his approach to personal rights and obligations. If parties are currently free to contract on the basis of an express prohibition they must also be able to expressly contract on the basis that the contract is personal.<sup>238</sup> Moreover, if parties can expressly make a contract personal they must also be able to do so impliedly. The end result is that DiMatteo's approach helps those who can afford and do receive legal advice as it is only by an express prohibition that assignment can be contained. The person not so well placed, who intends the contract to be personal, loses out.<sup>239</sup>

Fifth, DiMatteo's review of the pro-assignment cases showed 'that a finding of trust, confidence, skill, knowledge, and expertise need not be the death knell of assignability.'<sup>240</sup> However, even if a construction approach is adopted, these 'factors' are never decisive. This was evident in the judgment in *Tolhurst's* case which clearly adopts construction as the test.

Sixth, DiMatteo does not appear to recognise that his material change test must also in part be informed by construction. Without a statutory or code provision to the contrary,

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<sup>237</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 441.

<sup>238</sup> See *Frissell et ux v Nichols* (1927) 114 So 431 at 434 ('It is competent for the parties to make any contract a personal one no matter what the subject matter. If the intention is manifested by the parties in express terms in the contract itself, it effects the same object as where the law implied the intention from the subject matter.')

<sup>239</sup> See *Swarts v Narragansett Electric Lighting Co* (1904) 59 A 77 at 77 ('It would be quite unjust to a party to be bound to an assignee ... simply because it had not occurred to him to mention in the contract that it could not be assigned.')

<sup>240</sup> DiMatteo 'Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability' (1994) 27 *Akron L Rev* 407 at 430.



it cannot be correct, in a contractual situation, to determine whether or not an assignment or delegation will materially alter the position of a party without resort to the terms of the contract and the factual matrix of the contract.

Seventh, as to changes in form, although usually it may be said that a party contracts on the understanding that employees, managers or partners may resign,<sup>241</sup> or companies may be restructured,<sup>242</sup> this does not mean that in all cases the personality of that party is not material. For example, a person may contract with a particular company for the skill that that company is held out to have.<sup>243</sup> Therefore, certain obligations of that company may not be vicariously performed nor certain rights assigned. For example, in *Griffith v Tower Publishing Company Ltd, and Moncrieff*,<sup>244</sup> the receiver of a corporate publisher attempted to assign its rights under a certain publishing agreement to another publisher. The plaintiff argued that he entered into the publishing contract with that company because he liked the style and form in which that company published its books and he was impressed with the efficiency of the company's manager. It was held that the rights were not assignable, they were personal to the company because of the confidence placed by the plaintiff in the corporate publisher. The author would, of course, on normal principles be able to assign its right to any payments. As to the vicarious performance of duties, a company may only operate through its officers so there will usually be an implied right allowing the company to delegate duties to competent persons. There may, however, be cases where a person has contracted with a

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<sup>241</sup> See *Johnson v Raylton, Dixon & Co* (1881) 7 QBD 438 at 454 per Brett LJ. See also *Phillips v Alhambra Palace Co* [1901] 1 QB 59.

<sup>242</sup> See *Sally Beauty Co Inc v Nexxus Products Co Inc* (1986) 801 F 2d 1001 at 1009 per Posner J citing *United States Corp v Hackett* (1986) 793 F 2d 161 at 163-4.

<sup>243</sup> Previously, the personal nature of a contract with a company may have been evidenced by reference to the powers contained in its memorandum and articles. In addition, the existence of such powers may have limited the field of potential assignees. This perhaps is not as relevant today given the demise of the ultra vires doctrine, see further *Wetherell Bros Co v United States Steel Co* (1952) 200 F 2d 761.

<sup>244</sup> [1897] 1 Ch 21. See also *Stevens v Benning* (1855) 6 De GM & G 223, 43 ER 1218; *Hole v Bradbury* (1879) 12 Ch D 886. See further *Reade v Bentley* (1857) 3 K & J 271, 69 ER 1110; *Johnson v Raylton, Dixon & Co* (1881) 7 QBD 438.

company because of the particular expertise of a certain officer. Where there is such a reliance, the duty cannot be performed by anyone other than that officer.<sup>245</sup>

DiMatteo accepts that there may be cases where a change in corporate personnel may materially alter a contract, however, he concludes that if the same effect as an assignment can be obtained by a company selling its shares, it becomes non-sensical to continue to apply the personal rights rule. However, as pointed out by Lord Atkin in 1940 in *Nokes v Doncaster Amalgamated Collieries Ltd*,<sup>246</sup> a person contracting with a company must be prepared to run the former risk but is not obliged to run the latter.

Eighth, DiMatteo does not address the broader implications of his thesis. Under his thesis contractual rights are presumed not to be personal. What then of an offer? Generally the view is taken that an offer is not assignable because it is not a chose in action and it is personal to the offeree. The rules of acceptance are based on this idea. If the chose in action point were overcome, which is unlikely, then, if DiMatteo is correct, that offer must be potentially assignable as long as its acceptance by an assignee would not materially alter the offeror's circumstances. This cannot be right. It is a fundamental principle of contract formation that offers (and options)<sup>247</sup> may be made to a certain person or the entire world. Whether the former or the latter is the case has always been considered an issue of construction.

Finally, DiMatteo's call for a re-assessment of the personal rights rule is partly based on what he perceives as the now fungible nature of services. This reasoning is not

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<sup>245</sup> Eg *Southway Group Ltd v Wolff* (1991) 57 BLR 33. See also *Smith v Board of Education of City of Liberal* (1924) 222 P 101 (this case concerned a contract with a partnership of architects; one of the two partners left the firm and was replaced; it was held that the obligations of an architect are generally personal as they require special knowledge, skill and taste and involve an element of personal confidence; here a change in the firm meant that the services of one of the architects was not available and that rendered the contract unenforceable; it followed that the Board had contracted for the skill of both the partners.) As to partnerships see also *Dr Jaeger's Sanitary Woollen System Co Ltd v Walker and Sons* (1897) 77 LT 180; *Robson v Drummond* (1831) 2 B & Ad 303, 109 ER 1156, *The British Waggon Company and the Parkgate Waggon Company v Lea and Co* (1880) 5 QBD 149.

<sup>246</sup> [1940] AC 1014 at 1030.

<sup>247</sup> Eg *Clayman v Goodman Properties Inc* (1973) 518 F 2d 1026.

convincing. It may be true that there is much more sub-contracting today in the provision of services than was the case in the past. However, this may well be done without the knowledge of the consumer. If this is so, it would not evidence a growing acceptance of such practices or flow on to the greater assignability of rights. Also, if one takes the example of a hotel booking where a customer finds that the hotel is overbooked but the hotel puts him or her up in a hotel just around the corner which is a hotel of the same or better standard, the customer may well accept this as there is no real inconvenience, but that alone would not suggest that the customer thinks he or she is obliged to accept it. In short, much more empirical evidence is required before a review of such a fundamental rule should be carried out.

### ***(vi) Assignment may not vary the obligations of the obligor***

**[6.26] General rule.** It is a rule of assignment that it is not possible to vary the obligations of the obligor. For example, if X owes A a debt of \$100 payable at a certain place on a certain date, although A may be able to assign its right to the debt to a third party, that assignment alone cannot force X to pay the debt at another place nor on another date.<sup>248</sup> This rule is also expressed in terms that it is not possible by assignment to increase the burden of the obligor.

There is a relationship between this rule and the rule prohibiting the assignment of personal rights. If a right is personal, then to recognise its assignment is to vary the obligations of the obligor.<sup>249</sup> It is only when the presumed intention of the obligor is that it is irrelevant to the obligor who it performs for that performance for a person, who was not an envisaged beneficiary of the contract at the time of contract, does not amount to a variation of the obligation.

**[6.27] The variation of obligations rule and the principle of transfer.** The variation of obligations rule is not limited to accompanying the personal rights rule and is an

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<sup>248</sup> *Corbin on Contracts* (1963) Vol 4 para 868. This is not inconsistent with the rule that a debtor must seek out his or her creditor.

<sup>249</sup> For example, if A agrees for a certain remuneration to look after B for a certain period of time, B cannot assign that right to C. Clearly, this is a personal right and to allow the assignment would require A to look after C which is a different obligation to that promised under the contract.

independent rule of assignment. It is suggested that its genesis lies in the principle of transfer. That principle dictates that it is not possible to assign a right different to or better than the one vested in the assignor. If the assignor were able, by assignment, to vary the obligation of the obligor, it will then have managed to assign a right different to the one it has which is at odds with the principle of transfer. Moreover, if it were possible by assignment to vary the obligation of an obligor, then assignment would be an institution that was incompatible with contract because the extent of the voluntarily assumed obligation of the obligor would have changed. As already noted, as long as the principle of transfer governs assignment, it pays respect to party intention and therefore assignment as an institution is not at odds with contract.

It is important to emphasise that this rule is a rule governing assignability. It comes into operation where an assignment, if given effect to, would vary the obligation promised by the obligor. For example, if the obligor's performance is dependent upon a contingency and the effect of an assignment would increase the likelihood of that contingency occurring then the assignment could not be upheld because of this rule.<sup>250</sup> That is, because the assignment itself would have the effect of varying the allocation of risk agreed to under the contract. An obvious example of this is an insurance contract. It is possible for a contract of general insurance to be considered personal solely on the basis that the insurer's decision to insure is based on the level of risk posed by the insured. Here the insurer's obligation is subject to a contingency, that is, an event which is not in the control of either party. If by assignment the agreed probability of that contingency occurring increases, then, if the assignment is upheld, that would effectively vary the obligation of the obligor. The same reasoning applies to the provision of credit. A right to credit is personal as it is based on an assessment of the debtor's ability to repay. At the

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<sup>250</sup> It has been held that it is not possible for a creditor to assign the security for a debt while keeping the benefit of the debt because the effect would be to vary the obligation of the debtor. The result would be to convert one debt owing by the debtor and security provider into two debts, one owed to the creditor and one to the assignee, see *Hutchens v Deauville Investments Pty Ltd* (1986) 68 ALR 367.

same time an assignment of the right to credit may increase the risk that the assignor, with whom the duty to repay still lies, may not repay, thus varying the burden of the obligor.<sup>251</sup>

Sometimes this rule is relied upon to reject an assignment when the better analysis is that the obligor in the circumstances merely had a right to reject the request for performance. For example, in *Kemp v Baerselman*,<sup>252</sup> which was discussed earlier,<sup>253</sup> in addition to finding the assigned right personal on the basis of construction, the court also hinted that the assignee company, being a much larger concern than the assignor, could make demands on the farmer well in excess of his promised performance and thereby vary his obligation. It is suggested that this reasoning is incorrect. The assignee could not make greater demands on the obligor because it only took a transfer of a right equivalent to that previously vested in the assignor. The assignment did not have the effect of varying this obligation and so the assignment itself should not have been rejected on this ground. Clearly, however, if the assignee made a demand for performance which was in excess of that promised by the obligor, the obligor could reject that demand. The principle of transfer dictates that the assignee could not make a demand for performance which is in excess of that originally promised to the assignor. However, here the principle of transfer is governing performance, that is, it is characterising the right vested in the assignee. It is not determining assignability. This case is different to the examples given above where the effect of the assignment, if upheld, would actually have the effect of varying the allocation of risk under the contract.

The reasoning in *Kemp's* case would be more acceptable if the law took the view that this rule did not merely extend to variations in law (that is, variations of the contract) but also to variations of the obligation in fact.<sup>254</sup> There is a clear relationship between

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<sup>251</sup> *Cooper v Micklefield Coal and Lime Co Ltd* (1912) 107 LT 457. See also *Cole v Wellington Dairy Farmers Co-op Association Ltd* [1917] NZLR 372 and *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1019 per Viscount Simon LC.

<sup>252</sup> [1906] 2 KB 604. See also *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 at 423 per Lord Robertson.

<sup>253</sup> [6.13].

<sup>254</sup> Interestingly, there is a similar line of cases in the United States holding a buyer's contractual right to goods is unassignable by reason that the assignee's requirements being different to that of

this rule and the rule that the obligor is to be no worse off by reason of the assignment. However, it is suggested that the law of assignment is generally not concerned with whether or not the obligor is worse off (or potentially worse off) in fact by reason of the assignment.<sup>255</sup> Take for example the simple case of the assignment of part of a debt. Clearly that leads to a certain inconvenience for the debtor as it must now pay two people. However, the law takes the view that despite such an assignment, there still remains one debt and therefore the debtor is no worse off.<sup>256</sup> This can only be referring to the debtor being no worse off in law. Moreover, an assignment forces an obligor into a relationship with a third party not of their choosing (who may not be as accommodating as the assignor) and by application of the subject to equities rule prevents the obligor raising certain defences against the assignee that could have been raised if the action was being brought by the assignor.<sup>257</sup> The law does not even investigate the motive for an assignment. An assignment may take place for the sole

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the assignor's. It was thought necessary that these cases should be overcome and this was done not by the introduction of the 'material change of duty' test (see [6.24]) but rather by removing the personal discretion in output requirement and exclusive dealing contracts and substituting the objective standard of 'good faith operation of the plant or business to be supplied', see Uniform Commercial Code Art 2.210 comment 4 and Art 2.306. See further *Farnsworth on Contracts* (1990) Vol 3 para 11.4.

<sup>255</sup> It is no doubt possible to find exceptions. For example, it has been held that before an assignee can commence an action against an obligor, the assignee may be required to settle the costs of a previous unsuccessful action against the obligor brought by the assignor, see *Sinclair v British Telecommunications plc* [2001] 1 WLR 38. In addition, a statutory provision may extend only to the assignor, see *Deposit Protection Board v Barclays Bank Plc* [1994] 2 AC 367.

<sup>256</sup> Cf United Nations Convention on Assignment of Receivables in International Trade article 18(6) which, in the case of a partial assignment allows the debtor to obtain a complete discharge by paying as if it did not receive the notice of the assignment or a partial discharge by paying as directed by the notice. It was thought that if this were not the case, and the debtor was required to pay several assignees, then the cost of this would need to be addressed in the Convention, see UNCITRAL Report of the United Nations Commission on International Trade Law on its Thirtieth-Fourth Session 25 June-13 July 2001, General Assembly Official Records Fifty-Sixth Session Supplement No 17 (A/56/17) para 20.

<sup>257</sup> To some extent this effect could be seen as allowing the obligor to be worse off in law by virtue of the assignment as he or she is deprived of certain defences. However, the defences here are all procedural defences rather than substantive defences (see [8.32]) and the obligor will still be able to raise the claims that would have constituted these defences against the assignor.

purpose of attempting to get the obligor adjudicated bankrupt.<sup>258</sup> In addition, the onus of determining the efficacy of a notice of assignment and whether it is a legal or equitable assignment and what should be done upon receipt of such a notice is thrust upon the obligor.<sup>259</sup> Finally, although where the obligor's obligation is dependent upon a contingency and where the assignment would increase the probability of that contingency occurring, the assignment will not be upheld, the same does not apply if the assignor's performance is conditional upon prior performance by the obligor. Thus, the assignor can assign the right to performance prior to the assignor performing because, in law, this does not change the obligor's duty. That is, the risk allocation under the contract is generally not changed unless on the facts, the assignment impairs the chance of recovering the assignor's performance. Thus, there is more chance of such an assignment not being upheld where the assignor also delegates its duty.<sup>260</sup> Therefore, there is little room to argue that an obligor is to be no worse off in fact by reason of an assignment and if this course were to be adopted it would require an extension of the principle of transfer beyond the *nemo dat* rule and no doubt some distinction will have to be drawn between factual detriments that do not inhibit assignability and those that do, that is, there must be a material factual detriment.<sup>261</sup> However, in the result, the present law is that an obligor must accept a change in the manner of performance but not a change in the actual obligation.

**[6.28] Determination of obligation a matter of construction.** The extent of an obligation is determined by construction. It is an error to characterise the extent of a promised contractual performance as being that which the obligor was doing (in fact) for the assignor at the time of the assignment. This may appear an obvious point if, at the time of the assignment, performance by the obligor has not commenced. However, even if performance by the obligor has commenced at the time of assignment, the

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<sup>258</sup> *Fitzroy v Cave* [1905] 2 KB 364.

<sup>259</sup> It has even been said that the risk of the assignment being invalid is appropriately placed on the obligor and represents the general position in existing national law, see UNCITRAL Report of the United Nations Commission on International Trade Law on its Thirtieth-Fourth Session 25 June-13 July 2001, General Assembly Official Records Fifty-Sixth Session Supplement No 17 (A/56/17) para 19.

<sup>260</sup> See Uniform Commercial Code Art 2.210 and *Farnsworth on Contracts* (1990) para 11.4.

<sup>261</sup> [6.24].

assignor may, at that time, have only been demanding part of the possible performance that could be called for. For example, in *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd*,<sup>262</sup> the facts of which have been dealt with earlier,<sup>263</sup> the mere fact that the assignee was a larger enterprise than the assignor and could potentially make greater demands on the obligor did not, according to the majority, prevent the assignee from making demands on the obligor in excess of that which were requested by the assignor. On construction, the obligor's duty was linked to the capacity of his quarry and the subject land on which the cement works was built. It was not linked to the needs of the assignor and, in any case, as it was a long term contract, the needs of the assignor may have changed over time. This suggested that the obligor had agreed to supply a larger amount of chalk than that which was being supplied at the time of the assignment. No doubt there would be some limits on this. For example, with better technology it may in time have been possible to build a cement works within the limits of the subject land that could process cement at such a rate that it would make demands on the obligor that could not reasonably be met.

*Tolhurst's* case is an exceptional case. Generally, where a party enters into a contract to follow the instructions of one person, or to satisfy the needs of one person, the principle of transfer, governing performance and characterising the right vested in the assignee, dictates that such an obligation cannot by assignment be turned into a contract to follow the instructions of another or to satisfy the needs of another person. One suggested explanation of *Tolhurst's* case is that the obligor, in the original contract, had agreed to an increase in his burden.<sup>264</sup> However, it is suggested that the better explanation is that on construction, the obligation already encapsulated an increased demand. If a party agrees at the time of contract for varying demands to be made upon it, then the upper

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<sup>262</sup> [1903] AC 414.

<sup>263</sup> [6.13]. As already noted ([6.27]), Lord Robertson (at 422) dissented on the ground that the effect of the assignment, if upheld, was that the obligor would be bound to follow the orders of the assignee and satisfy their demands as opposed to the assignor's demand for chalk. He did not think it possible to split up the contract so that the obligor was excused from answering the assignee's calls for chalk but was obligated to supply at least 750 tons. This would, he thought, amount to a variation of the obligation of the obligor which could not occur without the consent of the obligor, cf [6.27].

<sup>264</sup> See *National Carbonising Co Ltd v British Coal Distillation Ltd* (1936) 54 RPC 41 at 46 per Clauson J.



and lower limits of those possible demands represent the burden of the contract. When an increased demand is then made within those limits, this should not be viewed as some consensual agreement to increase the burden of the contract, the burden remains the same.

**[6.29] Obligations and liability.** The rule that an assignment cannot vary the obligations of the obligor also raises the issue of the liability of the obligor. Here, again, this rule overlaps with the rule that dictates that the obligor is to be no worse off by virtue of an assignment as well as the rule that the assignee can be in no better position than the assignor. Essentially, this issue concerns the remedies available to the assignee for breach of contract by the obligor and is therefore dealt with in detail in Chapter Eight.<sup>265</sup>

## **(e) Assignment of Contractual Burdens**

**[6.30] The general rule.**<sup>266</sup> It is a rule of assignment that, unless there exists a statutory instrument to the contrary,<sup>267</sup> or unless a burden devolves by operation of law,<sup>268</sup> it is only possible to assign contractual rights and not contractual duties or burdens.<sup>269</sup> There

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<sup>265</sup> [8.9].

<sup>266</sup> In land law persons who are not party to a contract may be benefited and burdened by covenants under the doctrine of privity of estate. Moreover, certain negative covenants can be enforced against third parties if they 'touch and concern' the land. These doctrines, however, have never been accepted outside of transactions involving the transfer of interests in land.

<sup>267</sup> Eg Financial Sector (Transfers of Business) Act 1999 (Cth) s22. See also *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *PP Consultants Pty Ltd v Finance Sector Union* (2000) 201 CLR 648. Arguably, a transferee may also be bound by a burden that arises as a legal incident of a contract, see *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1988] 1 Lloyd's Rep 514 at 547 per Hobhouse J (approved [1990] 1 QB 818 at 890), see [6.5]. See also Law of Property Act 2000 (NT) s 56(3)(b); Property Law Act 1974 (Qld) s 55(3)(b); Property Law Act 1969 (WA) s11(3)(c). These sections provide that in the case of a contract made for the benefit of a third party, where the contract states that the third party must perform obligations to take the benefit, then the third party is required to perform the relevant obligations to take the benefit.

<sup>268</sup> See *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57 at 76 per Gibbs J.

<sup>269</sup> *Davies v Collins* [1945] 1 All ER 247 at 249; *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1019; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 103 per Lord Browne-Wilkinson; *Century 21 (South Pacific) Pty Ltd v Century 21 Real*

is an important distinction between this rule and the situation that arises where the right assigned is subject to some condition or contingency such as some obligation of performance by the assignor. In such cases the assignee takes subject to the contingency or condition but is in no way required to perform the condition or responsible for its non-performance. However, where the right vested in the assignee is dependent upon prior performance by the assignor, if it becomes clear the assignor cannot perform, then if the obligation is capable of vicarious performance, as a matter of practicality the assignee will need to perform if it wants to enforce the assigned right.

It is also necessary to distinguish the situation where the terms of an assignment make the assignment conditional upon the assignee carrying out certain contractual duties that are capable of being vicariously performed.<sup>270</sup> Such assignments do not negate the primary responsibility of the assignor to the obligor for performance of the duty. However, there can be difficult issues of construction that must be addressed in such assignments. For example, the agreement between the assignor and assignee may be that there is to be no assignment until the assignee performs the relevant obligation. In such a case, there exists at most an agreement to assign which may in some circumstances take immediate effect in equity but will not be sufficiently 'absolute' for the purposes of a statutory assignment. Alternatively, the condition may only be a condition subsequent so that the assignment is intended to take immediate effect and the assignee will be in breach of contract to the assignor if it fails to perform the relevant obligation.

The rule being discussed in this section is concerned with the extent to which a duty can be 'assigned' which makes the assignee responsible for the performance of that duty.

**[6.31] Non-assignment of duties and the principle of transfer.** There is a difficulty in explaining the existence of a rule that allows for the assignment of a duty by reference

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*Estate Corp* (1996) 136 ALR 687 at 698 per Burchett J; *Commissioner of Taxation v Orica Ltd* (1998) 194 CLR 500 at 513; *British Fuels Ltd v Baxendale* [1999] 2 AC 52 at 76. Cf *Calaby Pty Ltd v Ampol Pty Ltd* (1990) 71 NTR 1 at 16. As to whether an assignee may become liable to a claim for specific performance by an obligor if the assignee sues for specific performance itself, see Jones and Goodhart *Specific Performance* (2<sup>nd</sup> ed, 1996) at 215.

<sup>270</sup> *The British Waggon Company and the Parkgate Waggon Company v Lea and Co* (1880) 5 QBD 149.

to the principle of transfer. The principle of transfer dictates not only that a person can assign no greater right than that which is vested in it, but also that it is only possible to transfer something one owns. A party does not own an obligation, it can only own a right to an obligation. Therefore, there is little difficulty in proving that the principle of transfer underlies the rule that it is not possible to assign contractual duties or burdens. However, in practice, most of the concern is with possible exceptions to this rule and this section concentrates on these possible exceptions.

[6.32] *Tito v Waddell*. In terms of judicial statements, the possibility of assigning contractual burdens in Anglo-Australian law has only ever received serious consideration and approval by Robert Megarry VC in *Tito v Waddell (No 2)*.<sup>271</sup> In that case, Megarry VC investigated the extent to which a principle of benefit and burden permeates the law.<sup>272</sup> That is, the extent to which the law dictates that a person cannot accept a benefit without also taking the consequent burden. Many of his examples were drawn from the law of real property which is in turn informed by its own history and policies. It is not necessary here to delve into that history as it would mainly be concerned with areas well outside the assignment of contractual rights, and, in any case, it is probably fair to say that at most the idea that a person cannot take a benefit without accepting the burden represents a maxim of the law or an organising idea but this does not in itself dictate when it will apply.<sup>273</sup> Nevertheless, Megarry VC formulated two principles under which a contractual burden may be assigned which he did not appear to limit to transactions involving land even though his examples were drawn from land transactions. The first principle is the ‘conditional benefit’ principle and the second is the ‘pure principle of benefit and burden’. Again, the concern here is not with whether these principles are accurately drawn from history but rather, does their intended explanation and effect make doctrinal sense.

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<sup>271</sup> [1977] Ch 106.

<sup>272</sup> See further Davis ‘The Principle of Benefit and Burden’ [1998] *CLJ* 522.

<sup>273</sup> See *Government Insurance Office (NSW) v KA Reed Services Pty Ltd* [1988] VR 829 at 831 per Brooking J. Cf Aughterson ‘In Defence of the Benefit and Burden Principle’ (1991) 65 *ALJ* 319; Davis ‘The Principle of Benefit and Burden’ [1998] *CLJ* 522.

**[6.33] The ‘conditional benefit principle’.** The ‘conditional benefit’ principle was explained by Megarry VC in the following terms:<sup>274</sup>

An instrument may be framed so that it confers only a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed or certain burdens assumed, such as an obligation to make certain payments. Such restrictions or qualifications are an intrinsic part of the right: you take the right as it stands, and you cannot pick out the good and reject the bad. In such cases it is not only the original grantee who is bound by the burden: his successors in title are unable to take the right without also assuming the burden. The benefit and the burden have been annexed to each other ab initio, and so the benefit is only a conditional benefit.

Two introductory points should be mentioned before analysing the conditional benefit principle. First, in *Rhone v Stephens*,<sup>275</sup> Lord Templeman, appeared to accept the conditional benefit principle, but stated that the condition must be relevant to the exercise of the right.<sup>276</sup> This gives it some further judicial legitimacy. Second, it is

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<sup>274</sup> [1977] 1 Ch 106 at 290.

<sup>275</sup> [1994] 2 AC 310 at 322.

<sup>276</sup> That is, Lord Templeman's remarks in this respect may not be simply addressing the extent to which an assignor can assign a right and make it conditional upon the assignee vicariously performing an obligation. His reference to the condition being relevant to the exercise of the right appears in a passage where he approves the decision in *Halsall v Brizell* [1957] Ch 169. In that case, the defendant's predecessor was granted by deed certain rights to use certain roads and sewers on condition that sums were paid to maintain these facilities. The defendant purchased the relevant land subject to the covenants contained in the deed. It was held that the defendant was required to pay the relevant sums. On its face, this case could simply be an example of an assignment made conditional by the assignor. However, the deed contained a provision requiring the owners not to transfer their title except upon obtaining, from a purchaser, an agreement to abide by the covenants in the deed. If this point is relied on, it may be that the better interpretation of the case is that it is an example of a conditional benefit and that Lord Templeman in *Rhone v Stephens* interpreted it as such. The English Court of Appeal in *Thamesmead Town Ltd v Allotey* (unreported, 13 January 1998) took the view that Lord Templeman saw *Halsall v Brizell* as an example of a conditional benefit and his requirement that the condition be relevant was put forward as a requirement of conditional benefits. Presumably, if the matter was simply one between the assignor and assignee, they could agree to any conditions they like, and so it is logical to interpret Lord Templeman's speech as directed to the conditional benefit principle. Interestingly, *Halsall v Brizell* is usually put forward as an example of the pure principle. That is, the case was decided on the basis that the defendant wanted to take

important to keep in mind that the 'conditional benefit' principle will not apply where the benefit and burden are clearly independent.<sup>277</sup>

The principal requirement of the conditional benefit principle is that there must be a contractual duty or burden that does not merely define a contractual right but is inherent or intrinsic in the right itself.<sup>278</sup> That is, the 'Real Right' = (prima facie right – duty or burden). However, no matter how this idea is explained, it is clear that this does not mean that the burden is transferred, it simply means the assignee must agree or be otherwise obliged to perform the duty if it wants the benefit of the right. If there was a true assignment of a duty or burden then the assignor would cease to be liable for its non-performance. This is clearly not what Megarry VC had in mind because he makes it clear that the assignor still remains liable under the contract for its performance.

[6.33.1] There are perhaps two ways to explain the mechanics of the conditional benefit principle that would make doctrinal sense. The first relies on agreement by the assignee. Thus, the 'conditional benefit' principle may simply mean that the obligor has agreed to bring into existence a contractual right by entering into a contract with the assignor but that right is not assignable unless an assignee agrees to perform the burden of the contract. This is not merely a case of the assignor making the assignment to the assignee conditional. There is an effective prohibition on assignment. An attempted assignment without such an undertaking would be ineffective.

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the benefit of the deed, by using the roads and sewers, and therefore had to accept the burden. This result flows from a principle governing the law of deeds which has never been said to depend on the burden conditioning the benefit, see *Tito v Waddell* [1977] 1 Ch 106 at 292; *Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd* [1993] 1 WLR 138 at 146 per Hoffmann J (overruled on another point [1995] Ch 152); Davis 'The Principle of Benefit and Burden' [1998] CLJ 522 at 537. See also Morrison and Goolden (eds) *Norton on Deeds* (2<sup>nd</sup> ed, 1928) at 26-7.

<sup>277</sup> *Pan Ocean Shipping Co Ltd v Creditcorp (The Trident Beauty)* [1994] 1 WLR 161; *Radstock Co-operative and Industrial Society v Norton-Radstock UDC* [1967] Ch 1094, [1968] Ch 605.

<sup>278</sup> An example of a contractual duty which defines a right would be a duty to perform some obligation to earn a payment. An assignment of the right to receive the payment would be an assignment of a conditional right if at the time of the assignment the payment had not been earned and this results from the obligation or duty defining the right.

A number of points follow from this. First, it would be limited to immediate assignments, and the assignee's promise to perform must be part of that assignment or be part of a collateral agreement between the obligor and assignee.<sup>279</sup> If the assignor and assignee merely enter into an agreement to assign, which is to take effect upon the assignee performing the obligation, then prior to this, equity should not give effect to the agreement to assign as an immediate equitable assignment as this would be completely at odds with the prohibition agreed to by the obligor and assignor. Second, under the conditional benefit principle, it is necessary for the assignee to be liable to the obligor for failure to perform. To achieve this, it is generally necessary for the assignment to be for value. Thus the assignor promises to immediately assign and the assignee promises to perform the relevant obligation. From this position, today, it can simply be concluded that the obligor is a third party beneficiary of that contract and can enforce it as such. If the assignment is voluntary, to be effective, there will still need to be a collateral contract entered into between the obligor and assignee which deals with the condition. In either case, whether the assignment is legal or equitable, the assignee's duty to the obligor will always be legal as it is based on a contract either between the assignor and assignee or the assignee and obligor. The obligor therefore is not limited to equitable remedies.

[6.33.2] The second route is to rely on the notion that the assignee is *obliged* to perform the obligation. To achieve this much more weight needs to be placed on Megarry VC's notion that the duty is an intrinsic part of the right. Thus if an obligation may be said to be part and parcel of a right, then the right could not be taken without acceding to the duty. Again this does not mean the duty (and liability for non-performance) is transferred, it simply means the right cannot be taken without acceding to the duty. Here, instead of assignability being limited by reference to what is in effect a prohibition of assignment (that is, the chose in action lacks the characteristic of assignability unless the assignee agrees to accept the burden), assignability is limited because of the intended connection between the right and duty. That is, the chose in

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<sup>279</sup> It would not be sufficient for the collateral agreement to be between the assignor and assignee for the benefit of the obligor because, if that were the case, then the assignment on its own would appear to have assigned the right free of the condition which would be at odds with the principle of transfer as the assignor would have assigned a different right than it had.

action has the characteristic of assignability but the burden automatically attaches upon an assignment without the need for an agreement from the assignee.

On this analysis the right vested in the assignee has a duty or burden attached to it. This again is no more than an application of the principle that the intention of the parties impacts on the character of a contractual right as a chose in action. It follows that the assignor remains responsible as a matter of contract for the duty or obligation or burden. This is distinct from the situation where, upon assignment, the title to a contractual right is transferred and the contractual right itself is actually transferred to the assignee. In that case the contractual obligation is no longer owed to the assignor even as a matter of contract, it is transferred. However, a contractual duty or obligation or burden cannot be transferred in this sense as a person cannot own an obligation that that person owes to another. What occurs here is that a chose in action is created that has a duty or obligation as one of its characteristics and this binds any transferee of that chose in action.

The idea that a burden may be inherent or an intrinsic part of a right is perfectly logical from a doctrinal perspective.<sup>280</sup> It is generally accepted as doctrinally sound that one construction of an exclusion clause is to prevent primary contractual rights from arising rather than excusing a breach.<sup>281</sup> That is, the burden of an exclusion clause may impact on the existence and extent of primary contractual rights. If this is so it would follow that an assignee of such a right must take subject to the burden on the basis of the principle of transfer.

It is suggested that although either explanation is sound, as both rely on the principle of transfer, the latter is more efficient in the sense that if commercial practice occasionally requires an obligation to be 'transferred', the latter analysis achieves this without the need, in some cases, for the assignee to enter into distinct contracts with the obligor, which can easily be overlooked. Moreover, in the examples discussed below, it will be

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<sup>280</sup> Even from a theoretical perspective this makes sense as theories of property no longer view ownership as merely vesting rights in the 'owner' but also obligations. This is particularly important in the case of land where ownership is seen more as a form of stewardship, see Gray and Gray *Elements of Land Law* (3<sup>rd</sup> ed, 2001) at 118.

<sup>281</sup> See Coote *Exception Clauses* (1964) at 7-11.

seen that the conditional benefit principle operates without the agreement of the assignee and it is this latter explanation which provides that result.

[6.33.3] The issue then arises as to whether this principle can be found in the case law dealing with the assignment of chose in action. One obvious example is in fact an exclusion clause.<sup>282</sup> Here, however, although the assignee may be bound by an exclusion clause to which the assignor was subject, without some agreement by the assignee to this effect, this does not place positive duties on the assignee. It merely subjects the assignee to a contractual burden.<sup>283</sup>

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<sup>282</sup> Eg *Britain & Overseas Trading (Bristles) Ltd v Brooks Wharf & Bull Wharf* [1967] 2 Ll L Rpts 51.

<sup>283</sup> Another example may be an arbitration provision. The benefit of an arbitration provision is a chose in action and is assignable, *Shayler v Woolf* [1946] 1 Ch 320 at 323; *Montedipe SpA v JTP-RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep 11 at 16-17, cf *Cottage Club Estates Ltd v Woodside Estates Co Ltd* [1928] 2 KB 463. In practice, however, the issue that usually arises is whether, upon the assignment of a right under a contract that contains an arbitration provision, the assignee, when seeking to enforce the assigned right, is bound to refer any disputes to arbitration. The answer under English law, despite many of the decisions being based in part on the meaning of certain statutory provisions, appears to be that the assignee is so bound. That is, upon the assignment of the relevant right, the assignee is also benefited and burdened by the arbitration provision, see *Montedipe SpA v JTP-RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep 11 at 15 per Hobhouse J (however, note Hobhouse J's additional remark that the right to arbitrate is in fact the remedy in respect of the cause of action and under section 136 Law of Property Act (UK) (and its Australian equivalents) the remedy necessarily follows the right. See also *Socony Mobil Oil Co Inc v The West of England Ship Owners Mutual Insurance Association (London) Ltd (The Padre Island)* [1984] 2 Lloyd's Rep 408; *Rumput (Panama) SA v Islamic Republic of Iran Shipping Line (The Leage)* [1984] 2 Lloyd's Rep 259; *Herkules Piling Ltd v Tilbury Construction Ltd* (1992) 61 BLR 107 at 118. Similarly, it would appear that an assignee is bound by an exclusive jurisdiction clause, see *Glencore International AG v Metro Trading International Inc* [1999] 2 All ER (Comm) 899. It could be argued that the obligation to arbitrate is inherent in any assigned right and thus the result in the cases is explicable by reference to the 'conditional benefit' principle. Alternatively, if the view is taken that a provision for arbitration is more procedural in nature, as it survives the discharge of the contract, so that it cannot be said to be intrinsic to substantive rights, then the result in the cases may in fact be an example of the 'pure principle' discussed at [6.35]. See further Girsbanger and Hausmaniger 'Assignment of Rights and Agreement to Arbitrate' (1992) 8 *Arb Int* 121.



[6.33.4] However, it is not difficult to find examples of where an assignee may be required to perform a positive duty without having to find a positive agreement by the assignee to assume that duty. That is, an assignee may be required to abide by a condition if it wants to enjoy the assigned contractual right. For example, if the right assigned is a right to entry into a stadium for some event, the exercise of that right may require the assignee, for example, to show the ticket. On this view, if the assignee did something in contravention of the conditions of the ticket, the obligor may refuse entry. Another example would be where there is an assignment of the right to the proceeds under a contract of insurance. If the assignee wishes to recover it will be required to carry out any conditions for recovery such as giving notice of the loss. These examples show that there are cases where an assignee cannot take the benefit without the positive burden. However, in each of these examples, the assignee could not be required to carry out the condition if it did not want to enjoy the chose in action. Moreover, in each example, the assignee could never be liable to the obligor for breach of contract. That is, simply because the assignee may be required to undertake the burden to enjoy the right, does not equate to the assignee undertaking an obligation to the obligor.<sup>284</sup>

[6.33.5] It may be argued that this is the limit of the conditional benefit principle. Certainly at one point in his judgment Megarry VC gave as an example of the principle of benefit and burden the rule that a person named in a deed but not executing the deed cannot take the benefit of a deed without subscribing to the burden and that the burden cannot be enforced if that person refrains from taking the benefit.<sup>285</sup> However, at other points his judgment appears to go further to include positive obligations and liability to the obligor for failure to perform.<sup>286</sup>

[6.33.6] It may be that *Tolhurst's* case, the leading decision on the assignment of contractual rights, is, in fact, an example of this aspect Megarry VC's principle. There are some difficulties with the reasoning in *Tolhurst's* case. In particular, the assignee in *Tolhurst's* case was obliged to purchase its supplies from the obligor, but if it is not possible to 'assign' contractual duties, the assignee would not be so obliged. In *Kemp v*

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<sup>284</sup> *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* [2001] FCA 1040 para 136.

<sup>285</sup> See further Davis 'The Principle of Benefit and Burden' [1998] *CLJ* 522 at 524.

<sup>286</sup> *Tito v Waddell (No 2)* [1977] Ch 106 at 296-299 per Megarry VC.

*Baerselman*<sup>287</sup> the non-assignability of the assignor's duty was important in evidencing an intention that the right in question was personal and not assignable. However, this was not found to be so in *Tolhurst's* case even though like *Kemp's* case the contract here was an exclusive dealing arrangement requiring the assignor to buy a minimum of at least 750 tons per week and so much more as required by the assignor for the whole of its manufacture of cement on the land. Moreover, if the assignee in *Tolhurst's* case were to place an order, why should it rather than the assignor (who for most intents and purposes was treated as having ceased to exist), be subject to the duty to pay.<sup>288</sup> At one point, Lord Macnaghten suggested that the assigned right was not personal so long as the assignee was 'in a position to carry out the terms of the original contract'.<sup>289</sup> Later on he said that, 'it is plain that it could not have been within the contemplation of the parties that the company would lose the benefit of the contract if anything happened to Tolhurst, or that Tolhurst would lose the benefit of the market which the contract provided for him at his very door in the event of the company parting with its undertaking, as it was authorized to do by its memorandum'.<sup>290</sup> Lord Lindley simply said that in upholding the assignment, the assignor could not get rid of their obligations to Tolhurst.<sup>291</sup> Perhaps, Lord Lindley simply meant that the duties of the assignor were capable of vicarious performance and on construction must be made a condition of any assignment, and, moreover, the obligor had impliedly promised to follow the orders of any assignee.<sup>292</sup> This may also be the thinking behind Lord Macnaghten's statement that the assignee had to be 'in a position to carry out the terms of the original contract'. However, it is difficult to see how, by vicarious performance, the sub-contractor would be performing the obligation of the assignor by substituting its own order requirements.

<sup>287</sup> [1906] 2 KB 604, see [6.13].

<sup>288</sup> See the facts in *Atlantic & NCR Co v Atlantic & NC Co* (1908) 61 SE 185 (here in a prior action, the obligor successfully sued the assignor who then, in this action, successfully sued the assignee; the court found that the assignee was liable to the assignor because it had promised the assignor it would pay for the wood supplied to the assignee; moreover, the court found the assignee primarily liable to pay the obligor under the principle of benefit and burden, that is, it could not take the benefit of the contract to be supplied without accepting the burden to pay for that supply).

<sup>289</sup> [1903] AC 414 at 416.

<sup>290</sup> [1903] AC 414 at 416.

<sup>291</sup> [1903] AC 414 at 424. See also *Proctor v Union Coal Co* (1923) 137 NE 659.

<sup>292</sup> This is consistent with the first of Lord Macnaghten's statements above.

If the personal nature of a contractual right is based on intention (as Lord Macnaghten held), then that intention cannot be the intention of the assignee. This statement by Lord Macnaghten can only be explained on the basis that there was either a prohibition on assignment or the burden was an intrinsic part of the right. The effect of the second statement of Lord Macnaghten would appear to be that the assignee was bound to order and buy chalk from the obligor or else Tolhurst would effectively lose the benefit of the contract. In addition, the obligor was bound to supply the assignee's personal requirements as to chalk. That is, it was not a case where the assignee was not bound to buy chalk but if it did it was required to order all its requirements and pay for them. If that were the case, then until the assignee placed an order the obligor could lose the benefit of the contract which does not achieve what Lord Macnaghten had in mind.

It is suggested that the answer lies with recognising *Tolhurst's* case as an example of the 'conditional benefit' principle, in that the duty to buy was annexed to the assigned right to order and be supplied.<sup>293</sup> That is, either the duty was intrinsic to the right so that the assignee was obliged to perform the duty and was liable for its non-performance or, the relevant right was in fact personal and unassignable unless the 'assignee' was prepared to take over the burden of the contract and be liable under the contract.<sup>294</sup> The latter is a less satisfactory explanation as there is no evidence that the assignee expressly agreed to this.

Usually, in practice, this result is achieved by a novation which requires the obligor's consent. It may be argued that the case should be viewed as a novation where the obligor gave its consent in advance.<sup>295</sup> However, the court clearly dealt with the facts on the basis of assignment and given that it represents the leading decision on the assignment of contractual rights, it is difficult to write it off as a mere example of

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<sup>293</sup> See also *New Redhead Estate & Coal Co Ltd v Scottish Australian Mining Co Ltd* (1919) 20 SR(NSW) 12. Another example would be where an assignee takes a transfer of title to goods from a seller (who has agreed to sell the goods to a buyer under a conditional sale agreement) together with an assignment of the benefit of that sale contract. Clearly, once the buyer pays the price, the assignee would be subject to the obligation to transfer title in the goods to the buyer.

<sup>294</sup> Cf *Barker v Stickney* [1919] 1 KB 121, discussed at [6.34.2].

<sup>295</sup> However, it is not entirely clear to what extent such advance consent will be recognised, see further Kirby 'Assignments and Transfers of Contractual Duties: Integrating Theory and Practice' (2000) 31 *VUWLR* 317 at 345-48.

novation.<sup>296</sup> It must be explained on the basis of assignment and the 'conditional benefit' principle appears to provide that doctrinal explanation.<sup>297</sup>

[6.33.7] If the above analysis is correct a few things follow. First, there is nothing in *Tolhurst's* case that would deny Lord Templeman's requirement in *Rhone v Stephens* that the obligation be relevant to the exercise of the right. It may be that even though, as suggested in this dissertation, the intention of the parties to a contract shapes a contractual right in its character as a chose in action, there may be a legal limitation on this ability when it comes to attaching burdens to rights that would not otherwise be relevant to the exercise of that right. That is, in addition to an intention to link a benefit

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<sup>296</sup> Cf *Calaby Pty Ltd v Ampol Pty Ltd* (1990) 71 NTR 1 at 17-8, where Angel J suggests that the only explanation of the case is that by virtue of the contract being impliedly made with 'assigns' the assignee inherited the whole contract, similar to the operation of a nomination provision. He accepts that the contract therefore remained on foot with the assignee simply stepping into the shoes of the assignor rather than there being a novation. Presumably, it could not be argued that privity of contract was created on the basis that the assignor, at the time of contract, was acting as principal in its own right and as agent for the assignee. The law of agency generally requires that the principal (assignee) must be capable of being ascertained at the time the agent enters into the contract. In any case, it is unlikely that this would ever represent the intention of the assignor. The better view, it is suggested, is that where there is a reference in a contract to 'assigns' this merely points to the assignability of the contract, see [2.5]. It does not create privity of contract and does not in itself constitute the contract a contract for the benefit of a third party.

<sup>297</sup> This case can be contrasted with *Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd* [1993] 1 WLR 138 per Hoffmann J (overruled on another point [1995] Ch 152) (here A purchased shares in the defendant company for the purpose of attempting to obtain some compensation that may be payable to the company; A and the defendant promised the shareholders they would enter into a contract with the plaintiff trustee promising that trustee that any compensation recovered would be paid to the plaintiff for the benefit of shareholders; in due course A and the defendant entered into such an agreement with the plaintiff and A further promised the plaintiff not to transfer the shares unless the transferee entered into a covenant in similar form; nevertheless A did transfer the shares to an assignee/defendant without obtaining such a covenant and the assignee further assigned them to another assignee/defendant; it could not be claimed by the plaintiff that the latter two defendants took a conditional benefit because they did not take an interest in the contract between the plaintiff and A – the benefit and burden must arise from the same contract; moreover, even if it were the shareholders who sued these two defendants, there was still no issue of them taking a conditional benefit in taking the shares because all A promised the shareholders was to enter into a contract with the plaintiff on certain terms which A had done).

and burden, the benefit and burden must also have some intrinsic or inherent relationship to one another. For example, clearly, the obligation to pay for the receipt of a service or for the transfer of title to goods is 'relevant' to such rights. However, the reverse does not necessarily follow. If the right assigned is the right to receive payment, it does not follow that the assignee is required to perform the service or deliver the goods. Second, it cannot be right that the assignee can never be liable for failing to perform the obligation. As noted above, one example of a conditional benefit principle is where an assignee must perform a duty if it wants to enjoy the benefit. If the assignee determines not to take the benefit it cannot be held liable for breach of contract. However, if that were accepted as being always the result in the case of conditional benefits it would allow an assignee who has taken the assignment of a right to the performance of a service or the right to receipt of title to goods to refuse to accept those services or goods when they are tendered by the obligor. This would leave the obligor in a serious predicament. He or she cannot obtain a discharge from the assignor and in due course will be in breach of contract for not performing on time. Even if that breach is excused because of the circumstances, such a result effectively allows the assignor and assignee to defeat the contract, so that the obligor loses a valuable contract because it is placed permanently in suspense by the assignee. Thus, it depends on the nature of the case whether, assuming the assignment is operative, the taking of the benefit and burden is obligatory or optional.<sup>298</sup>

**[6.34] The 'conditional benefit' principle and *De Mattos v Gibson*.** It is suggested that further case support can be found for the conditional benefit principle in cases that have historically been discussed in the context of the principles enunciated by Knight Bruce LJ in *DeMattos v Gibson*.<sup>299</sup> In that case, Knight Bruce LJ said:<sup>300</sup>

Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the

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<sup>298</sup> See further *Tito v Waddell (No 2)* [1977] 1 Ch 106 at 291.

<sup>299</sup> (1858) 4 De G & J 276, 45 ER 108.

<sup>300</sup> (1858) 4 De G & J 276 at 282, 45 ER 108 at 110. See also *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108 (purchaser of ship took subject to existing charterparty).

third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.

The status of this principle remains uncertain.<sup>301</sup> Moreover, it is not the concern here to track its history or current status as it has never been seriously put forward as a principle of assignment. In addition, generally, it will not be relevant in the case of the assignment of a contractual right because the property, the contractual right, is created for the first time when vested in the assignor and does not come subject to a previous promise to use it in some way except to the extent that a prohibition on assignment may attach to it.<sup>302</sup> Moreover, the only remedy is injunctive relief which is not generally helpful to the obligor who wants the relevant contractual obligation performed. However, the principle can appear relevant in the case of intangibles where it is possible to say that the object of the contract is to transfer to the assignor something that was owned by the obligor, for example, copyright or the right to exploit a patent. As noted, the point for looking at these cases is that it is in them that further support for the conditional benefit principle can be found.

[6.34.1] The starting point is the decision in *Werderman v Société Général d'Electricité*.<sup>303</sup> In that case, without any express reference to *DeMattos v Gibson*, an assignee of a right to exploit a patent was successfully sued for an account of profits. It was held that on construction, the liability to pay profits to the obligor attached to the right to exploit the patent so that it bound anyone taking an assignment of that right with notice of this condition. Apart from the reference to notice, which has a *DeMattos v Gibson* ring to it, the case appears to be a straightforward application of the conditional benefit analysis suggested above. On that analysis the issue of notice is not relevant, if the right is a 'conditional benefit' the assignment is ineffective unless the assignee promises to account or is obliged to account. In the case of the latter, which as suggested earlier is the better analysis, if an assignee takes an assignment of contractual rights, it has the burden of

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<sup>301</sup> See the discussion in Worthington *Proprietary Interests in Commercial Transactions* (1996) ch 5 and Merkin 'The Burden of Contracts and the Doctrine of Privity' in Merkin (ed) *Privity of Contract* (2000) ch 4 paras 4.5-4.10.

<sup>302</sup> [6.16.1]. Cf the example of a conditional sale agreement above [6.33.6] note 291.

<sup>303</sup> (1881) 19 Ch D 246.

investigating the terms of that contract and cannot circumvent the burden by arguing that it did not have notice of it.<sup>304</sup>

[6.34.2] Later in *Barker v Stickney*,<sup>305</sup> an author assigned copyright to a publisher who together with a receiver assigned that copyright to the assignee. It was a term of the contract between the publisher and author that the publisher would not assign the copyright except subject to the terms of their agreement.<sup>306</sup> It was held that the assignee who had full notice of the terms of the original contract was not liable to pay royalties even though the assignor was contractually bound to do so. Bankes LJ distinguished the decision in *Werderman* on the basis that there the original contract placed a charge on the subject matter of the contract and that was not the case here.<sup>307</sup> He also referred approvingly to the explanation of *Werderman's* case given by Vaughan Williams LJ in *Bagot Pneumatic Tyre Co v Clipper Pneumatic Tyre Co*<sup>308</sup> to the effect that all that was decided there was 'that if you had notice of a contract between the person under whom you claim property, real or personal, and a former owner of the property, whereby a charge or encumbrance was imposed upon the property of which you thus take possession and have the enjoyment, you take the property subject to that charge or encumbrance, and can only hold it subject thereto.'<sup>309</sup> Vaughan Williams LJ went on to say; 'But that proposition does not ... involve the consequence that the assignee of the property is liable to be sued for non-performance of the terms contained in the contract to which he was not a party. In my opinion, the utmost length to which that case goes is to impose an encumbrance on the property.'<sup>310</sup> From this it would appear that for the obligor to succeed, it must continue to hold some proprietary interest in the subject matter of the assignment (charge or lien) and the assignee must have notice of it. The issue of whether or not a contractual obligation can form an intrinsic part of a contractual right was not addressed by Bankes LJ.

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<sup>304</sup> *Mangles v Dixon* (1852) 3 HLC 702, 10 ER 278.

<sup>305</sup> [1919] 1 KB 121.

<sup>306</sup> As noted above, ([6.16.6]) no point appears to have been taken that this term amounted to a prohibition on assignment.

<sup>307</sup> [1919] 1 KB 121 at 127.

<sup>308</sup> [1902] 1 Ch 146.

<sup>309</sup> [1902] 1 Ch 146 at 157. See also *Dansk Rekytriffel Syndikat Aktieselskab v Snell* [1908] 2 Ch 127.

<sup>310</sup> [1902] 1 Ch 146 at 157-58.

Warrington LJ held there was no charge created and the obligor's right rested in contract with the result that those contractual rights were not enforceable against the assignee as it is not possible to assign contractual burdens.<sup>311</sup> Nevertheless, he appears to accept the conditional benefit explanation of *Werderman's* case. He says of that case that it was not a case of a charge, what was assigned there was a right to share in the profits.<sup>312</sup> He refers approvingly to the statement of Jessel MR<sup>313</sup> in *Werderman's* case to the effect that it was 'part of the bargain that the patent shall be worked in a particular way and the profits be disposed of in a particular way, and no one taking with notice of that bargain can avoid the liability.'<sup>314</sup> The difference then between *Werderman's* and the case he was dealing with (*Barker's*) was simply one of construction, a matter upon which views may differ.

Scrutton LJ said that prior to 1880 the plaintiff may have been successful but that *DeMattos v Gibson* ended liability based on notice alone. Moreover, liability was also restricted to negative covenants and in due course it was found that as regards personal property *DeMattos v Gibson*, to the extent it provided any hope to the plaintiff, was impractical so that to make such an assignee liable, it must be party to the contract in which the relevant stipulations are made.<sup>315</sup>

[6.34.3] Two points come from this. The first is Scrutton LJ's uncertainty as to the continued existence of the principle enunciated in *DeMattos v Gibson* and second, is his view that *Werderman's* case was solely based on notice and that such liability had now been overtaken by later legal developments. He recognised the difficulty this decision may give to authors as they need to assign copyright if they are to get their books published. However, he concluded by saying that authors might protect themselves by keeping the copyright 'and assign no more than a right to publish conditional upon royalties being paid,

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<sup>311</sup> [1919] 1 KB 121 at 128. He also noted that the argument for a charge was misconceived as it could only be enforced by sale which would result in putting an end to all royalties forever.

<sup>312</sup> [1919] 1 KB 121 at 130.

<sup>313</sup> [1919] 1 KB 121 at 130.

<sup>314</sup> (1881) 19 Ch D 246 at 252.

<sup>315</sup> [1919] 1 KB 121 at 131-32. See also *Calaby Pty Ltd v Ampol Pty Ltd* (1990) 71 NTR 1 at 17-8 per Angel J.



*and only assignable if they are provided for.*<sup>316</sup> This suggestion, although rarely ever likely to be accepted by a publisher, is, it is suggested a statement of the conditional benefit principle which is akin to that of Warrington LJ's. The distinction that they fail to make is that the conditional benefit principle should be able to be employed in the case where there is a sale of the copyright or patent just as much as their accepted acknowledgement of it in the case where the assignor only holds a right (or licence) to exploit a copyright or patent. They seem to be of the view that for the obligor to succeed it must continue to hold an interest in the chose in action that is being assigned. However, the issue is not one of the obligor's ownership, it is one of properly characterising the chose in action vested in the assignor.

**[6.35] The 'pure principle of benefit and burden'.** This principle only applies where the benefit and burden are independent of one another.<sup>317</sup> Under this principle, the assignee may be required to perform the relevant obligation if policy considerations require it. It exists not as 'a technical doctrine, to be satisfied by what is technical and minimal [but rather as a] broad principle of justice, to be satisfied by what is real and substantial'.<sup>318</sup> It is said to be the price the law compels one to pay for taking certain independent rights.<sup>319</sup> In *Tito v Waddell* itself, a mining company acquired certain lands for the purposes of mining phosphates. The acquisition of these lands was subject to covenants requiring the company to return the land to its former owners and to replant the land. The rights under these contracts were assigned to commissioners subject to the covenants contained in the contracts. The company itself was wound up and it was held that the commissioners were liable by virtue of the pure principle of benefit and burden to the owners of the land for failing to replant it. Although the pure principle has not been overruled, it may be argued that it did not survive the decision of the House of

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<sup>316</sup> [1919] 1 KB 121 at 133-34 (emphasis added).

<sup>317</sup> *Tito v Waddell* [1977] 1 Ch 106 at 290 and 302.

<sup>318</sup> [1977] 1 Ch 106 at 305. Nevertheless, earlier (at 302) Megarry VC appears to subject the general benefit and burden principle to an intention test. Thus, if it was never the intention (express or implied) for the assignee to take on the burden, it cannot be held liable for the burden. Moreover, in addition to such an intention it is necessary for the assignee to have taken a 'sufficient' benefit, see [1977] 1 Ch 106 at 305.

<sup>319</sup> [1977] 1 Ch 106 at 309.

Lords in *Rhone v Stephens*.<sup>320</sup> In that case, Lord Templeman, with whom the other Law Lords agreed, said that he did not recognise the 'pure principle'.<sup>321</sup>

[6.35.1] It is suggested that the 'pure principle' has been subjected to more 'bad press' than it actually deserves.<sup>322</sup> In *Tito v Waddell*, Megarry VC made it absolutely clear that in the case of the 'pure principle', the assignor remains liable for the performance of the obligation.<sup>323</sup> Therefore, like the 'conditional benefit' principle what is occurring here is both an assignment and something akin to a vicarious performance but where the assignee is directly liable to the obligor for failure to perform. However, in this case, because of the independence of the right and obligation, there is a presumption of vicarious performance rather than an agreement or obligation flowing from the nature of the chose in action.

[6.35.2] This is not at all a commercially insensitive doctrine. In fact, a version of it forms the basis of assignment under the United States Uniform Commercial Code. Thus §2-210(4) dealing with sales provides:<sup>324</sup>

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<sup>320</sup> [1994] 2 AC 310. See also *Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd* [1993] 1 WLR 138 (overruled on another point [1995] Ch 152). See further *Baytur SA v Finagro Holding SA* [1992] 1 QB 610; *Government Insurance Office (NSW) v KA Reed Services Pty Ltd* [1988] VR 829 at 831-41; *Calaby Pty Ltd v Ampol Pty Ltd* (1990) 71 NTR 1 at 19; *Gallagher v Rainbow* (1994) 179 CLR 624 at 648 per McHugh J; *Holli Managed Investments Pty Ltd v Australian Securities Commission* (1998) 160 ALR 409 at 418 per Finkelstein J. Cf *Rufa Pty Ltd v Cross* [1981] Qd R 365 at 366 per Lucas SPJ, at 368 per Campbell J at 371 per Kneipp J; *Rural & Agricultural Management Ltd v West Merchant Bank Ltd* (1995) 128 FLR 440.

<sup>321</sup> [1994] 2 AC 310 at 322.

<sup>322</sup> In *Government Insurance Office (NSW) v KA Reed Services Pty Ltd* [1988] VR 829 at 831-32, Brooking J gave a number of examples to evidence his concern over the limits of pure principle. For example, where a gift of a car is made by a purchaser who has purchased the car on credit must the beneficiary pay for the car if the purchaser does not? Another example was a man asking a taxi driver to fetch his wife promising to pay the fare and then the husband refusing to pay, is the wife now liable? With respect, the answer in each of these cases, under the pure principle is no, because the beneficiary is not taking the benefit of the transaction, that is, the right to performance, but merely the fruits of the transaction.

<sup>323</sup> [1977] 1 Ch 106 at 290.

<sup>324</sup> See also Restatement (Second) of Contracts §328.

An assignment of “the contract” or of “all my rights under the contract” or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

The only issue for Anglo-Australian law is whether or not there is a commercial need to develop a presumption of delegation in assignment where the assignor’s duties remain executory. For example, if there was seen to be a need to promote assignability of what would otherwise be an exclusive dealing arrangement, such as in *Kemp’s* case,<sup>325</sup> this could be done with such a presumption. Another area where the presumption could do some justice is where there is an assignment in circumstances where the assignor ceases to exist despite having obligations still to perform. Where the assignee has promised the assignor that it will perform those obligations, the obligor should be able to enforce that promise on the basis of being a third party beneficiary of the promise. But where this is not the case, and where it is clear to the assignee at the date of the assignment that the assignor is going to repudiate its obligations, or cease to exist, so that the assignee will only get the benefit of unconditionally accrued rights, there may be good reasons for holding the assignee bound to perform the contract. Arguably, this was what occurred in *Tolhurst’s* case and, in fact, *Tolhurst’s* case, on the analysis above was also an exclusive dealing arrangement. Therefore, if the ‘conditional benefit’ principle did not exist, *Tolhurst’s* case may still be seen as an example of the ‘pure principle’ in operation. In addition, there is a certain appeal in the notion that, at least in the context of sales, if the assignee takes an assignment of the benefit of the contract, then not only as a matter of practicality<sup>326</sup> should it pay if the assignor does not, but arguably as a matter of law it should take on the payment obligations. If this does not fall within the conditional

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<sup>325</sup> [6.13].

<sup>326</sup> See *Cooper v Micklefield Coal and Lime Co Ltd* (1912) 107 LT 457 at 458 (‘It is, of course, true that the assignee cannot insist on the continued performance of the contract unless either his assignor is able and willing to satisfy the obligation to pay, or the assignee himself is willing to do it for him. In that sense at least, apart from novation, the obligation to pay is doubly secured after the assignment, because there is not only the continuing personal liability of the assignor, but the necessity upon the assignee of performing the obligations that are the consideration’.)

benefit principle,<sup>327</sup> then arguably it should be dealt with by the pure principle. An assessment of the pure principle falls outside this dissertation as it is clearly policy driven and not explicable by reference to the transfer principle. However, it needs to be noted that it is also not at odds with the transfer principle as the assignor still remains liable, that is, there is no transfer of the obligation.

[6.35.3] Finally, if there is a perceived need to develop such a principle then it will also be necessary to determine whether it needs to be enacted under statute because clearly, the liability between assignee and obligor here is not based on contract, it is imposed and the weight of authority which actually supports the maxim of benefit and burden and the pure principle that flows from that maxim take the view that it is an equitable principle giving rise only to equitable remedies.<sup>328</sup> However, if that is the case, there may be problems in making the principle extend beyond the enforcement of negative covenants. Generally, to enforce a positive contractual covenant would require an order for specific performance which is unlikely to issue if there is no contract between the obligor and assignee.<sup>329</sup> However, there may be much to be said for allowing a party to a contract (the obligor) to obtain an order of specific performance against some interested third parties.<sup>330</sup>

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<sup>327</sup> [6.33.7].

<sup>328</sup> See *ER Ives Investment Ltd v High* [1967] 2 QB 379 at 394-5 per Lord Denning MR, at 399 per Danckwerts LJ; *Rural & Agricultural Management Ltd v West Merchant Bank Ltd* (1995) 128 FLR 440 at 449 per Young J. Cf *Tito v Waddell* [1977] 1 Ch 106 at 292.

<sup>329</sup> See further *GIO v KA Reed Services Pty Ltd* [1988] VR 829 at 832-34 per Brooking J.

<sup>330</sup> See Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (4<sup>th</sup> ed, 2002) paras 20.240-20.255. Query, however, whether it should work the other way and allow an equitable assignee to obtain such an order against the obligor. If the matter is seen as lying entirely in equity, that is, the obligor is attempting to enforce an equitable personal obligation, akin to the type of obligation that may arise upon a beneficiary under a will taking a gift which requires the performance of some condition, (for other possible constructions of such dispositions, see *Countess of Bective v FCT* (1932) 47 CLR 417 at 418 per Dixon J) then it is quite clear that equity may in certain circumstances issue an order requiring compliance with the condition, eg *Gill v Gill* (1921) 21 SR (NSW) 400.

## (f) Conclusion

**[6.36] Conclusion.** This Chapter has aimed to elucidate those considerations that are relevant to determining the assignability of a right. The major focus has been on the personal rights rule, the efficacy of express prohibitions on assignment and the rule that prevents the assignment varying the obligations of the obligor. It has been shown that the determination of each of these rests on party intention. More importantly it has been shown that the personal rights rule, the non-variation of obligation rule and the general focus on party intention are all predicted by and explained by reference to the transfer principle.

Finally, as regards the assignment of contractual burdens, it was suggested that the 'conditional benefit' principle is not only doctrinally sound but its result dictated by the transfer principle. As regards the 'pure principle' its adoption can only be explained on policy grounds and that adoption process therefore falls outside this dissertation. However, the existence of an equivalent doctrine under the UCC would clearly give much weight to an argument for its adoption.

## 7. Characterising Assigned Contractual Rights

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### (a) Introduction

**[7.1] Purpose of chapter.** This Chapter assumes the existence of a valid assignment. The next step is to identify the characteristics of the right vested in the assignee. Generally, this will be a straightforward exercise in construction. However, strictly, it is a two stage process. First, it is necessary to characterise the contractual right vested in the assignor under the contract.<sup>1</sup> Second, it is necessary to construe the terms of the assignment to determine to what extent the assignor has assigned that right.<sup>2</sup> Usually, it will be an entire or absolute assignment. However, in any given case the assignment may be a fraction or part of a legal chose in action (when relating to a debt) or it may be a case where distinct rights were separately assigned.

**[7.2] Structure of chapter.** To a certain extent this process of characterisation occurs concurrently with the identification of an assignable right as it is necessary to identify the right before determining its assignability.<sup>3</sup> For this reason, it has been convenient to

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<sup>1</sup> Eg *Schneideman v Barnett* [1951] NZLR 301 (here an argument to the effect that the intended subject matter of the assignment was 'the contract of insurance' (so as to make the assignee the insured) was rejected when the assignor, at the time of the assignment, only had the right to receive the proceeds; moreover the assignment of the proceeds was upheld despite adjustment not having taken place at the time of the assignment). Similarly, where a lessor of goods assigns the benefit of the lease without transferring title to the goods to the assignee, all that is usually assigned is the benefit of the promise to pay the hire, see *International Leasing Corp (Vic) Ltd v Aiken* [1967] 2 NSW 427 at 438 per Jacobs JA. Moreover, some rights under such contracts, such as contractual licences to seize, may be personal, see *Re Davis & Co* (1888) 22 QBD 193; *Brown v The Metropolitan Counties Life Assurance Society* (1859) 28 LJQB 236. However, presumably such a right would pass with title to the goods and so, perhaps, the better analysis is that the right is assignable but to a limited class, see further *The Australian Guarantee Corp Ltd v Balding* (1930) 43 CLR 140 at 161 per Dixon J.

<sup>2</sup> Eg *Ogdens Ltd v Weinberg* (1906) 95 LT 567 (assignment of all 'contracts' was sufficient to assign a right to sue for breach of contract that had accrued at the time of the assignment).

<sup>3</sup> Eg *Dawson v Great Northern and City Railway Co* [1905] 1 KB 260. There is an analogy here with construction and implication of terms in contracts; prior to construing a contract it is

deal with a number of aspects of characterisation in previous chapters. For example, the characterisation of the right held by an assignee of future property was dealt with in Chapter Four and the notions of 'personal rights' and 'conditional benefits' were dealt with in Chapter Six.

This Chapter focuses on three difficult areas of characterisation. First, the strength of the assignee's right. Second, the meaning of 'assigning the fruits of a contract'. Third, the assignment of conditional contractual rights. These three sections are discrete areas and so this Chapter, unlike other chapters, does not build to a conclusion. To a large extent this Chapter completes the analysis of matters raised in earlier chapters.

**[7.3] Characterisation and transfer.** This Chapter is not so much concerned with explaining any of the rules governing the assignment of contractual rights by reference to the principal of transfer. Rather, it is concerned with maintaining compliance with the principle of transfer in matters where it could inadvertently be departed from.

The importance of the characterisation process cannot be over emphasised. If it is not done correctly, although in law the assignor would not have assigned a different right to the one it has (as that is impossible in any transfer), the effect in fact (unless picked up) may be that the assignor has assigned a different right. Moreover, a wrong characterisation may factually increase or vary the obligations or burdens of the obligor. In such a case security of contract is also endangered, as the obligor's expectation of being accountable only for the promise it made would not have been maintained.

## **(b) The Strength of the Assignee's Right**

**[7.4] Introduction.** In Chapter Four mention was made of the strength of the assignee's right.<sup>4</sup> That Chapter was principally concerned with properly characterising an equitable assignment of a legal right. It was suggested that for a transaction to be properly termed an equitable assignment of a legal right, it was necessary to vest in the assignee the

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necessary to determine its terms, however, it is not possible to imply a term prior to construing the contract because it is first necessary to determine whether or not there is a gap that needs to be filled by an implied term.

<sup>4</sup>

[4.5].

beneficial ownership of the subject legal right. This in turn, it was suggested, meant that such an assignee's remedies cannot be limited to actions against the assignor to enforce the assignment, the assignee may also have recourse directly against the obligor by way of equitable remedies to protect its equitable interest. The extent and versatility of those remedies is discussed in Chapter Eight. However, in Chapter Four, one caveat put on the ability of the assignee to have direct recourse against the obligor was the strength of the assignee's right. The detail of that caveat is dealt with here as it concerns the characterisation of the assignee's interest.

**[7.5] The strength of the assignee's right.** A contractual right is a chose in action which exists only because of the intention of the assignor and obligor to enter into a contract. Although these parties may not be able to make something property that the law would not otherwise recognise as such, they are able to mould its characteristics.<sup>5</sup> One particular aspect that may be addressed in a contract is the manner in which a right may be enforced. Thus, if a contractual right vested in an assignee merely allowed the assignee to force the assignor to exercise the right for the benefit of the assignee then, it may be that the transaction is not a true assignment, or it may be that the contract (between the assignor and obligor) has dealt with the manner of enforcement in some way. The latter is an issue of strength.

Such constrictions on the manner of enforcement may not be expressly addressed by the assignor and obligor but flow simply from the nature of the right assigned. However, this is an issue that is more likely to be relevant in the case of equitable assignments than in legal assignments because, the statutory regime allows the assignee to directly enforce the assigned right against the obligor and dictates that together with the legal right go all remedies. The examples to be discussed here therefore concern equitable assignments.<sup>6</sup>

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<sup>5</sup> For a possible limitation, see [6.33.7].

<sup>6</sup> Cf note 8 below. It needs also to be mentioned that the manner of enforcement may also be dictated by law rather than intention. For example, it was held in *FCT v Everett* (1980) 143 CLR 440, that although the effect of an equitable assignment of an equitable interest is that the assignee can enforce the right in its own name, in the case of the assignment of a portion of a partner's share in a partnership, it was necessary to maintain that a trust existed between the



[7.5.1] The first example is *Herkules Piling Ltd v Tilbury Construction Ltd*.<sup>7</sup> In this case a subcontractor agreed to assign certain fruits of its contract with the contractor to a third party. The building contract prohibited the assignment of the benefit of the contract without consent from the contractor but allowed for the assignment of sums that are 'or may become due and payable ... under this sub-contract'. The assignment was subject to certain conditions and took effect as an agreement to assign a present right and was thought, at the relevant time, to operate as an equitable assignment. The building contract contained a clause requiring all disputes to go arbitration: that is, the enforcement mechanism. The trial judge held that the arbitration clause formed part of the benefit of the contract which could not be assigned without the consent of the contractor. Therefore, although the assignment of these fruits of the contract was valid, the nature of the right vested in the assignee did not carry the contractual mechanism for enforcement, namely the right to arbitrate. Thus although the transaction was properly called an assignment, since the assignee was vested with the beneficial ownership of the subject legal right, the assignee's rights were limited to actions against the assignor because of the strength of that right.<sup>8</sup> The proper claimant was the assignor. It may be

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assignor and assignee as the assignment did not constitute the assignee a partner so that the assignee could not directly enforce rights against the obligor.

<sup>7</sup> (1992) 61 BLR 107. See also *Flood v Shand Construction Ltd* (1996) 54 Con LR 125.

<sup>8</sup> Arguably the same result would follow if the assignment had been legal. That is, the assignee under a legal assignment is also subject to an arbitration provision ([6.33.3]) the benefit of which was here not assignable. Alternatively, given that the statutory provision states that along with the legal right goes 'all legal and other remedies for the same', the effect of a legal assignment may be that the assignee takes the benefit (and burden) of the arbitration clause where the dispute properly concerns an assignable right (despite the prohibition), that is, here these fruits of the contract, cf *Yeandle v Wynn Realisations Ltd* (1995) 47 Con LR 1 at 14 per Hobhouse LJ. However, strictly, the benefit of the arbitration clause is a matter of right and the statutory provision only secures those remedies that go with an assignable right. It may be that because the arbitration provision was not assignable and because the statutory regime for assignment clearly carries with it the 'legal and other remedies for the same', then the effect of the prohibition was to prohibit legal assignments altogether. This, however, may misconceive what is meant by remedies here, see *Yeandle v Wynn Realisations Ltd* (1995) 47 Con LR 1 and *Flood v Shand Construction Ltd* (1996) 54 Con LR 125 (both of these cases involved a similar prohibition on assignment that allowed for the assignment of sums which were due or may become due and payable under the relevant contract; it was argued that due to the terms of the statutory regime

added, that even without this prohibition it appears to be the case that the benefit of an arbitration clause can only be exercised by the legal right holder. The position is akin to the exercise of an option.<sup>9</sup> For example, it has been held that for an assignee to intervene in an arbitration that has already commenced, it is necessary to give notice to the obligor to complete a legal assignment and in addition, notice must be given to the arbitrator, although the latter is probably a procedural requirement.<sup>10</sup>

[7.5.2] More problematic, but perhaps explicable by reference to the strength of the right assigned, is the decision of Romer J in *Friary Holroyd and Healey's Breweries Ltd v Singleton*.<sup>11</sup> In *Warner Bros Records Inc v Rollgreen Ltd*,<sup>12</sup> Roskill LJ<sup>13</sup> relied on the decision in *Friary* for his statement that an equitable assignee only has rights against the assignor. In *Friary* a lessee was granted an option to purchase. The option was expressed to be given to the lessee, 'his executors, administrators, and assigns'. The question arose as to whether an equitable assignee of a legal lease, who had not perfected title by a legal assignment, could exercise the option to purchase given to the 'assigns' of the lessee. Generally, an equitable assignee of a lease is not liable to the head lessor to pay the rent or observe other lease covenants even though taking possession as there is no privity of contract with the head lessor and no privity of estate

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the assignee should be able to either commence proceedings to determine whether a sum is due under the contract, or commence an action to determine if damages are payable for a breach of contract; it was held that the exception to the prohibition was for liquidated amounts, that is, rights to claim debts that were due and payable and it did not extend to rights in respect of existing claims or causes of action which may result in debts becoming due; in this latter case there can be only an assignment of the future right to recover the sum awarded by an arbitrator or court; that is, there was no denial of the assignee's remedy; once the right accrued, it could claim the debt; what it could not do was commence proceedings to determine whether a debt was due as that right had not been assigned).

<sup>9</sup> [4.11.5].

<sup>10</sup> *Baytur SA v Finagro Holding SA* [1992] QB 610; *Montedipe SpA v JTP-RO-Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep 11.

<sup>11</sup> [1899] 1 Ch 86 (reversed on the facts [1899] 2 Ch 261).

<sup>12</sup> [1976] 1 QB 430, see [4.9.2].

<sup>13</sup> [1976] 1 QB 430 at 443-444.

as that requires a legal lease.<sup>14</sup> Romer J held that the equitable assignee could not exercise the option to purchase. Roskill LJ in *Warner Bros* thought this case was founded on basic principles. If he meant by this no more than that an equitable assignee of an option cannot exercise the option in its own name because that requires exercise of the legal right, then, it is suggested, that this is a legitimate explanation of the result in the case so long as the option is considered a legal chose in action.<sup>15</sup> However, in *Warner Bros* Lord Denning MR<sup>16</sup> correctly pointed out that Romer J's reasoning was based on construction. Romer J construed the word 'assigns' in the option as meaning 'legal assigns'. Romer J said:

The word 'Assigns' in the option to purchase in the lease given to the lessee, his executors, administrators, or assigns, had in my opinion the same meaning as the word 'assigns' added to the lessee's name in the covenants entered into by and with him in the lease. In other words, it meant the persons entitled to the term as between them and the lessor and bound by and entitled to the benefit of the covenants entered into by the lessee and lessor respectively which ran with the land demised. The plaintiffs, though in possession, could not have been sued at law by the lessor on the lessee's covenants, nor could the plaintiff's have sued the lessor's assigns on his covenants by reason of the plaintiffs being equitable assigns of the lessee's term and in possession.<sup>17</sup>

This explanation does call for further analysis. It is suggested that what Romer J was getting at here was simply that there was a prohibition of the assignment of the option. That is, a prohibition that did not prohibit legal assignment (as a legal assignee of the lease would be bound by its covenants) but only equitable assignment. If that is right, then the equitable assignee here only became an assignee of the lease even though the

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<sup>14</sup> See *Government Insurance Office (NSW) v KA Reed Services Pty Ltd* [1988] VR 829 at 835 per Brooking J, and the cases there cited. See also Smith 'The Running of Covenants in Equitable Leases and Equitable Assignments of Legal Leases' [1978] *CLJ* 98.

<sup>15</sup> The Court of Appeal in *Friary* in upholding Romer J's reasoning as to legal principle appear to have understood him to be saying no more than that the assignee could force the assignor (through its liquidator) to exercise the option for its benefit, see *Friary Holroyd and Healey's Breweries Ltd v Singleton* [1899] 2 Ch 261, (1899) 81 LT 101. See also *McMahon v Swan* [1924] VLR 397. Cf *MacDonald v Robins* (1954) 90 CLR 515.

<sup>16</sup> [1976] 1 QB 430 at 442.

<sup>17</sup> [1899] 1 Ch 86 at 90.

terms of the assignment were wide enough to capture the lease and option.<sup>18</sup> Such a prohibition if valid is relatively unique. Most prohibitions either merely prohibit legal assignment or both legal and equitable assignment. Nevertheless, *Romer J* appeared to accept that if steps had been taken to perfect the assignee's title under a legal assignment then the assignee could exercise the option. That is, although as an equitable assignee of the lease the assignee had no interest in the option, upon taking steps to render the assignment a legal assignment, so that the assignee was bound by the covenants in the lease, the assignee would automatically have an interest in the option without a separate assignment of it. There may appear to be a doctrinal problem with this, because, if the interest of an equitable assignee amounts to the beneficial ownership of the legal right which is the subject of the assignment, and if upon an equitable assignment the assignee has no interest in the option, how can the assignee, by simply taking steps to render the assignment a legal assignment suddenly have an interest in the option? The answer, it is suggested, lies in the strength of the right held by the assignee. In this case, the provisions for assignment (as between assignor and assignee) were wide enough to capture the option. The only impediment to this was the prohibition which, by reason of intent, weakened the assigned right in its character as a chose in action, which, when lifted, allowed the assignment provisions to take full effect automatically without a further assignment. That is, the prohibition was only intended to impede transferability until the occurrence of a contingency.

**[7.5.3] Conclusion.** These two examples show the importance of the concept of the 'strength' of the right vested in the assignee. Moreover, they show that even though the 'assignee' may only have a remedy against the assignor to protect its beneficial ownership of the subject right, the transaction may still be classified as an assignment, that is, a transaction involving a transfer.

## **(c) The Assignment of the 'Fruits' of a Contract**

**[7.6] The meaning of assigning the fruits of a contract.** The earlier discussion in Chapter Six concerning the distinction between present and future property showed a

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<sup>18</sup> See also *Griffith v Pelton* [1958] Ch 205; *Batchelor v Murphy* [1926] AC 63; *Price v Murray* [1970] VR 782; *Davenport Central Service Station Ltd v O'Connell* [1975] 1 NZLR 755; *Re Adams and the Kensington Vestry* (1883) 24 Ch 199. See further Wade [1957] *CLJ* 148.

distinction between assigning contractual rights to performance and assigning the fruits of a right to performance.<sup>19</sup> This section deals with some further issues arising from that distinction as it raises an issue of characterisation.

Before moving on, it may be noted that the expression 'assigning the fruits of a contract' is generally only used when the subject matter of the assignment is the payment of money. It need not necessarily be so limited, however, to prevent the following discussion becoming overly complicated this usage is adopted.

On its face the expression appears to reflect a simple idea, it captures those assignments that attempt to assign an unconditionally accrued right to payment. However, the expression is ambiguous and its possible meanings are noted here.

[7.6.1] First, an 'assignment of the fruits' may be intended to be no more than a promise by one person to another to account to the latter for any payments received under a contract. Such a transaction only operates as a bipartite relationship. The assignor merely contracts to deal with the subject property a particular way once it comes into his or her hands. It is an assignment of the subject matter of the contract. Nevertheless, because this agreement may be seen as an agreement to assign the fund (rather than the debt) once it comes into existence, equity may give effect to the transaction as an equitable assignment of future property.<sup>20</sup> In that case, assuming the formalities for such an assignment are made out, the assignee will obtain a beneficial interest in the proceeds when they are acquired by the assignor if at that point there is still no legal transfer. The result may be different if it is clear that the intention is that the fund must first vest beneficially in the assignor or if the assignment is subject to some other contingency.<sup>21</sup>

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<sup>19</sup> [6.7].

<sup>20</sup> *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 at 13 per Latham CJ (There can be an assignment of a debt only when there is intended to be an assignment of the right of the creditor against the debtor.)

<sup>21</sup> *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 at 17 per Rich J. However, the assignment may still be valid if the existence of the property that is the subject matter of the assignment is merely contingent upon an act or election of the debtor, see *The Australian Guarantee Corp Ltd v Balding* (1930) 43 CLR 140.

[7.6.2] The second category is where the assignor attempts to assign the 'right to the fruits of the contract'. That is, an agreement that the right to the fruits of the contract immediately vest in the assignee upon them unconditionally accruing rather than when they are received by the assignor. Here the assignment is intended to take effect upon the fruits unconditionally accruing and the assignee is intended to have direct rights against the debtor to sue for the fruits.<sup>22</sup> This is an agreement to assign future property if it is entered into prior to the obligation to pay unconditionally accruing. Prior to the obligation to pay unconditionally accruing, it may 'loosely' be said that there exists either a conditional right to payment or a contingent right to payment.<sup>23</sup> However, strictly, prior to the obligation to pay unconditionally accruing, there is no 'obligation to pay' and therefore 'no right to payment', there is merely a present right to some future performance where that performance will involve the making of a payment. For example, in *Wreckair Pty Ltd v Emerson*,<sup>24</sup> a company agreed to supply the plaintiff with certain pumps it owned. The plaintiff was to hire out the pumps and the proceeds of hire were to be split between the company and plaintiff on a 60/40 basis. However, the company's 60% was to be used by the plaintiff to reduce the debt owed by the company to the plaintiff. At the time of the winding up of the company \$9000 had been produced from hire and an issue arose as to whether 60% of that could be set-off by the defendant guarantors against a claim by the plaintiff. The result of that set-off application is not relevant here, however, it was held that the company had assigned a future chose in action being 60% of the fruits of the hire proceeds. The subject matter of the assignment was the right to receive and recover the hire as soon as the debt accrued and became due and owing to the plaintiff under the hire contracts. However, it may be

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<sup>22</sup> Cf *Flood v Shand Construction Ltd* (1996) 54 Con LR 125 (where it was held that a prohibition had the effect that the assignee could sue for sums that were due and payable but could not bring an action to determine if a sum was due and payable or an action for damages for breach of contract). See also *Yeandle v Wynn Realisations Ltd* (1995) 47 Con LR 1.

<sup>23</sup> These are present contractual rights but until there is actually an obligation to pay there is no debt and no right to payment, see *The Australian Guarantee Corp Ltd v Balding* (1930) 43 CLR 140 at 152 per Isaacs J.

<sup>24</sup> (1991) 5 ACSR 576. See also *Re Williams* [1930] 2 Ch 378; *Sandford v DV Building & Constructions Co Pty Ltd* [1963] VR 137.

noted, that there can exist an unconditionally accrued right to payment prior to the relevant sum being payable.<sup>25</sup>

[7.6.3] There is a clear doctrinal difference between these two categories.<sup>26</sup> In the first, the assignor has attempted to vest in the assignee a right to a fund which was created when the fund was created which was when the debtor performed the contract (by paying the assignor) and was discharged from all or part of the contract. In the second category, the assignor has attempted to vest in the assignee a primary contractual right which will come into existence when the obligation to pay has unconditionally accrued and which replaces the prior existing primary conditional or contingent contractual right to future performance.

[7.6.4] The third category is where the assignor attempts to assign (immediately) a present contractual right to some future payment under the contract which has yet to be earned. It is suggested that this transaction should not be categorised as an assignment of the fruits. This is simply an assignment of a right to performance where that performance happens to involve a primary obligation to pay.<sup>27</sup> The notion of the 'fruits' of a contract should be limited to unconditional obligations to pay and will involve the assignment of future property when assigned prior to such unconditional accrual.<sup>28</sup> It is true that an assignment of a unconditionally accrued contractual right is still an assignment of a right to the performance of the contract but here the continued existence of that right no longer requires the continued existence of the contract and it is therefore suggested that such an assignment can be legitimately termed an 'assignment of the

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<sup>25</sup> See *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* (1936) 54 CLR 361 at 379-80 per Dixon and Evatt JJ and see [8.7].

<sup>26</sup> The distinction between the first and second category has been attempted to be exploited by commercial parties to allow for the creation of combined fixed and floating charges over book debts, see *Agnew & Bearsley v Commissioner of Inland Revenue* [2001] 2 AC 710.

<sup>27</sup> Under the Uniform Commercial Code, prior to amendments made in 1972, a distinction was drawn between 'accounts' and 'contract rights', the latter referring to payments not yet earned. These distinctions are now subsumed into the definition of 'account', see Art 9.102.

<sup>28</sup> See *G & T Earle Ltd v Hemsworth* (1928) 44 TLR 605 at 609 and *Delaware County Commissioner v Diebold Safe and Lock Co* (1890) 133 US 473.

fruits'.<sup>29</sup> Moreover, the importance of this distinction was emphasised earlier in the discussion of the division of contractual rights to performance, where an example was given of an attempted assignment of part of a right to payment under a lump sum building contract. It will be recalled that it was because part of the right to performance was assigned rather than part of the fruits that the assignment could not be upheld.<sup>30</sup>

[7.6.5] If category three is correct then it shows that the assignment of the fruits, at least where that expression is being used in conjunction with obligations to pay, is synonymous with the assignment of debts. Prior to the accrual of an unconditional obligation to pay there is no debt. That is, although the existence of a debt does not depend on it being immediately payable, generally, until there is an unconditional obligation to pay there is no debt.<sup>31</sup> If the obligation to pay is conditional upon some prior performance by the other party to the contract, then until that performance is given there is no obligation to pay (and no present right to payment) and no debt.<sup>32</sup> Thus,

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<sup>29</sup> Cf *Yeandle v Wynn Realisations Ltd* (1995) 47 Con LR 1 and *Flood v Shand Construction Ltd* (1996) 54 Con LR 125, where an assignment of sums 'due and which may become due' only gave the assignee a right to a liquidated amount. The assignee could not bring an action for breach of contract in respect of a non-payment. This would appear to deny the right to a liquidated amount under the contract the character of being a right to some contractual performance which would carry with it the right to damages upon breach.

<sup>30</sup> [6.9].

<sup>31</sup> In the case of sales, a debt will arise if property in the goods has passed and they have not been paid for, see *Australian Guarantee Corp Ltd v Balding* (1930) 43 CLR 140 at 153-54 per Isaacs J. That is, a sale as opposed to an agreement for sale. An action for damages for failure to perform, that is, a breach of contract, will arise when the buyer refuses to pay, under a valid agreement for sale where property in the goods has not passed. However, even in this latter case, if the obligation to pay has accrued, there must still be a debt in existence, see *Australian Guarantee Corp Ltd v Balding* (1930) 43 CLR 140 at 160 per Dixon J. This must be the case even in immediate over the counter sales, that is, there is a moment when an agreement for sale is concluded and a right to payment accrues (that is, a debt), even though payment and transfer of property follow almost instantaneously. Moreover, where a contract states that payment is to be made on a certain day, then a debt will arise on that day even if there is no conveyance by that time because there is nevertheless an obligation to pay.

<sup>32</sup> This point is not always appreciated, for example, in *Marathon Electrical Manufacturing Corp v Mashreqbank PSC* [1997] 2 BCLC 460 at 465-66, Mance J approves a statement made by Oditah *Legal Aspects of Receivables Financing* (1991) at 28-29, which recognises the distinction between unaccrued obligations to pay (that is present rights to performance) and unconditionally



where an executory loan agreement is in place, no debt is created but merely a contingent contractual right to an advance which will result in a breach of contract if it is not forthcoming when a call is made on it.<sup>33</sup> In such a case, it is impossible to presently assign a debt as it does not exist.<sup>34</sup>

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accrued obligations to pay (that is, fruits/debts) but suggests that the law treats both as existing debts. This, it is suggested, is against the weight of authority, see [6.7] note 45, [7.6.2]. No doubt in each case there is existing property that can be assigned, but only the latter represents an existing debt. If there is a commercial need to end this distinction it must be clearly articulated, see note 27. Arguably any practical problems can be overcome, not by ending the distinction, but by recognising and giving effect to a notice of the agreement to assign prior to the property coming into existence, see [8.6], [8.14], 8.32.

<sup>33</sup> *May v Lane* (1864) 64 LJQB 236. The right to the advance, that is, the right to performance, may not be assignable as it may be personal being based on the confidence placed by the lender in the borrower's ability to repay, [6.14]. However, in *May v Lane*, it was suggested by Rigby LJ (at 238) that it was not assignable because it was not a chose in action and it was not a chose in action because to recognise it as such would be at odds with the law of maintenance and champerty.

<sup>34</sup> Where the assignment is of future property it may be still sensible to speak of that as a future debt in a non-technical sense but where the assigned right is a present right where the obligation to pay is conditional or contingent (as opposed to the time for payment), that cannot sensibly be termed a debt unless a legislative provision dictates otherwise (see *Australian Guarantee Corp Ltd v Balding* (1930) 43 CLR 140; *Re WF LeCornu Ltd* [1931] SASR 425; *Independent Automatic Sales Ltd v Knowles & Foster* [1962] 1 WLR 974; *Bakewell v The Deputy Federal Commissioner of Taxation (South Australia)* (1937) 58 CLR 743 at 754 per Latham CJ.) or perhaps where the condition or contingency upon which the obligation to pay is dependent is bound to occur or is within the control of the creditor so that in essence only payment is deferred and not the accrual of the obligation to pay, see *Paul & Frank Ltd v Discount Bank (Overseas) Ltd* [1967] Ch 348 at 362 per Pennycuik J. See further *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* (1936) 54 CLR 361 at 379-80 per Dixon and Evatt JJ (if an obligation to pay has arisen by the time of discharge, then although the date for payment may not have arisen by that time, there would still exist an assignable chose in action (a debt) even if payment is still dependent on the occurrence of a contingency so long as that contingency does not involve further performance of the contract). See further *Colonial Bank v European Grain & Shipping Ltd (The Dominique)* [1987] 1 Lloyd's Rep 239. Moreover, where in a contract of hire-purchase the contract is determinable by the hirer at will so that it cannot be said that the contract contains a promise to pay for the goods then no obligation to pay for the goods will presently exist, see *HJ Wigmore & Co Ltd v Rundle* (1930) 44 CLR 222; *Australian Guarantee Corp Ltd v Balding* (1930) 43 CLR 140 at 159 per Dixon J; *Blackwood's Ltd v Chartres* (1931) 31 SR(NSW) 619.

[7.6.6] Before moving on there is one further scenario that should be considered. If there is an attempted assignment of an unconditional right to payment prior to the obligation to pay becoming unconditional, (which if given for value would be upheld as an agreement to assign), then presumably the existing conditional or contingent contractual right to performance must still be vested in the assignor. Clearly, when the obligation to pay becomes unconditional, the assignee will take the immediate beneficial interest in that right and, if at that point there is still no valid legal assignment, the assignor will hold its legal interest on trust for the assignee.

However, what if, prior to the obligation to pay becoming unconditional, the assignor further assigns the present conditional or contingent right to performance to a second assignee? That is, what happens when the obligation to pay becomes unconditional? One view might be that the present right to some conditional performance is a distinct chose in action from the unconditional right to payment and, as the latter has then been assigned away, the second assignee will have no claim to the payment. That they are distinct would appear to flow from the accepted position that an assignment of an unconditional right to payment, prior to such a right accruing, is an assignment of future property.

From a contract perspective, a contractual right to performance which is conditional or contingent upon some future performance or event automatically becomes an unconditional right to performance once that condition is fulfilled or that contingency occurs. Moreover, it is quite clear (putting aside the complication of the first assignment in the above fact scenario) that if there is an assignment of such a conditional or contingent contractual right, then although the assignee cannot immediately enforce that right, once the condition is fulfilled or the contingency occurs the assignee can immediately enforce the assigned right as an unconditional right to performance without the need for a separate assignment of that unconditional right. The difficulty is to explain this result from a personal property perspective because the conditional and unconditional rights must be dealt with as distinct rights rather than as merging personal contractual rights.

One way this could be explained is by the feeding of title. That is, at the time of the assignment the assignor only had title to a conditional or contingent right and could only assign such a right. However, clearly, if there were no assignment, then once the condition or contingency occurred the party in the position of the assignor would be said to hold an unconditional contractual right to payment. Arguably, where there is an assignment, this is then fed through to the assignee.

This analysis does have a weakness. The idea of feeding title generally refers to the transmission of a better title to a thing, such as goods. Importantly, the 'thing' never changes only the strength of the title in respect of that thing. In the case of contractual rights, however, the 'thing' is the contractual right, that is, in the scenario being discussed, the assigned conditional or contingent right to performance. Thus the application of the feeding of title idea here would seem to change the 'thing' which is not possible. That is, it is feeding title to a different thing.<sup>35</sup> It is not sufficient to say that what is assigned is simply the 'right to performance under the contract', so that what is then fed through is simply a better title to that right to performance.<sup>36</sup> It is necessary to properly and precisely characterise what that right to performance is. This has two aspects. First, the right to performance encapsulates a promise by the obligor to the assignor which does not change to a promise to the assignee by virtue of the assignment. Second, at the time of the assignment, the assignor only had title to a conditional or contingent right to payment and this is what was transferred.

Nevertheless, it may be that this aspect of feeding title only applies to transactions involving tangibles and different rules apply to intangibles. It has already been noted in Chapter 3 that the law with respect to intangibles does, in certain respects, operate by its own set of rules.<sup>37</sup> Thus an exception to the *nemo dat* rule allows an assignor to assign a

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<sup>35</sup> If the movement from a conditional or contingent right to an unconditional right was not seen as a change to a different thing, then the door is left open to argue that prior to the performance of the condition or the occurrence of the contingency there must presently exist an assignable unconditional right to payment the enforcement of which is merely suspended. This, however, would appear to be at odds with those cases that have held that the assignment of a debt, where at the time of assignment the obligation to pay was merely conditional, is merely the assignment of future property, see [7.6.5].

<sup>36</sup> [3.7].

<sup>37</sup> [3.9].

debt twice with any dispute between the assignees being resolved as a priority dispute. This is despite the fact that after the first assignment, the assignor has nothing left to assign. If it is then the case that feeding title explains how an unconditional right is transferred to an assignee without a separate assignment, then, in the case where an assignor first agrees to assign a future unconditional right and later separately assigns to another assignee the remaining present conditional right, then, upon the performance of the relevant condition, the effect of feeding title would arguably be that both assignees are then vested with an unconditional right to performance. That is, the effect is the same as if the assignor assigned the right twice. Thus any dispute would be resolved as a priority dispute.<sup>38</sup>

Another analysis is that upon the performance of a condition or the occurrence of a contingency the conditional or contingent chose in action is replaced by an unconditional one and this automatically vests in the person who at that time is vested with the right to performance. This is not unique, it has already been mentioned that a right to damages replaces a right to performance. However, in that case, the notion of 'replacing' the right to performance is used in a loose sense as there is no real replacement until damages are paid. In the case of conditional and unconditional rights, however, there must be a true replacement as both cannot continue to exist. Thus, upon the occurrence of the relevant condition, the conditional right is extinguished and replaced by the unconditional right. If this analysis is correct, then no issue of priority will ever arise. If the assignor maintains the conditional right or assigns that right to a second assignee, that right will be extinguished upon the occurrence of the condition and the first assignee taking the assignment of the unconditional right will be the only party left with an interest.

For the purposes of this dissertation, it is not necessary to choose between these two possible approaches as neither impacts on the transfer thesis, however, it is suggested that this latter analysis is more doctrinally sound than the feeding of title analysis. However, this latter analysis may give rise to unwanted results. For example, for the same reasons that the law allows an assignor to assign a debt twice (despite the doctrinal

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<sup>38</sup> The position would appear to be different with tangibles where it has been held that title is fed to the first transferee, see *Patten v Thomas* (1965) 66 SR (NSW) 458, [1965] NSWLR 1457 and see Bridge *The Sale of Goods* (1997) at 397-98.

problems this gives rise to) it may be preferable that any dispute between the assignees be decided by reference to priority rules rather than a strict application of doctrine which would extinguish the second assignee's claim. However, it may be noted, that a slight variation of the facts may result in the second assignee being the successful party without the matter necessarily involving a priority dispute. For example, assume A sells goods to X and takes an assignment of X's present and future book debts; assume that X then sells the goods to Y on credit terms whereby X maintains title in the goods until the price is paid; next, assume X transfers title in the goods to B and at the same time assigns its rights in the contract of sale with Y to B; further assume that the contract of sale between X and Y was set out in a document that evidenced an immediate assignment of the benefit of the contract to B which may be the case where B is financing X. Here, arguably the benefit of the contract of sale between X and Y never vested in X, or, if it did, it was always a title conditional upon an assignment to B. Since A's title is subject to the principle of transfer, it could not have obtained any right to payments under the contract between X and Y.<sup>39</sup>

**[7.7] Problems with the notion of assigning the fruits.** There is no doubt that the distinctions drawn above as regards the assignment of fruits have not always been maintained. For example, in *Glegg v Bromley*,<sup>40</sup> the assignor assigned sums she may become entitled to by virtue of certain litigation that was on foot. Fletcher Moulton LJ<sup>41</sup> and Parker J,<sup>42</sup> had no problem in holding that this involved the assignment of future

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<sup>39</sup> See *Snyder's Ltd v Furniture Finance Corp Ltd* [1931] 1 DLR 398 (here at 406, it was suggested that the same result should follow even if the assignment to B was not immediate, so long as the contract of sale between X and Y had an express provision to the effect that it may be assigned.) However, if B did not make advances to X but an obligation to pay X was created upon the assignment, then A would have a claim to that debt. A distinct situation is where there is a sale of goods subject to a title retention provision with a subsequent on-sale of the goods on credit terms together with an assignment of book debts by the buyer/on-seller. Here there is a priority dispute between the assignee and title retention seller who relies on its equitable tracing rights, see McLauchlan 'Priorities - Equitable Tracing Rights and Assignments of Book Debts' (1980) 96 *LQR* 90.

<sup>40</sup> [1912] 3 KB 474. See also *Deputy Commissioner of Taxation v Government Insurance Office of New South Wales* (1993) 117 ALR 61.

<sup>41</sup> [1912] 3 KB 474 at 489.

<sup>42</sup> [1912] 3 KB 474 at 489.

property, being the fruits of the litigation if successful and they concerned themselves with the issue of whether or not there was consideration for the assignment. Vaughan Williams LJ,<sup>43</sup> on the other hand, concluded that the assignment was an assignment 'of property and not an expectancy ... [it] ... was an assignment of ... the fruits of an action.' However, it is suggested that it is not possible to entitle a present assignment an assignment of fruits unless the 'fruits' have unconditionally accrued, in *Glegg's* case, by way of a court order.

In addition, *Glegg's* case, together with *Norman v Federal Commissioner of Taxation*,<sup>44</sup> *Shepherd v Federal Commissioner of Taxation*<sup>45</sup> and *Australian Guarantee Corp v Balding*,<sup>46</sup> show how difficult it can be to maintain the distinction between the tree and its fruits. In some cases, despite very careful drafting, there simply may not exist any present property so that any assignment must be an assignment of future property. Thus, in *Booth v Commissioner of Taxation*,<sup>47</sup> Mason CJ saw the result in *Norman v Federal Commissioner of Taxation*, not as one turning on the drafting of the memorandum of assignment but as an example of the occasional impossibility of identifying 'a present right to future income divorced from the proprietary right which generates that future income.'<sup>48</sup> He added: 'In such cases an attempted assignment deals with future property or an expectancy and operates to vest the future income in the assignee as and when that future income accrues due, but not before it accrues due. Accordingly, the assignment would not be effective to prevent the income being derived or being deemed to be derived by the assignor.'<sup>49</sup> Whether that is a correct analysis of *Norman's* case may be doubted, however, there is little doubt that what Mason CJ suggested is a truism. Moreover, in some cases the distinction between the tree and its fruit may not be drawn for policy reasons. In fact, in *Hadlee v Commissioner of Inland Revenue*,<sup>50</sup> Cooke P,<sup>51</sup> in discussing the abovementioned statements of Mason CJ suggested that Mason CJ was

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<sup>43</sup> [1912] 3 KB 474 at 484.

<sup>44</sup> [6.7].

<sup>45</sup> [6.7].

<sup>46</sup> [6.7].

<sup>47</sup> (1987) 164 CLR 159.

<sup>48</sup> (1987) 164 CLR 159 at 167.

<sup>49</sup> (1987) 164 CLR 159 at 167-68.

<sup>50</sup> [1991] 3 NZLR 517 (affirmed [1993] AC 524).

<sup>51</sup> [1991] 3 NZLR 517 at 520, cf at 528 per Richardson J (affirmed [1993] AC 524).

not denying that the difference between assigning the fruits and assigning the tree is usually one of intention but that for certain purposes, especially tax, for policy reasons, it may not be possible to rely on such fine doctrinal distinctions to alienate the derivation of income from the assignor.<sup>52</sup> For example, if income is derived from the personal exertion of the assignor, then for tax purposes, it may be irrelevant to whom that right to income was beneficially vested in terms of assignment.

## (d) Conditional Rights

**[7.8] Meaning of 'conditional'.** The words 'conditional' and 'condition' have various meanings in contract law depending upon the context in which they are used.<sup>53</sup> In this section, unless otherwise stated, an assigned contractual right is conditional if it is dependent upon some performance obligation on the part of the assignor. The impact on an assignee in its relationship with the obligor in taking the assignment of such a right is dealt with in Chapter Eight. The issue in this section is simply with determining the existence of such conditions and the characterisation of the subsequent right held by the assignee.

**[7.9] Importance of distinction.** The distinction between conditional and unconditional contractual rights is perhaps the most important issue of pure contract law affecting the assignment of contractual rights. Some important aspects of the distinction have already been outlined in the discussion of the 'fruits' of a contract. Put simply, if the assignor only has title to a conditional (or contingent) right and by mistake it is characterised as an unconditional right when vested in the assignee, then the principle of transfer would have been circumvented.

The distinction between conditional and unconditional contractual rights ultimately turns on construction and would appear to be a straight forward distinction. However, as the following analysis will show, it is a distinction not always appreciated and one that occasionally can be difficult to draw.

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<sup>52</sup> See also *FCT v Everett* (1980) 143 CLR 440 at 453.

<sup>53</sup> See Stoljar 'The Contractual Concept of Condition' (1953) 69 *LQR* 485; Carter *Breach of Contract* (2<sup>nd</sup> ed, 1991) paras 408-410.

**[7.10] Identification of conditional rights.** Generally, the distinction between conditional and unconditional rights is straight forward. Whether a contractual right is conditional, that is, subject to a performance obligation, is a matter of construction. In recent years, however, and in the context of claims for restitution following discharge of contract for breach or repudiation, the limited contractual relevance of the distinction between conditional and unconditional rights as used to characterise performance obligations and to denote the order of performance has been expanded to provide a basis for restitution. It is necessary to take a short diversion into these cases as they highlight some of the misconceptions of the distinction. The result of these cases is also important to claims for restitution by an obligor against an assignee. However, as this involves a direct claim against the assignee a detailed discussion of such claims falls outside this dissertation.<sup>54</sup>

**[7.11] The restitution context.** Both the House of Lords and the High Court of Australia have suggested that the conditional nature of a payment (rather than unjust enrichment) could provide the ground for its recovery after the contract is discharged for breach or repudiation. It is not intended here to enter into the debate as to whether such claims are best approached by reference to contract or unjust enrichment but simply to highlight the confusion these cases give rise to as regards the characterisation of contractual rights as either conditional and unconditional.

**[7.11.1]** The decision of the House of Lords was that of *Stocznia Gdanska SA v Latvian Shipping Co.*<sup>55</sup> Here a shipbuilder terminated contracts for breach by the buyers and sued for amounts that had fallen due under the contracts. The buyers argued that they did not have to pay as there was a total failure of consideration as regards each payment obligation. Lord Goff, in obiter, distinguished these construction contracts from contracts of sale and relying principally on the judgment of Dixon J in *McDonald v Dennys Lascelles Ltd*,<sup>56</sup> said that in sale contracts, 'it has been held that the buyer's remedy is contractual, the seller's title to retain the money being conditional upon his completing the contract.'

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<sup>54</sup> [8.13].

<sup>55</sup> [1998] 1 WLR 574.

<sup>56</sup> (1933) 48 CLR 457 at 475-9.



[7.11.2] The decision of the High Court of Australia is that of *Baltic Shipping Co v Dillon (The Mikhail Lermontov)*.<sup>57</sup> Here, upon the sinking of a cruise ship in the middle of a voyage, a passenger sued for damages and restitution of the fare. The restitution claim failed. Mason CJ (with whom Brennan and Toohey JJ agreed), said that in the context of a discharged contract, a payment may be recovered either by reference to the intention of the parties or failure of consideration. He suggested that this intention would be made out where the 'defendant's right to retain the payment is conditional upon the performance of his or her obligations under the contract'.<sup>58</sup> Gaudron J suggested that failure of consideration has no role where the relevant obligation is not an entire obligation because here recovery is based on non-fulfillment of a condition. In the case of an entire obligation, she suggested that there is necessarily a failure of consideration unless there is complete performance.<sup>59</sup> McHugh J appeared to also reason that recovery is based on intention suggesting that where a contractual payment is made 'conditionally upon the performance of a promise by the payee, the right to retain the moneys after discharge of the contract is dependent on whether the promise has been performed'.<sup>60</sup> However, he did add that where 'the promise has not been performed, there has been a total failure of consideration by reason of the non-fulfillment of the condition'.<sup>61</sup> For these statements, the majority principally relied upon the judgment of Dixon J in *Dennys Lascelles*. The other members of the Court, Deane and Dawson JJ, suggested that in such cases recovery (restitution) is granted to prevent an unjust enrichment and is based on failure of consideration.<sup>62</sup>

[7.11.3] It is the decision of Dixon J in *Dennys Lascelles* that deals with the conditional right point. In that case Dixon J said:<sup>63</sup>

When a contract stipulates for payment of part of the purchase money in advance, the purchaser relying only on the vendor's promise to give him a conveyance, the vendor is entitled to enforce

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<sup>57</sup> *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1993) 176 CLR 344.

<sup>58</sup> (1993) 176 CLR 344 at 351.

<sup>59</sup> (1993) 176 CLR 344 at 351 at 386.

<sup>60</sup> (1993) 176 CLR 344 at 351 at 389.

<sup>61</sup> (1993) 176 CLR 344 at 351 at 389.

<sup>62</sup> (1993) 176 CLR 344 at 375.

<sup>63</sup> (1933) 48 CLR 457 at 477. For a similar statement see *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 65 per Lord Wright.

payment before the time has arrived for conveying the land; yet his title to retain the money has been considered not to be absolute but conditional upon the subsequent completion of the contract.

*Dennys Lascelles* concerned a contract for the sale of land where the price was payable in instalments. Title (or at least delivery of a certificate of title in registrable form) was to be transferred upon the final instalment being tendered. The contract was discharged for breach by the purchaser prior to this time. It was held that the purchaser was not obliged to make payments that had accrued prior to the time of discharge. Moreover, payments that had been made were recoverable and it is here that Dixon J's statement to the effect that payments made were not absolute but conditional has been seized upon to ground recovery in contract rather than restitution.

[7.11.4] It is suggested that the interpretation placed on Dixon J's statement both in *Stocznia Gdanska Sa v Latvian Shipping Co* and *The Mikhail Lermontov* is in error.<sup>64</sup> Although most payments made under a contract may be said to be conditional in the loose sense of being related to some performance obligation, the true nature of an obligation must be determined by construction. The contract in *Dennys Lascelles* concerned an instalment contract for the sale of land and here the agreed return for each instalment is the other party's promise to perform rather than the actual performance of that promise. It is this distinction that allows a vendor (prior to discharge) to bring an action to recover an instalment that has not been paid. This is reflected in Dixon J's reference to 'the purchaser relying on the vendor's promise to give him a conveyance'. It must follow from this that since such a buyer only bargained for the vendor's promise to perform and that promise has been given by the time the instalment becomes payable, then each instalment, (other than the last instalment) in terms of intention, involves an unconditional obligation to pay.<sup>65</sup> Therefore, reliance on this case for the proposition that a conditional payment is recoverable by reason of its character as a conditional payment cannot be maintained. In addition, once a determination as to the presumed intention of the parties is made it cannot change. Therefore, since Dixon J concluded

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<sup>64</sup> See further Carter and Tolhurst 'Conditional Payments and Failure of Consideration: Contract or Restitution' (2001) 9 *Asia Pacific Law Review* 1.

<sup>65</sup> See further Dixon J's citation of *Ruddenklau v Charlesworth* [1925] NZLR 161 at 164-5, at (1933) 48 CLR 457 at 475-6.

that on construction the instalments were unconditional payments, his later reference to the vendor's title to retain them being conditional could not have been a reference to construction. It is suggested that Dixon J characterised the title to retain the payment as conditional because of the obligation to make restitution that was imposed where there was a total failure of consideration. He did not mean to use the word 'conditional' to characterise performance obligations and the order of performance and where each payment is matched by concurrent obligations of performance.<sup>66</sup>

[7.11.5] It may be that the distinction Dixon J was drawing was actually picked up by Lord Goff in *Pan Ocean Shipping Co Ltd v Creditcorp (The Trident Beauty)*.<sup>67</sup> This case concerned the assignment of rights to hire payments under a time charterparty. In one particular period, payment was made in advance to the assignee and the ship was off-hire for repairs for that entire period. An action for recovery of the payment was brought against the assignee. In the result, the action failed as the debtor had contracted on the basis that it would only look to the assignor for all remedies. However, in answer to a submission that the right to payment was conditional in the hands of the assignor and therefore also conditional in the hands of the assignee, Lord Goff remarked that this was to misunderstand the meaning of 'conditional'. He took the view that 'conditional' simply meant the payment was not final because there was in his view a *contractual* obligation to repay it if it was not subsequently earned.<sup>68</sup> Counsel on the other hand were submitting that the right to payment was conditional in the traditional sense of being subject to or dependent on performance of an obligation. Except for classifying the obligation to repay as contractual (which Lord Goff would have held to be the case whether or not there was an express contractual right to repay),<sup>69</sup> Lord Goff's response here is consistent with Dixon J's approach in *Dennys Lascelles*. That is, the description of the payment as conditional was only for the purpose of noting that it was repayable if not earned. However, because Lord Goff's analysis of recovery was based on contract his approach still contains the anomaly that a contractual right may be both unconditional and conditional at the same time. Moreover, as this was a case where the goods had to be immediately available upon the tender of the first instalment, it would

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<sup>66</sup> See generally Stoljar 'Dependent and Independent Promises' (1957) 2 *Syd LR* 217.

<sup>67</sup> *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161.

<sup>68</sup> [1994] 1 WLR 161 at 165.

<sup>69</sup> [1994] 1 WLR 161 at 164.

appear that in terms of intention this case involved a true conditional payment so that the submission of counsel was correct, and the assignment should have been characterised as an assignment of a conditional right. The failure to characterise it as such was in breach of the principle of transfer.<sup>70</sup>

[7.11.6] Lord Woolf said that the right to receive hire was independent of the obligation to give credit for hire paid but not earned.<sup>71</sup> He did not think the right was conditional at all. He said there was 'nothing qualified about the right', there was only an independent right to be repaid.<sup>72</sup> It may be that Lord Woolf's view is also in line with that of Dixon J, but he did not explain how the independent right to be repaid arises. This was not crucial in the case itself as there was an express contractual regime dealing with that issue. But if that were not the case, and there only exists an unconditional right to receive payment, then that would in all cases (that is, even if there were no assignment) prevent any recovery based on failure of consideration.

**[7.12] A potential problem, the effect of discharge.** Where a vendor terminates an instalment contract for the sale of land for breach by the purchaser, the vendor cannot sue for instalments that fall due prior to discharge and are not paid. Arguably this result flows from the payment obligation only conditionally accruing at the time of discharge.<sup>73</sup> That is, the right to receive payment is never totally divorced from the obligation to perform and so the right to receive payment is not unconditional.

This explanation makes some sense because if the right to receive payment was intended to be independent of performance how could there ever be recovery based on

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<sup>70</sup> It is, however, a distinct issue as to whether or not the obligor should be successful in claiming restitution against the assignee, see [8.13].

<sup>71</sup> [1994] 1 WLR 161 at 169.

<sup>72</sup> [1994] 1 WLR 161 at 171.

<sup>73</sup> See generally on the effect of discharge, *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 849 per Lord Diplock; *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-7 per Dixon J. Cf *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574.

failure of consideration?<sup>74</sup> However, as noted above, in terms of intention such instalments must be independent of performance. It is suggested that the better explanation of the effect of discharge here is simply that it would be inconsistent with the election to terminate the contract for the vendor to then bring an action for the payment. Therefore, although unconditionally accrued rights survive discharge, it does not follow that it is possible to call for the performance of those obligations after discharge as opposed to suing for damages for the non-performance of those obligations. In order to call for performance, that performance must not be inconsistent with the election to discharge the contract. For example, in the case of a sale of goods by instalments where the price for a particular instalment is paid in advance, the buyer can continue to call for the goods to be delivered after discharge. Moreover, a debt that has been earned by performance can be enforced after discharge.

**[7.13] Characterising a conditional right in the hands of the assignee.** As already noted, the principle of transfer dictates that if an assignor assigns a right that is conditional upon some later performance by the assignor, the right vested in the assignee must also be a conditional right until the condition is fulfilled.

It is, however, necessary here to draw an important distinction. In the discussion of the 'conditional benefit' principle in Chapter Six, it was suggested that there appears to be a class of rights in which the burden forms an intrinsic part of the right held by the assignor. That is, the right carries with it the burden. In such cases, it is not possible for the assignee to take the right without the burden and this may mean the assignee is required to perform the relevant contractual obligation. However, where there is no assignment of a true 'conditional benefit' but where the right assigned is conditional upon some later performance obligation by the assignor, then although that obligation defines the character of the assigned right, that right still has an independent existence as a conditional right. It does not carry with it the obligation to perform, it is only subject to the performance of that obligation.

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<sup>74</sup> It is not necessary to answer this question here, however, the answer lies in rejecting any notion that failure of consideration is based on qualified intent, see Tolhurst in Hedley and Halliwell (eds) *The Law of Restitution, Butterworths Common Law Series* (2002) para 19.31.

It follows that if a present right to a future payment is assigned where the obligation to pay will accrue upon the performance of some obligation by *the assignor*,<sup>75</sup> it is clear the assignee cannot enforce that right to payment prior to the performance of that obligation by *the assignor*.<sup>76</sup> The assignee's right is contingent not only upon that obligation being performed but being performed by the assignor or vicariously performed by the assignor. This is the effect of the obligation (being a contractual obligation of the assignor) defining the nature of the contractual right vested in the assignee. That is, because the assignment is an assignment of a contractual right, it is not possible to characterise that right independently of the contract. For example, in *Tooth v Hallett*,<sup>77</sup> a builder assigned a right to receive payment under a building contract. The assignment occurred after the time for performance of the contract had expired. Under the contract, at the expiration of that time the obligor had a right to employ others to complete the work. As it turned out, soon after the assignment, the builder entered into a creditor's deed and the trustee of that deed, with the consent of the obligor and using its own funds completed the work. No amount was due under the contract prior to the trustee taking over the work. It was held that the assignee's right must be characterised by reference to the contract and was therefore subject to the conditions of the contract which allowed the obligor to get someone else in to complete the work. If that had occurred here, then clearly anything payable to that third party could be deducted from anything that was due to the assignee. It could make no difference that it was the trustee who completed the work, that is, the assignee could not

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<sup>75</sup> This is to be distinguished from the case where the payment has been earned at the time of the assignment but it is not yet payable, see *G and T Earle Ltd v Hemsworth RDC* (1928) 44 TLR 605 (affirmed [1928] All ER 602, (1928) 44 TLR 758).

<sup>76</sup> [8.7].

<sup>77</sup> (1869) LR 4 Ch App 242. Cf as to amounts accrued prior to the third party taking over contract, *Re Trytel* [1952] 2 TLR 32.

be placed in a better position simply because the work was carried out by the trustee of the assignor.

## **PART 4**

### **THE POSITION OF THE PARTIES**



## 8. The Position of the Parties

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### (a) Introduction

**[8.1] Purpose of chapter.** This Chapter is concerned with the remedies available to the obligor, assignor and assignee. The largest portion of the Chapter concerns the rights and remedies of the assignee and obligor as it is here that the principle of transfer has a role to play. Nevertheless, to provide a complete picture of the rights of the parties the relationships of the assignor/obligor and assignor/assignee are also outlined.

The rules governing the assignment of contractual rights which are most relevant here are:

5. After receiving notice of the assignment, the obligor may not do anything to diminish the rights of the assignee.
6. The assignee can be in no better position than the assignor was prior to the assignment.
7. The obligor should be no worse off by virtue of an assignment.<sup>1</sup>
8. The assignee takes subject to the equities.

Each of these rules will be noted throughout the Chapter and explained by reference to the transfer principle.

**[8.2] Structure of chapter.** This Chapter has three principle sections which deal with the relationship of the assignor/obligor, assignor/assignee and assignee/obligor. The latter deals with the rights of the assignee, the rights of the obligor which it has against the assignee and the operation of the subject to equities rule. Finally, this Chapter

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<sup>1</sup> There is also a view that the obligor is to be no better off by virtue of an assignment and this can be found in the reasoning of the United Nations Convention on Assignment of Receivables in International Trade, see Article 23 and UNCITRAL Commentary to the Draft Convention on Assignment in Receivables Financing (Part II), Note by the Secretariat A/CN.9/WGII/WP106, 16 September 1999 para 65. See also *Pan Ocean Shipping Co Ltd v Creditcorp (The Trident Beauty)* [1994] 1 WLR 161 at 171-72 per Lord Woolf.

concludes with an investigation of the operation of the subject to equities rule as it applies to intermediate assignees. The Chapter does not deal with the position between competing assignees which is governed by priority rules and falls outside the dissertation.

## **(b) Assignor/ Obligor**

**[8.3] Assignor/ Obligor.** The assignor remains primarily liable to the obligor for the non-performance of its outstanding contractual obligations.<sup>2</sup> The remedies available to the obligor upon a failure of the assignor to perform such obligations will be the normal remedies available for breach of contract.

Turning to the position where the obligor fails to perform, generally, where there is a legal assignment, the obligor will not be liable to the assignor unless the assignment was not of all the rights under a contract but rather concerned the absolute assignment of some distinct right under the contract and where the breach relates to a right still vested in the assignor. Such cases are likely to be rare because there may not be many instances of rights that can be separated this way and therefore the assignment of anything less than the entire benefit of the contract will not satisfy the statutory requirement that the assignment be 'absolute'. In any case such a split may not be within the contemplation of a reasonable person in the position of the obligor.<sup>3</sup> Where that is not the case, that is, where the obligor continues to be liable to the assignor, the normal remedies for breach of contract would be available to the assignor.

Where an assignment fails because of an express prohibition on assignment, it has been held in England that the assignor may be entitled to recover substantial damages in respect of a breach by the obligor even though the assignor did not own the underlying property at the time of breach nor has suffered any financial loss caused by the non-

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<sup>2</sup> *Fratelli Sorrentino v Buerger* [1915] 1 KB 301 at 313 per Atkin J (affirmed [1915] 3 KB 367); *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 55. This may include any period by the which the contract is extended by the assignee exercising an option, *Baker v Merkel* [1960] 1 QB 657. Statutory provisions do exist to the contrary, see Butt *Land Law* (4<sup>th</sup> ed, 2001) para 15104.

<sup>3</sup> [6.10].

performance.<sup>4</sup> It is not necessary here to debate the correctness of this position, however, in such a case, if the assignor is also liable in damages to the assignee for promising to assign rights and failing to do so because of the prohibition, then, it has been suggested that the assignor cannot claim its liability to the assignee as a loss suffered by the assignor vis-à-vis the obligor as that 'loss' will be too remote.<sup>5</sup> That is, a party to a contract cannot be liable for damages which flow from the other party doing something which the contract forbids. Arguably, the proper concept here is causation rather than remoteness.

Finally, it needs to be mentioned, that until the obligor receives notice of the assignment, it can obtain a good discharge from the assignor.<sup>6</sup> In the case of a legal assignment this must follow because until notice is given there is no assignment. In the case of an equitable assignment, the assignment is effective prior to notice but the effect of the assignment is that the obligor still owes its obligation in law to the assignor and in equity to the assignee and its conscience is not bound as regards the assignee until notice is given.<sup>7</sup>

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<sup>4</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85; *Darlington Borough Council v Wiltshire Northern Ltd* [1995] 1 WLR 68. See also *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518. See further Coote 'Contract Damages, Ruxley and the Performance Interest' [1997] *CLJ* 537.

<sup>5</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 110 per Lord Browne-Wilkinson.

<sup>6</sup> *Rose v Clark* (1842) 1 Y & C 534, 62 ER 1005; *Stephens v Venable (No 1)* (1862) 30 Beav 625, 54 ER 1084; *Liquidation Estates Purchase Co Ltd v Willoughby* [1898] AC 321; *Nioa v Bell* (1901) 27 VLR 82 at 85 per Holroyd J; *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 668-9 per Collins MR; *Squires v SA Steel & Sheet Pty Ltd* (1987) 45 SASR 147 at 144 per Bollen J; *Herkules Piling Ltd v Tilbury Construction Ltd* (1992) 61 BLR 107 at 117.

<sup>7</sup> [4.10].

## (c) Assignor/ Assignee

[8.4] **Assignor/ Assignee.**<sup>8</sup> Where there is a contract of assignment, the relationship between the assignor and assignee is governed by the express and implied terms of the contract and non-performance brings into operation the normal remedial rules.<sup>9</sup> For example, where the assignor, after assignment but prior to the obligor receiving notice of the assignment, discharges the obligor,<sup>10</sup> the assignor usually will be answerable to the assignee for breach of contract<sup>11</sup> and in some cases restitution if the assignor is unjustly enriched (by taking receipt of benefits assigned to the assignee) at the expense of the assignee.<sup>12</sup> Moreover, if the contract of assignment is vitiated by reason of some conduct on the part of the assignee or assignor, such as misrepresentation, the assignor or assignee as the case may be, can rescind that contract and in the case of a rescission by the assignor, it will generally not matter that the assignee may have in the mean time assigned the chose in action to a bona fide third party.<sup>13</sup>

The assignor may also have a claim for restitution against the assignee, for example, if a debtor pays an assignee and the assignee fails to discharge some obligation to the assignor which was to occur upon receipt of that payment, then, if for any reason the contract between the assignor and assignee is ineffective, there may be circumstances

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<sup>8</sup> Given that an assignment is generally effective upon the execution of consideration, the assignee would rarely require an order of specific performance against the assignor unless he or she requires some further act by the assignor before the assignment is effective at law or equity as the case may be, see Jones and Goodhart *Specific Performance* (2<sup>nd</sup> ed, 1996) at 167.

<sup>9</sup> The personal representatives of the assignor are bound by any assignment that was binding on the assignor but are not personally liable, see *Re Westerton* [1919] 2 Ch 104; *Re Rose* [1952] Ch 499. See also, *Re Worthington* [1914] 2 KB 299.

<sup>10</sup> *Re Patrick* [1891] 1 Ch 82 at 88 per Lindley LJ.

<sup>11</sup> See note 14 below.

<sup>12</sup> *Cotton v Heyl* [1930] 1 Ch 510.

<sup>13</sup> *The Southern British National Trust Ltd v Pither* (1937) 57 CLR 89 at 103-4 per Latham CJ at 108, 110-12 per Dixon J. See also *Cockell v Taylor* (1852) 15 Beav 103, 51 ER 475. See further *Abram Steamship Co Ltd v Westville Shipping Co Ltd* [1923] AC 773 (here a misrepresentation made by the assignor was innocently passed on by the intermediate assignee to the ultimate assignee so that the rescission by the ultimate assignee was held to reinvest the intermediate assignee with a right to rescind against the assignor).

where it can be said that the assignee is unjustly enriched at the expense of the assignor.<sup>14</sup>

In addition, often the rights of the assignee will be dependent upon performance by the assignor. In such a case the assignee cannot call for performance until and unless the assignor performs. If the assignor fails to perform it will be in breach of contract vis-à-vis the obligor and may also be in breach of contract vis-à-vis the assignee if it promised (as part of the contract of assignment) that it would perform those obligations.<sup>15</sup> In such cases, although the actions of the assignor may impact on the exercise of the assignee's rights, the assignee will not be responsible to the obligor for the non-performance of the assignor.<sup>16</sup>

Finally, the extent to which the assignor and obligor can agree to vary a contract despite the assignee having an interest in the contract is dealt with below in the context of the relationship between obligor and assignee.<sup>17</sup>

**[8.5] Remedies for failing to assign.** Perhaps the most topical issue as regards this relationship concerns the remedies available in the case of a breach of a promise to assign. This generally will arise where the assignor promises, for value, to immediately assign a right in the face of a valid prohibition on assignment. In such a case, although the weight of authority is that the assignment will not be valid,<sup>18</sup> the contract between assignor and assignee will be given effect to so that the assignor will be liable in

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<sup>14</sup> This same scenario may result in the assignee being unjustly enriched at the expense of the obligor, see UNIDROIT Convention on International Factoring 1988 article 10(2)(a).

<sup>15</sup> It has been said that a court will have little trouble in implying an obligation that the assignor will do nothing to defeat the assignment, see *Anning v Anning* (1907) 4 CLR 1049 at 1070 per Isaacs J. However, arguably some actions of the assignor should be allowed if made for legitimate commercial reasons, see [8.14]-[8.16.4]. See also the warranties the assignor gives the assignee under the Restatement of Contracts 2d (1979) Art 333.

<sup>16</sup> *Liquidation Estates Purchase Co Ltd v Willoughby* [1898] AC 321 at 331 per Lord Herschell; *Young v Kitchen* (1878) 3 Ex D 127. See also *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 917 per Lord Hoffmann (assignee's right affected by assignor exercising right to rescind).

<sup>17</sup> [8.14].

<sup>18</sup> [6.16.1].

damages to the assignee for failing to assign.<sup>19</sup> As already noted, in some cases it may still be possible for this contract to be given effect to as a bilateral agreement to assign requiring the assignor to account to the assignee for the fruits of the contract.<sup>20</sup> However, with contractual rights to performance, often the nature of the obligor's performance will make it impossible for the assignor to account to the assignee for that performance and the preferred course for the assignee is to sue for damages in respect of the breach of contract. In such a case the normal contract rules will apply and this will often result in a measure that equates with the cost to the 'assignee' of remedying the defective performance of the obligor because, if the assignment had been valid, the assignee could recover that cost from the obligor.<sup>21</sup>

## (d) Assignee/ Obligor

### ***(i) The rights of the assignee***

**[8.6] The issue of discharge.** Generally, upon receiving notice<sup>22</sup> of the assignment the obligor is bound in conscience to perform the relevant obligation for the benefit of the assignee.<sup>23</sup> As regards legal assignments this causes no problems as there is no assignment until notice. In the case of equitable assignments, as already noted,<sup>24</sup> once

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<sup>19</sup> [6.16.1].

<sup>20</sup> [6.16].

<sup>21</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 110 per Lord Browne-Wilkinson.

<sup>22</sup> What constitutes sufficient notice for this purpose is not entirely clear. For example, must a notice contain a payment of performance instruction, see *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1969] 1 QB 607 at 615 per Widgery LJ; *Denney, Gasquet and Metcalfe v Conklin* [1913] 3 KB 177; *James Talcott Ltd v John Lewis and Co Ltd* [1940] 3 All ER 592? See also United Nations Convention on Assignment of Receivables in International Trade Articles 5(d), 16(1), 17(1), 17(2). A resolution to this aspect of formalities falls outside this dissertation. It would appear that a notice of an agreement to assign is not sufficient, see *Shaw v Foster* (1872) LR 5 E Ir App 321. Moreover, it is doubtful that mere knowledge of an assignment is sufficient.

<sup>23</sup> *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 60 at 668-9 per Collins MR.

<sup>24</sup> [4.10].

the obligor receives notice then often neither the assignee nor the assignor can provide it with a valid discharge.<sup>25</sup> This results from the obligor owing its duty in part to both the assignee and assignor. Clearly, the obligor can obtain a discharge from the assignee if the assignee is empowered by the assignor to give it<sup>26</sup> or if the obligor is instructed by the assignor to perform for the benefit of the assignee and does so.<sup>27</sup> However, where the obligor is met with claims from both the assignor and assignee, its safest course is to interplead. Moreover, the facts of any case, may alleviate this strict position. For example, if the assignment in *Tolhurst's* case was equitable, once the assignor sold the land it could no longer claim any right to supply under the contract as that right was tied to the ownership of the land. Therefore, the obligor clearly could obtain a discharge by performing for the person owning the land, that is, the assignee.

Generally, however, in the case of both legal and equitable assignments, without the authority of the assignee, once notice of the assignment is given, the obligor cannot obtain a good discharge by payment or performance to the assignor.<sup>28</sup> One possible

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<sup>25</sup> *Deposit Protection Board v Dalia* [1994] 2 AC 367 at 385 per Simon Brown LJ (overruled on another point sub nom *Deposit Protection Board v Barclays Bank Plc* [1994] 2 AC 367).

<sup>26</sup> *Durham Bros v Robertson* [1898] 1 QB 765 at 770 per Chitty LJ; *Lett v Morris* (1831) 4 Sim 607, 58 ER 227. See also UNIDROIT Convention on International Factoring (1988), Art 8(1)(a). In practice the obligor should verify the authorisation if the notice is not provided by the assignor.

<sup>27</sup> See *Jones v Farrell* (1857) 1 De G & J 208 at 218, 44 ER 703 at 707 per Lord Cranworth LC; *Durham Bros v Robertson* [1898] 1 QB 765 at 770 per Chitty LJ; *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584. Care must be taken in the case of a partial assignment of a debt. Here the assignee cannot give the debtor a discharge even in respect of the part of the debt assigned to the assignee and the assignor cannot give a good discharge in respect of the non-assigned part of the debt as there remains in law one single debt, see *Deposit Protection Board v Dalia* [1994] 2 AC 367 at 381 (overruled on another point sub nom *Deposit Protection Board v Barclays Bank Plc* [1994] 2 AC 367). Compare United Nations Convention on Assignment of Receivables in International Trade Articles 17(2)-17(6).

<sup>28</sup> *Legh v Legh* (1799) 1 Bis & P, 126 ER 1002; *Brice v Bannister* (1878) 3 QBD 569; *Liquidation Estates Purchase Co Ltd v Willoughby* [1898] AC 321; *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462 per Lord Macnaghten; *Swan & Cleland's Growing Dock & Slipway Co v Maritime Insurance Co* [1907] 1 KB 116; *James Talcott Ltd v John Lewis & Co Ltd* [1940] 3 All ER 592; *Pettit & Johnston v Foster Wheeler Ltd* (1950) 2 DLR 42 (affirmed (1950) 3 DLR 320). However, an assignee would have to give credit to the obligor if the obligor

exception may be where payment to the assignor or some third party in fact benefits the assignee by discharging a duty the assignee had to the assignor or third party.<sup>29</sup>

**[8.7] The right to demand performance.** The extent to which an assignee can demand performance from the obligor ultimately depends upon a construction of both the right assigned and the extent of the performance obligation promised by the obligor to the assignor and this is determined at the time the contract between them was formed.<sup>30</sup> Moreover, an assignee can only demand performance from the obligor when the time to perform has accrued. Thus, if an assignee takes an assignment of a conditional right whereby the performance of the assignor is a condition precedent to the obligor's duty to perform, then clearly the assignee cannot call for the obligor's performance unless the assignor has performed.<sup>31</sup> The reason for this result is simply that the assignee's right is contingent upon the prior performance by the assignor. For example, if in a contract of hire, the hire is payable in arrears and the hired goods are not available in a particular period, clearly the owner of the goods cannot recover that hire if the contract is validly discharged by the other party for breach by the owner. The effect of discharge would be to prevent the right to payment (and the obligation to pay) from accruing. If the contract was not discharged, that is, if the innocent party elects to affirm the contract or the breach was not such as to give rise to a right to terminate, the owner could still not recover because the right to recover being conditional on the availability of the goods during the hire period, would never have accrued. Moreover, an assignee of the right to

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had paid the assignor by cheque which was still outstanding at the time of notice, see *Bence v Shearman* [1898] 2 Ch 582.

<sup>29</sup> See *Gray v UDC Finance Ltd* [2000] 3 NZLR 192. See also *Aplin v Cates* (1860) 30 LJ Ch 6 (here after notice the assignor informed the debtor that he thought the assignment was invalid; it was held that the debtor was justified in continuing to pay the assignor despite a call for payment by assignee since the assignor had threatened to exercise its right to sue for the entire sum if an instalment was late; the onus was on the assignee to obtain an injunction and until that was done the debtor's actions were justified in the circumstances). Cf *Jones v Farrell* (1857) 1 De G & J 208, 44 ER 703 (in this case assignors brought action against the debtor; the debtor offered to pay the assignee's if they provided an indemnity; this was refused and so the debtor paid the assignor; it was nevertheless held that the assignee could bring an action in equity against the debtor).

<sup>30</sup> [7.1].

<sup>31</sup> *Tooth v Hallett* (1869) LR 4 Ch App 242. See also *William Pickersgill & Sons Ltd v London and Provincial Marine & General Insurance Co Ltd* [1912] 3 KB 614. See [7.12].



hire could not bring an action in debt against the obligor for that period. For reasons that will be discussed in more detail later,<sup>32</sup> the reason why the assignee is affected by the requirement that the obligation to pay must accrue and the rules of discharge flows from the nature of the right assigned. It is a conditional contractual right and the precondition for its enforceability has not been met. This is a result of the principle of transfer. If the result were different then there would have been an assignment of a right that was greater than and different to the one vested in the assignor. In short, what would have been immediately assigned was a right that did not exist.<sup>33</sup>

**[8.8] Legal assignment and the rights of the assignee.** In the case of a legal assignment of a contractual right, all legal and other remedies in respect of that right vest in the assignee and the assignee can bring an action in its own name for such remedies. The effect of this provision is straightforward, the assignee can have recourse to all the normal remedies that flow from a failure on the part of the obligor to perform the obligation.<sup>34</sup> Nothing further needs to be said about this here.<sup>35</sup> However, the most controversial issue concerns the measure of damages available to the assignee for a breach of contract by the obligor. This issue is dealt with next.

**[8.9] Legal assignment and the rights of the assignee: damages.** The rule that an assignment cannot vary the obligations of the obligor has also been expressed as, ‘the

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<sup>32</sup> [8.21].

<sup>33</sup> [7.6.6]. There is an important question as to whether the end result should be any different if the obligor's performance is a condition precedent to the obligation of the assignor to perform. The principal example is where there is legal assignment of a present right to receive an advance payment which is conditional upon some future performance by the assignor. Where that advance payment is made to the assignee and the assignor fails to perform, the issue arises as to whether the obligor can then maintain a claim for restitution against the assignee. The resolution of this restitutionary claim falls outside of this dissertation, see *Pan Ocean Shipping Co Ltd v Creditcorp (The Trident Beauty)* [1994] 1 WLR 161.

<sup>34</sup> Cf [6.10] note 67.

<sup>35</sup> With respect to specific performance, generally, if the assignor could have obtained specific performance then the assignee can obtain it so long as it is still just to grant the remedy given the new circumstances of the assignment, see Jones and Goodhart *Specific Performance* (2nd ed, 1996) at 211-216; Spry *Equitable Remedies* (6<sup>th</sup> ed, 2001) at 80-89. In addition, there may be circumstances that would allow an assignee to obtain such an order when the assignor could not, see Spry *Equitable Remedies* (6<sup>th</sup> ed, 2001) at 88.

liability of the obligor cannot be varied by the assignment'.<sup>36</sup> This must be correct because an obligor's liability to pay damages, for non-performance of an assigned contractual right, flows from a secondary obligation which, although imposed and not agreed to,<sup>37</sup> seeks to uphold the security of the contract. That is, the valuation of damages seeks, in money terms, to value the primary right. Therefore, inasmuch as the transfer principle prohibits a variation of the primary obligation, it must also prohibit a variation of liability in respect of an obligation to pay damages.

[8.9.1] It is often said that the assignee can recover no more than the assignor could have recovered. There is recent authority for the view that this 'rule' applies in respect of breaches committed both before and after the assignment. The basis for this limited liability is said to be that the obligor is not to be put in any worse position by reason of the assignment.<sup>38</sup> This rule clearly overlaps with the variation of obligation rule and is the mirror image of the rule that states that the assignee can be in no better position than the assignor was prior to the assignment.

There is also recent authority to the contrary which suggests that although an assignment cannot vary the heads of damage, it may make the obligor liable for a greater measure of loss.<sup>39</sup> There is no doubt that a logical argument can be made to the effect that, if a contract is found assignable, then the obligor should expect, subject to the rules of remoteness, to have to compensate for the loss of the assignee. The difficulty with this argument is that, as noted earlier, generally, there is no investigation as to whether the parties considered a contract assignable, the only investigation is whether or not the contract was personal or, in the case of a prohibition, not assignable. Moreover, this argument lacks any doctrinal force.

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<sup>36</sup> See *National Carbonising Co Ltd v British Coal Distillation Ltd* (1936) 54 RPC 41 at 46 per Clauson J.

<sup>37</sup> *Grein v Imperial Airways Ltd* [1937] 1 KB 50 at 69 per Greer LJ.

<sup>38</sup> *Bovis International Construction Inc v The Circle Partnership* (1995) 49 Con LR 12 at 22 per Staughton LJ.

<sup>39</sup> *Bovis International Construction Inc v The Circle Partnership* (1995) 49 Con LR 12 at 31 per Millett LJ.

[8.9.2] The answer to this impasse must flow from first principles. There are two issues to consider. First, although an assignment does not make the assignee party to the contract, if an assignment involves a transfer so that the assignee owns the subject matter of the assignment, then it would be a denial of that ownership and the principle of transfer, if the assignee were not able to recover for its personal loss. In short, the transfer thesis dictates that if the assigned right is infringed then the assignee must be able to recover for its own loss.

A more detailed explanation of this first point is as follows: The reason why an obligor must render personal performance to the assignee is because there is an actual transfer of the right to performance. However, that actual transfer occurs as a result of the transfer of title to the right to performance. Thus when an assignee calls for the performance of a contractual obligation, it calls for the performance of an obligation owed to it by virtue of its title (ownership) of the contractual right. The assignee cannot enforce this right under the contract as it is not a party to the contract. Therefore, when the obligor fails to perform and the assignee commences an action claiming damages for breach of contract, (the ownership of the right to damages having automatically vested in the assignee by virtue of its ownership of the right to performance), what that award will protect is the assignee's title to the right to contractual performance. When a piece of tangible property is converted, the damages recoverable by the person with the immediate right to possession will equate to the value of the goods. Although the non-performance of a contractual obligation is not the same as exercising dominion over someone's goods, it has an analogous effect to the extent that the assignee is deprived of a benefit it could legitimately expect to enjoy from its ownership of the contractual right to performance. Therefore, its compensation should equate to the value of that property. Here, because the 'property' is the title to a right of contractual performance, that value is determined by reference to the assignee's expectation interest which would bring into operation the normal contract law measures.

[8.9.3] This then leads to the second issue. The suggestion that the assignee can recover for its own personal loss does not open the obligor up to a claim beyond anything reasonably contemplated by the obligor at the time of contract. The principle of transfer also protects the obligor because he or she cannot be asked by the assignee to perform an obligation greater than that which was promised in the contract with the assignor.

Therefore, the damages for breach of that contractual obligation can never be greater than the value to the assignor of that primary obligation. Although the transfer principle dictates that the assignee's expectation interest must be protected, since damages seek to uphold security of contract, that is, the value of performance of the obligation, if the obligor was made liable for a sum representing an amount greater than that which it would have been liable to pay the assignor, then the award of damages would have effectively varied the obligation of the obligor in breach of the principle of transfer. In short, the transfer principle dictates that the obligor can never be liable to the assignee for an amount greater than that which would have been payable to the assignor. This acts as a cap on liability.

Another explanation of this second aspect is as follows: Where there is an assignment of a contractual right, what the assignee purchases is title to a contractual right which is a right to an obligation promised by the obligor to the assignor. For the reasons noted earlier, the effect of there being an actual transfer of the contractual right means that the characterisation of that contractual right does not change by reason of the assignment. It remains a right to an obligation promised to the assignor. What occurs upon assignment is that by reason of that actual transfer the obligor must now perform the relevant obligation to and for the benefit of the assignee. However, in terms of putting a value on that right its character as a personal contractual right owed to the assignor is important. That is, although one does not value property by reference to the identity of a previous owner, unless perhaps where the previous owner added some celebrity to the property, in the case of an assigned contractual right, because the asset that the assignee purchases is a right to an obligation which as a matter of contract was promised to the assignor, this does effect its value. Subject to what is said below,<sup>40</sup> this does not mean that the assignee recovers what the assignor could have recovered, it simply means that the value of the right to the assignor sets a cap on the recovery of the assignee.<sup>41</sup> If it were otherwise, then the assignee suffering less damages than the assignor would have suffered could still recover what the assignor could have recovered. That cannot be right because the assignee is enforcing a contractual right and the remedy must reflect its expectation interest to the extent that that is not greater than what would have

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<sup>40</sup> [8.9.4].

<sup>41</sup> See *Dawson v Great Northern and City Railway Co* [1905] 1 KB 260 at 272-74 per Stirling LJ.

represented the assignor's expectation interest. The transfer principle dictates both these results. Therefore, there may be situations where the obligor may be better off in fact by virtue of the assignment.

[8.9.4] It is necessary to consider the application of the above principles in two situations. The first is where the assignment takes place after a breach of contract by the obligor and the second is where the assignment takes place prior to a breach of contract by the obligor.

In the case of a breach occurring prior to assignment, then whether the assignor attempts to assign the right to performance in respect of that breach or the right to damages, the measure of damages recoverable by the assignee must be calculated by the loss suffered by the party holding the primary right to performance at the time of breach.<sup>42</sup> Therefore, in such a case, the assignee recovers damages assessed by reference to the loss suffered by the assignor.<sup>43</sup> This result does not flow from the idea that the secondary right to damages replaces the right to performance, because, as already noted, until damages are paid or the contract is discharged, both rights continue to exist. Rather, the result flows from the principle of transfer. If an assignor, who has suffered no substantial loss, could confer on an assignee a right to substantial damages, then the assignor would have

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<sup>42</sup> See *Dawson v Great Northern and City Railway Co* [1905] 1 KB 260; *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SLT 533; *Darlington Borough Council v Wiltshire Northern Ltd* [1995] 1 WLR 68.

<sup>43</sup> One limitation here is that the interest of the assignor can only set a limit on recovery if the breach causes damage to the interest of the assignor. In the case of a mortgage, it is possible to assign a primary right to performance free of the effects of any previous breach and this occurs where there is a re-assignment by the mortgagee (the breach occurring during the course of the mortgage). In such a case, it is suggested, the assignee can recover for its own loss because the mortgagee's interest was never injured, see *Bovis International Construction Inc v The Circle Partnership* (1995) 49 Con LR 12. This result may be explained on the basis that although a mortgage of personal property transfers the ownership of that property to the mortgagee, that ownership is still a relative title in the sense that it only exists for the purpose of security and title is only transferred to the extent necessary to give effect to the security, see *The Bradford Banking Co Ltd v Henry Briggs, Son & Co* (1886) LR 12 App Cas 29 at 36 per Lord Blackburn.

managed to assign a right greater than it holds which is not permissible under the principle of transfer.<sup>44</sup>

The same result follows in the case of a valid assignment of a right to an indemnity. Often, the context in which such a right is assigned is where the indemnified party becomes liable to the creditor/assignee and cannot pay and therefore assigns the benefit of the indemnity to the creditor/assignee who then enforces it against the indemnifier.<sup>45</sup> Generally, where an indemnity relates to loss suffered or liability incurred in respect of certain property, then unless the indemnity is expressed to cover the loss or liability of the owner of the subject property 'for the time being', then the amount recoverable by an assignee is measured by reference to the loss or liability of the assignor.<sup>46</sup> It would follow that unless the assignor has suffered loss or incurred liability, the assignee cannot recover. For example, an indemnity (which is limited to the loss suffered by the assignor) will not extend to the loss the assignor would have suffered by reason of a later breach if there had been no assignment.<sup>47</sup> It would be nonsense for the assignee to be able to recover for loss the assignor would have suffered when the assignor no longer owns the property which is the subject of the indemnity. Thus, if at the same time the subject property is transferred to the assignee there is an attempted assignment of the right to the indemnity, and if later the subject property is damaged, then no loss would

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<sup>44</sup> *Darlington Borough Council v Wiltshire Northern Ltd* [1995] 1 WLR 68 at 72 per Dillon LJ.

<sup>45</sup> *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476. See also *Re Perkins* [1898] 2 Ch 182 (here A leased premises and assigned the lease to B taking an indemnity from B who then assigned the lease to C taking an indemnity from C. C died and B became bankrupt and the lessor called upon A to pay which A did; A proved in the bankruptcy of B and in a compromise took an assignment of B's right of indemnity from C. A sued the executors of C and recovered the amount A had to pay the lessor. That is, B was liable to A for the sum that A had paid the lessor; C had agreed to indemnify B and it was the benefit of this indemnity that was assigned to A so that C had to pay A the sum that B was liable to pay A which in turn was the sum that A had to pay the lessor. Thus, it was not a case of assignee A recovering for its liability to the lessor but rather recovering to the extent of C's liability to B).

<sup>46</sup> *Pendal Nominees Pty Ltd v Lednez Industries (Australia) Ltd* (1996) 40 NSWLR 282 at 291-92 per Cohen J. However, because the assignee 'owns' the relevant right, he or she may keep the full sum recovered even if that amounts to a greater sum than that paid in settlement to the assignor, *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101.

<sup>47</sup> See *Housing Guarantee Fund Ltd v Yusef* [1991] 2 VR 17 at 21 per Crockett J at 25 per Murphy J.

have been suffered by the assignor so the assignee can recover nothing.<sup>48</sup> Generally, however, the right of indemnity, that is, the right of performance, is not assignable as it is personal and what is assignable and assigned is the fruits of the contract (if it took place prior to the loss being suffered) or the proceeds if the assignment takes place after the loss. In either case, clearly what the assignee can recover is an amount equivalent to the loss or liability of the assignor.

[8.9.5] Where the breach occurs after assignment, then general principle dictates that the assignee recovers compensation for its expectation loss with the limit being the loss that could have been recovered by the assignor. However, in assessing this cap, what the obligor was doing in fact for the assignor at the time of the assignment is irrelevant. This is particularly important in supply contracts of which *Tolhurst's* case is a prime example. The reason for this is simply that the assignor may not have been making all the demands on the obligor it could have made under the contract at that time. Of course, the notion of arriving at a sum that the assignor might have recovered if it were around at the time of the action and making the demands on the obligor that the assignee was making can be somewhat speculative. What should generally occur is this; a finding needs to be made that the demands made by the assignee were within the bounds of what the obligor promised the assignor; if that is made out, then an assessment of the loss suffered by the assignee should be determined. Finally, to ensure the obligor is not having to compensate an especially vulnerable assignee, the remoteness rules must be applied and these are applied as at the time of contract.<sup>49</sup>

[8.9.6] Finally, despite the above, there may be cases where the obligor does not simply promise to perform a non-personal obligation for the benefit of the obligor but in fact promises to perform for an assignee. Here the assignee's damages may not be capped by what the assignor could have recovered. *Tolhurst's* case may be an example of this. It will be recalled that in that case the obligor was obliged to account to the assignee for the damages suffered by the assignee in the obligor failing to perform its contractual obligations even though the assignee was a much larger enterprise than the assignor and

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<sup>48</sup> *Walker v Phoenix Assurance Co of Australia Ltd* (1980) 1 ANZ Ins Cas 60-045.

<sup>49</sup> Because the rules of remoteness are applied as rules of contract law, they ensure that the obligor is no worse off in law by reason of the assignment, rather than ensuring the obligor is no worse off in fact by reason of the assignment.

was making much larger demands on the obligor. The result flowed from a construction of the contract which evidenced that the obligor had agreed not only to supply the assignor with its needs but also any assignee. This is what occurred in that case, the assignee placed orders to satisfy its needs. The only limits agreed to at the time of contract were the extent of the obligor's quarry and the size of any cement works that could be built on the land sold by the assignor to the assignee. The demands made by the assignee were not in excess of this and therefore the transfer principle was not being breached. Thus, any contractual damages which were valued by reference to such performance were also in line with the principle of transfer. There was no variation of obligation in assessing damages this way. The same result must follow where a contract is entered into solely for the benefit of an assignee.<sup>50</sup>

**[8.10] Equitable assignments and the rights of the assignee.** As noted earlier,<sup>51</sup> where a transaction is upheld as an equitable assignment, the obligor will immediately owe its personal obligation in part to the assignee whether or not the obligor has notice of this.<sup>52</sup> If the obligor fails to carry out its obligation, it should be accountable to whoever was beneficially owed that obligation at the relevant time. Thus, as noted, in the case of an assigned contractual right where the obligor is required to perform an obligation, the requirement of notice, in terms of binding the conscience of the obligor, is to bring home to the mind of the obligor its responsibility to the assignee prior to the time for performance. That is, notice is only relevant to the issue of discharge by performance. If the obligor breaches the contract its liability should be the loss suffered by the assignee with the loss that would have been suffered by the assignor operating as a cap on liability. It would not be appropriate in such a case for the assignee to claim the loss that would have been suffered by the assignor if that is a greater amount than the assignee's personal loss when it was within the power of the assignee, having knowledge of the assignment, to give notice.

**[8.10.1]** It then becomes necessary to investigate the remedies available to the equitable assignee. In doing this it is necessary to reiterate the position adopted in this dissertation

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<sup>50</sup> This, it is suggested, provides an explanation for the result in *Darlington Borough Council v Wiltshire Northern Ltd* [1995] 1 WLR 68.

<sup>51</sup> [4.10].

<sup>52</sup> *Ward v Duncombe* [1893] AC 369 at 392 per Lord Macnaghten.



that if the assignee wishes to enforce the legal right it must join the assignor as a matter of substantive law.<sup>53</sup> If, however, the assignee wishes only to claim equitable relief then it can bring an action in its own name and only be required to join the assignor as a matter of procedure.<sup>54</sup> It was also noted that it would only be possible to adopt this analytically correct position if the equitable remedies available to the assignee were sufficiently versatile, otherwise the just, although doctrinally incorrect, rule that joinder is always a matter of procedure, would need to be maintained. It is with the remedial consequences of the position adopted in this dissertation that the discussion below addresses.

**[8.10.2]** In the case of an assignment of a primary contractual right to performance or payment, once the assignment is complete the obligor's performance obligation is beneficially owed to the assignee. However, the assignee can only legitimately expect that performance will be rendered to it personally if notice is given to the obligor before the time set for performance.<sup>55</sup> If the assignee at any point wishes to obtain an order for

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<sup>53</sup> [4.11].

<sup>54</sup> [4.11.5].

<sup>55</sup> *Deposit Protection Board v Dalia* [1994] 2 AC 367 at 387 per Sir Michael Fox (overruled on another point sub nom *Deposit Protection Board v Barclays Bank Plc* [1994] 2 AC 367); *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454. Cf *Hammond v Messenger* (1838) 9 Sim 327, 59 ER 383. Once notice is given, generally, unless it can be said that the assignee has received the benefit of some tendered performance, the obligor will be required to account to the assignee for that performance. Despite this possibility of having to account twice, query whether an improper accounting (whether the obligation is to pay or perform) to the assignor can amount to a breach or repudiation of contract by the obligor. In the case of a legal assignment such an accounting to the assignor arguably may amount to a defective performance (as the obligation is owed in law solely to the assignee) either resulting in a breach of contract or putting it out of the power of the obligor to perform for the assignee. A view could be taken that where the obligor owes its duty in part to both assignor and assignee (such as in the case of an equitable assignment of a legal right), an accounting to the assignor may not amount to a defective performance, even if the obligor has notice of the assignment. However, it must be kept in mind that an assignment does not change the contractual promise to the assignor to a promise to the assignee. The obligor owes its contractual duty to the assignee by virtue of the actual transfer that takes place upon the transfer of title. Therefore, if the obligor continues to perform to the assignor, despite having notice of the assignment, then as a matter of contract law, there is no breach. However, by reason of the institution of assignment, the obligor will be required to account to the assignee for that performance.

specific performance, then, generally, since this is a call for the enforcement of a legal right, the assignor should be joined as a matter of substantive law.<sup>56</sup>

**[8.10.3]** The next two situations are first where, after the assignment, the obligor fails to perform its primary contractual duty and is liable for breach of contract and second where the breach of contract occurs prior to the assignment. Clearly, on the analysis proffered, if the assignee wishes to sue for common law damages for breach of contract or for a common law debt that has accrued, the assignor would have to be joined as a matter of substantive law. However, the assignee's arsenal is not necessarily exhausted by this. As regards the enforcement of a payment obligation, the assignee can simply rely on its equitable interest. Joinder here would be procedural, because equity has had no problem in enforcing debts.<sup>57</sup>

**[8.10.4]** Far more problematic is the situation where the obligor fails to perform the contract and the assignee wishes to rely on its equitable interest to sue for damages. It is suggested that if the assignee does bring such an action it is entitled to equitable compensation, which flows from the enforcement of (and protects) an equitable right.<sup>58</sup> The assignee has an equitable interest and has a legitimate expectation that equity will protect that interest. If the obligor fails to perform, then as against the assignor there is a breach of a common law duty but as against the assignee (whether or not at the time of the breach the obligor has notice of the assignment) it is suggested that there is an

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<sup>56</sup> Cf [4.11.2]. If there are outstanding obligations to be performed by the assignor, the assignee is unlikely to obtain an order if the court is not adequately assured that those obligations will be performed. Hence the necessity of having the assignor a party.

<sup>57</sup> There are early equity cases of assignees of debts bringing action in equity in their own name to enforce the debts, not all of which are partial assignments, see Barbour 'The History of Contract in Early English Equity' in Vinogradoff (ed) 4 *Oxford Studies in Social and Legal History* (1914) at 108 citing *Perryer v Hallifax* (1677) Rep Temp Finch 299, 23 ER 164; *Fashion v Atwood* (1688) 2 Chan Cas 37, 22 ER 835; *Peters v Soame* (1701) 2 Vern 428, 23 ER 874; *Atkins v Dawbury* (1714) Gilb Eq Rep 88, 25 ER 61; *Lord Carteret v Paschal* (1733) 3 P WMS 197, 24 ER 1028; *Row v Dawson* (1749) 1 Ves 331, 27 ER 1064.

<sup>58</sup> It is not suggested that this route has always been recognised as open, see *Torkington v Magee* [1902] 2 KB 427 at 432 per Channell J.

equitable 'contractual' wrong<sup>59</sup> which may be treated in equity as unconscionable conduct which, causing loss, may be compensated for by way of equitable compensation. Where the assigned right is a contractual one, the compensation should generally be subject to the same requirements of causation, remoteness and mitigation as a similar action brought at law. Moreover, although equitable compensation is often referred to as being restitutionary in nature, it is suggested that it need not be so limited and its 'compensatory' aspect must mean that in the case of a wrong arising by virtue of a breach of contract, it is able to protect the assignee's performance or reliance interest.

[8.10.5] The above suggestion is not meant to be a radical development in equitable compensation. That equity's conscience is drawn to a breach of contract is evidenced by its jurisdiction to grant specific performance and injunctions. That the granting of damages for breach of contract is not new to equity is evidenced by the fact that it is accepted that a court may grant statutory (equitable) damages in addition to or in substitution of an order for specific performance where it has jurisdiction to grant specific performance. Moreover, it may grant equitable compensation to cover any loss suffered by a claimant in seeking specific performance. In recent years, many jurisdictions have seen a growth in equity's compensatory jurisdiction and although some commentators have sounded warnings there has been little sustained attack on this growth and much support.<sup>60</sup> There appears little reason to inhibit equity from having a

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<sup>59</sup> A more conservative view may be that since the conscience of the obligor vis-à-vis the assignee is only personally bound upon notice, the equitable wrong can only occur where there is a breach of contract with prior notice of the existence of the assignment. That is, a breach of contract alone is not an equitable wrong. The result here is that if the breach occurs without prior notice of the assignment, then equity's conscience is not drawn to the event and the assignee is left to join the assignor (in a substantive sense) and claim common law damages.

<sup>60</sup> Eg Sir Anthony Mason 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *LQR* 238; Rickett 'Equitable Compensation: Towards a Blueprint?' (2003) 25 *Syd LR* 31; Finn 'Equitable Doctrine and Discretion in Remedies' in Cornish, Nolan, Sullivan and Virgo (eds) *Restitution: Past, Present and Future* (1998) at 260-62; Rickett 'Compensating for Loss in Equity - Choosing The Right Horse For Each Course', in Birks and Rose (eds) *Restitution and Equity Vol 1: Resulting Trusts and Equitable Compensation* (2000) ch 10; Tilbury and Davis 'Equitable Compensation' in Parkinson (ed) *The Principles of Equity* (2<sup>nd</sup> ed, 2002) ch 22; Rickett and Gardner 'Compensating for Loss in Equity: The Evolution of a Remedy' (1994) 24 *VUWL* 19; Aitken 'Developments in Equitable

jurisdiction to grant compensation for breaches of all equitable duties if that provides the most appropriate remedy.

[8.10.6] One caveat to what has been said, however, is where the breach of contract occurs prior to the assignment. Here the assignor may be attempting to assign either the right to performance or the present right to damages. In most cases it is likely that both concurrent existing rights will be intended to be assigned and, in any given case, public policy may inhibit the mere assignment of the right to damages. In either case, it is suggested that the assignee will have no right to equitable compensation. This is because the assignee had no interest in the contract at the time of breach and therefore there was no equitable wrong vis-à-vis the assignee. The assignee's remedy here is for common law damages which requires joinder of the assignor as a matter of substantive law.

[8.10.7] Finally, it should be kept in mind that the award of equitable compensation to an equitable assignee of a legal right will be rare. The assignee here is still required to join the assignor as a matter of procedure and if it is going to do that then it might as well simply claim damages at common law for breach of contract. The jurisdiction is more likely to be exercised where the assignor is not procedurally required to be joined and where the assignee must rely solely on its equitable interest.<sup>61</sup>

[8.11] **Agreements not to raise equities.** It is not uncommon for an obligor to promise the assignor that in the event of an assignment the obligor will not raise against the assignee any equities that it has against the assignor.<sup>62</sup> In some cases a promise to this effect may be implied.<sup>63</sup> Clearly, such a provision is enforceable between an assignor

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Compensation: Opportunity or Danger?' (1993) 67 *ALJ* 596. See further McDermott 'Jurisdiction of the Court of Chancery to Award Damages' (1992) 109 *LQR* 652.

<sup>61</sup> See [4.9.8].

<sup>62</sup> Such a provision is likely to be strictly construed, see *Re Partnership Pacific Securities Ltd* [1994] 1 Qd R 410 at 424-25 per Williams J.

<sup>63</sup> See *Re Agra and Masterman's Bank* (1867) LR 2 Ch App 391 at 395; *Re General Estates Co* (1868) LR 3 Ch App 758; *Higgs v The Northern Assam Tea Co Ltd* (1869) LR 4 Ex 387; *Re Northern Assam Tea Co* (1870) LR 10 eq 458; *Hilger Analytical Ltd v Rank Precision Industries Ltd* [1984] BCLC 301. See also *Re Blakely Ordnance Co* (1867) LR 3 Ch App 154. Cf *Re Natal Investment Co* (1868) LR 3 Ch App 355 and *Re Rhodesia Goldfields Ltd* [1910] 1 Ch 239.

and obligor as a matter of contract. It has also been held that the benefit of such a provision may be enforced by an assignee against an obligor,<sup>64</sup> except where the obligor is relying on a direct action against the assignee.<sup>65</sup> However, there has been little analysis as to how the assignee can take the benefit of such a provision except, in perhaps the leading case, it was suggested that such a provision amounts to an equity of the *assignee*, even though its genesis is in a term of the contract between the assignor and obligor.<sup>66</sup> A better approach, it is suggested, is simply to recognise that such a right is assignable and that given that such a provision generally exists only for the benefit of an assignee, then it would follow that its assignment is intended to be included in the assignment of any contractual right.

Even without an assignment of the benefit of such a provision there may be ways in which the assignee may take the benefit of it. For example, as already mentioned, it may be that such a provision exists solely for the benefit of an assignee and the assignee then may take the benefit of it simply on the basis that it is a third party beneficiary to the contract. The weakness in this argument may be that it will often be the case that the

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<sup>64</sup> See *Re General Estates Co* (1868) LR 3 Ch App 758; *Higgs v The Northern Assam Tea Co Ltd* (1869) LR 4 Ex 387; *Re Blakely Ordnance Co* (1867) LR 3 Ch App 154; *Re Agra and Masterman's Bank* (1867) LR 2 Ch App 391; *Re Northern Assam Tea Co* (1870) LR 10 eq 458; *Re Goy & Co Ltd* [1900] 2 Ch 149; *Phoenix Assurance Co Ltd v Earl's Court Ltd* (1913) 30 TLR 50; *Hilger Analytical Ltd v Rank Precision Industries Ltd* [1984] BCLC 301; *The Hong Kong and Shanghai Banking Corp v Kloeckner & Co AG* [1989] 2 Lloyd's Rep 323; *The Society of Lloyd's v Leighs* [1997] 6 Re LR 289. See also *The Southern British National Trust Ltd v Pither* (1937) 57 CLR 89 at 113 per Dixon J. Cf *Lechmere v Hawkins* (1798) 2 Esp 626, 170 ER 477; *Taylor v Okey* (1806) 13 Ves Jun 180, 33 ER 263; *M'Gillivray v Simson* (1826) 2 C & P 320, 172 ER 145. See also United Nations Convention on Assignment of Receivables in International Trade Article 21 which prohibits the debtor excluding defences arising from fraud on the part of the assignee or defences based on the debtor's incapacity.

<sup>65</sup> *The Society of Lloyds v Wilkison (No 2)* [1997] 6 Re LR 214.

<sup>66</sup> See *Higgs v The Northern Assam Tea Co Ltd* (1869) LR 4 Ex 387 at 394. It may be because of this notion that it is an 'equity' that it has been suggested that an assignee can only take the benefit of such a term if the assignee is a bona fide purchaser for value, see *Re Brown & Gregory Ltd* [1904] 1 Ch 627 at 632 (affirmed [1904] 2 Ch 448). However, perhaps the better interpretation of that case is simply that no agreement not to raise equities was expressed or implied in the contract, see further *Hilger Analytical Ltd v Rank Precision Industries Ltd* [1984] BCLC 301 at 304.

assignee is not identifiable at the time of contract although this is not necessary fatal to the efficacy of a contract for the benefit of a third party. In addition, such a provision may not be expressly for the benefit of an assignee.<sup>67</sup> Another possibility is the notion that the intention of the parties characterises contractual rights in their nature as choses in action. Thus it may be argued that where the provision is for the benefit of the assignee, although the relevant contractual right may be conditional or have some weakness when vested in the assignor, it loses any such infelicity in the hands of the assignee as it is intended by the obligor to be reshaped in its character as a chose in action when assigned. This would not be a case of an assignor being able to assign a greater right than it has, the right had this potential characteristic from the moment the assignor and obligor entered into the contract. Moreover, where the provision is not made expressly for the benefit of an assignee, but for the assignor, the characterisation of the relevant contractual right that is assigned does not change throughout the transaction.

## ***(ii) The rights of the obligor***

**[8.12] Introduction.** An obligor may have direct rights against an assignee (which may be independent of the assignment or related to it) or rights against the assignor to which the assignee is subject. The extent to which a legal system allows an obligor to raise such rights (other than independent direct rights) will impact on the viability of assignment, particularly as a method of finance. The competing arguments, at least as regards the assignment of receivables were well summed up by Oditah, viz:<sup>68</sup>

In favour of limiting cross-claims that may be raised against the receivables financier, one may argue, first that the needs of modern lending and other financing practices require that non-negotiable debts be given the quality of quasi-negotiability by limiting the number of cross-claims which may be raised against a financier advancing money on the strength of receivables. Limiting the permissible cross-claims which may be raised protects the marketability of receivables as well as their value. Permitting wider scope for the debtor's cross-claims and defences diminishes the value of receivables and the amount of money which the assigning

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<sup>67</sup> For example, under a loan agreement the borrower may promise to make repayments without resort to set-off or counterclaim, see *Skipskredittforeningen v Emperor Navigation SA* [1997] 2 BCLC 398.

<sup>68</sup> Oditah *Legal Aspects of Receivables Financing* (1991) para 8.1.

creditor can raise on the basis of this species of personal property. Secondly, permitting a wide variety of cross-claims may unjustly punish the receivables financier who has no control over relations between assignor and debtor. Thirdly, cross-claims may enable the debtor to enjoy a preference over the assignor's other creditors. ... In support of a wider scope for the debtor's cross-claims and defences a number of arguments can be raised. In the first place, it may be said that assignment law is already harsh enough on the debtor: the assignment to the financier does not require his consent and he is powerless to stop it; the financier may be less indulgent than the assignor with whom the debtor contracted; if the debtor mistakenly pays the assignor after receiving notice of assignment, the debt is not discharged and he must pay again to the receivables financier. These are inconvenient and there is scarcely any good reason why he should be deprived of the right to raise all his cross-claims. Secondly, since the title of the financier is derivative it ought not to be better than that of the assignor. Indeed it is difficult to see why the commercial value of an assignment should be enlarged at the expense of the debtor. Were it otherwise, receivables would be more valuable in the hands of the financier than in those of the assignor. This may give the assignor a perverse incentive to assign his claims against the debtor.

Oditah goes on to suggest that, in England, no clear line has been adopted as regards these competing policy considerations and that in regards to the 'subject to equities' rule, although the core of the rule is reasonably understood, its limits have not been defined with precision.<sup>69</sup> He would no doubt have made the same remark as regards Australian law if he were commenting on that jurisdiction.

This section explores the extent to which the principle of transfer can provide some precision to this area. It will be suggested that this principle does show that there is a doctrinal thread running through the case law. Where the principle of transfer does not apply, it will be suggested that the case law is concerned with the prevention of unconscionable conduct. This, like the principle of transfer, is again a clear application of legal principle, albeit less predictable than the operation of the principle of transfer.

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<sup>69</sup> Oditah *Legal Aspects of Receivables Financing* (1991) para 8.2. Oditah was writing in 1991 and did not have before him the decision in *Pan Ocean Shipping Co Ltd v Creditcorp (The Trident Beauty)* [1994] 1 WLR 161, which arguably did take a policy position to uphold the assignee's security of receipt. Moreover, in the international arena there has been a clear and open adoption of the position to uphold security of receipt for the purpose of promoting receivables financing and keeping the cost of credit down, see [8.13]. See also Marshall *The Assignment of Choses in Action* (1950) at 181.

However, the important point is that, again, legal principle informs decision-making here.

Most of the discussion below is concerned with explaining the subject to equities rule. However, the first issue dealt with concerns the ability of the obligor to vary the contract after notice of assignment.

**[8.13] The obligor's direct rights.** Given that no contractual relationship is created between the assignee and obligor by virtue of the assignment, it is rare for the obligor to have direct rights against the assignee.<sup>70</sup> Such rights must flow from a separate contract, a statutory provision, tort or unjust enrichment. Perhaps the most difficult of these is the extent to which the obligor may claim restitution of a payment made by the obligor to the assignee (as a result of the assignment) when the assignor totally fails to perform its obligations in respect of that payment.<sup>71</sup> This is a direct claim that is related to the assignment. No analysis of such claims is provided here since they are not related to the transfer thesis.

### ***(iii) The rights of the obligor: Transfer and the obligor's ability to vary the contract after notice of assignment***

**[8.14] Introduction.** It is generally stated as a rule of assignment that after notice of the assignment, the obligor cannot do anything to diminish the rights of the assignee.<sup>72</sup> This 'rule' is often used to suggest that after notice the obligor cannot continue to pay the assignor as that would diminish the assignee's rights. In addition, this 'rule' is used to

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<sup>70</sup> In New Zealand by virtue of the Contractual Remedies Act 1979 s 11(1), an obligor may bring an action against an assignee for a breach of contract committed by the assignor but damages are limited to the value of the assigned right to the assignee at the time of assignment by virtue of s11(2), see *Gray v UDC Finance Ltd* [2000] 3 NZLR 192.

<sup>71</sup> See *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 480-81 per Dixon J; *Pan Ocean Shipping Co Ltd v Creditcorp (The Trident Beauty)* [1994] 1 WLR 161. See also UNIDROIT Convention on International Factoring Article 10; United Nations Convention on Assignment of Receivables in International Trade Article 23.

<sup>72</sup> *Roxburghe v Cox* (1881) 17 Ch D 520 at 526; *Brice v Bannister* (1878) 3 QBD 569 at 577; *The First National Bank of Chicago v The West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg) (The Evelpidis Era)* [1981] 1 Lloyd's Rep 54 at 64.



uphold the position that the obligor cannot, after notice, agree with the assignor to vary the contract to the detriment of the assignee.<sup>73</sup> This position has a superficial appeal. It seems logical to hold that since the assignee owns the right, that right should not be capable of being varied without the consent of the assignee. However, this is fact puts the cart before the horse. The first issue that must be addressed is to identify the nature of the right transferred. This supposed lack of ability to vary the contract is not dictated by the transfer principle. In fact, far from preventing the assignor and obligor from varying the contract, the transfer principle allows for it. The assignee, in taking the benefit of contractual rights, must accept that such rights are inherently capable of variation by agreement between the parties to the contract so that in taking a transfer of such a right the assignee must accept that that right may be varied.<sup>74</sup>

It may be argued that the position taken in the last paragraph in fact abandons the transfer principle. For example, in the case of a legal assignment, and taking the substantive view of such assignments as adopted in this dissertation, if the assignee owns the right to the performance of the relevant obligation and can enforce all remedies in respect of that right, then (if effect is to be given to the idea of transfer) nothing should remain in the assignor for it to have power to vary the contract.

However, the argument proffered in last paragraph overlooks the effect of an assignment of a contractual right. It will be recalled that an assignment does not create privity of contract between the assignee and obligor. Moreover, for the assignee to enforce a contractual right, there must be a contract in existence and that contract requires there to be at least two parties. Given that the assignee is not a party, the assignor must still remain a party and it is therefore still legitimate to say that a contract exists between the obligor and assignor.<sup>75</sup> From this it follows that while the contract

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<sup>73</sup> There appears to be no difficulty in varying the contract to the benefit of the assignee, see *Royal Exchange Assurance v Hope* [1928] Ch 179.

<sup>74</sup> The discussion here is concerned with the assignment of a right to performance. If the assignment is of the fruits of the contract, then clearly, prior to the time these come into existence, that is, prior to the time the assignment takes effect, the assignor and assignee can agree to vary the contract.

<sup>75</sup> Note, however, the ability of an assignee to enforce its rights is not dependant on the continued existence of the assignor so long as the assignor's obligations have been executed. Moreover, the assignee's rights are not necessarily dependant upon the continued existence of the contract as

remains on foot, the assignor's position as party to the contract provides it with the power to agree to variations.<sup>76</sup> This power flows simply from being a party to the contract. It does not flow from a term of the contract and it is not a 'contractual' right and therefore it is not transferred to the assignee upon the assignment of the benefit of the contract.<sup>77</sup>

It is suggested that this post notice 'rule' is simply a reflection of the law's recognition of a relationship between the assignee and obligor which is policed to prevent unconscionable conduct.<sup>78</sup> That is, because the assignee owns and is owed the right to performance, a relationship exists between these parties which binds their conscience at the point when either of them receives notice of the assignment. At that point each must consider the position of the other in making decisions (although they need not necessarily act in the interests of the other) and therefore must act in good faith and neither of them can act in a manner that would exploit the other's vulnerability to the assignment. Here, because the assignee is taking the assignment of a contractual right, it is vulnerable to rights and obligations under the contract being varied as between the parties to the contract. However, the obligor cannot, upon receiving notice of the assignment, seek to exploit this vulnerability, because to do so would amount to

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some unconditionally accrued rights may be enforced after discharge. See further *Southwell v Scotter* (1880) 49 LJQB 356.

<sup>76</sup> However, it is not correct to continue to say that as a matter of contract the obligor owes its obligation to the assignor as that would be at odds with the actual transfer of the right.

<sup>77</sup> Occasionally statements are made that distinguish the assignment of the 'benefit' of the contract from the assignment of rights under the contract, eg *Yeandle v Wynn Realisations Ltd* (1995) 47 Con LR 1. However, it is suggested, that under the property model of assignment this distinction cannot be maintained. Only contractual rights may be assigned and for the most part these flow from contractual terms. The class of contractual rights and duties that do not flow from the terms of the contract is small, see Peden *Good Faith in the Performance of Contracts* (2003) para 1.5. Therefore, references to the assignment of the 'benefit' of a contract should be taken to refer to an absolute assignment of all rights under the contract. In any case, the ability to vary or walk away from a contract is not part of that small group of rights as it is not a power granted by contract law but is an inherent in every member of the community. It may be noted, however, that the obligor and assignee would be able to agree between themselves a variation of the performance obligation that is the subject matter of the assignment simply by reason the relationship that exists between them, see further Restatement of Contracts 2d (1979) Art 338(3).

<sup>78</sup> This submission is discussed in greater detail at [8.30].

unconscionable conduct.<sup>79</sup>

In short, the principle of transfer dictates that the assignee takes subject to contractual modifications. The relationship that exists between the assignee and obligor upon notice of the assignment tempers the strict application of the principle of transfer by not allowing a modification that was the result of unconscionable conduct. It may be added that although the assignor maintains its power to agree to modifications, in any given case, this may put the assignor in breach of contract with the assignee.

If, as suggested, this so called 'rule' is based on the existence of unconscionable conduct, it should not and cannot be stated as strict rule. The issue then becomes one of when is it unconscionable for the obligor to attempt to vary an assigned contractual right after the obligor has received notice of the assignment.<sup>80</sup> As a general statement it can be said that the variation must be made for good commercial reasons. Often, but not in all cases, such variations are made to secure contract performance. The analysis suggested below attempts to show that if an obligor is in the position where its counter performance from the assignor is dependent upon it either funding the assignor or otherwise coming to some arrangement with the assignor, then the obligor will not be engaging in

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<sup>79</sup> Some may prefer to express this duty of the obligor solely in terms of good faith. I have no objection to this except that if this is related to the growing notion in Australia of good faith in contractual performance it would be less acceptable in England where that notion has not yet taken hold in the common law. The suggestion here is that the relationship is being policed by equity and, to that extent, there is nothing new in the notion that a lack of good faith may amount in equity to unconscionable conduct, see Finn 'Unconscionable Conduct' (1994) 8 *JCL* 37 at 37-8 citing Spence *The Equitable Jurisdiction of the Court of Chancery* Vol 1, at 411. Thus, the expression 'good faith' when used in this section is meant to capture an aspect of unconscionable conduct.

<sup>80</sup> Although it is tempting to suggest (for the purposes of uniformity) that the position here should be the same as the position as regards third party beneficiaries of a contract, this analogy is in fact false. An assignment occurs without consent and without the parties necessarily intending that contractual rights be assignable. This is at odds with contracts made for the benefit of third parties where those contracts are enforceable by those third parties. Here, because of the expressed intention to benefit third parties, it is possible to base limitations on the right to vary the contract by reference to notions of reliance and acceptance, see Law Commission for England and Wales *Privity of Contract: Contracts for the Benefit of Third Parties*, (1996) Law Com 242, paras 9.1-9.51.

unconscionable conduct if it makes such payments or consents to such variations. Similarly, where the concern of the assignor is that of the obligor's performance, then on the same principle the assignor should be able to agree to a variation with the obligor that will bind the assignee.

**[8.15] Rights which have not accrued.** A strict rule that prohibited all post notice variations would perhaps be most capable of giving rise to harsh consequences if it prevented modifications in entirely executory contracts. Both the Uniform Commercial Code (§ 9-405) and the United Nations Convention on Assignment of Receivables in International Trade (Article 22) allow for modifications in executory contracts. Section 9-405 relevantly provides:<sup>81</sup>

- (a) A modification of or substitution for an assigned contract is effective against an assignee if made in good faith. The assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that the modification or substitution is a breach of contract by the assignor. This subsection is subject to subsections (b) through (d).
- (b) Subsection (a) applies to the extent that:
  - (1) the right to payment or a part thereof under an assigned contract has not been fully earned by performance.

Article 22 provides:

1. An agreement concluded before notification of the assignment between the assignor and the debtor that affects the assignee's rights is effective as against the assignee and the assignee acquires corresponding rights.
2. After notification of the assignment, an agreement between the assignor and the debtor that affects the assignee's rights is ineffective as against the assignee unless:
  - (a) The assignee consents to it; or
  - (b) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.
3. Paragraphs 1 and 2 of this article do not affect any right of the assignor or the assignee for breach of an agreement between them.

Under the UCC the assignee's position is expressly secured as it obtains an interest in

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<sup>81</sup> See also Restatement of Contracts 2d (1979) Article 338(2).

any modified contract.<sup>82</sup> This must, in any event, follow as a matter of principle. That is, since a right has been vested in the assignee, it must continue to hold that right even if the contract (and the assignee's right) is modified. It may be noted that the notion of upholding modifications made 'in good faith and in accordance with reasonable commercial standards' was rejected by UNCITRAL in its deliberations leading to the United Nations Convention. It was thought that although such a provision may help with the numerous minor modifications that are often made in project finance and other financial restructuring where obtaining the assignee's consent would become burdensome, such a provision introduced too much uncertainty and was not required as such contracts generally provide for such modification.<sup>83</sup> It may be noted, however, that under the United Nations provisions, actual consent from the assignee is required where the receivable is both fully earned and where there is only partial performance of the contract. The latter results from the view adopted under the convention that an amount is considered fully earned when an invoice is issued.<sup>84</sup> It is where the receivable is not fully earned that the convention allows for constructive consent, that is, where the modification is foreseen in the original contract or a reasonable assignee would have consented to such modification.

It is suggested that where the contract remains entirely executory and the obligor has legitimate concerns about the ability of the assignor to perform, then any agreed variation which is made to ensure that performance would bind the assignee.

**[8.15.1]** A slightly more difficult problem is where the agreement between the assignor and obligor would have the effect of extinguishing the assignee's right. This will clearly occur if the assignor and obligor agree to discharge the contract. It may also occur in the case of a mere modification if that modification is one that does not merely modify the assignee's right but extinguishes it altogether. This is unlikely to occur in practice as assignees generally take an assignment of the benefit of the contract rather than one

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<sup>82</sup> Under the United Nations Convention this is only expressly provided for in the case of pre-notice variations, see Article 22(1).

<sup>83</sup> UNCITRAL Report of the Working Group on International Contract Practices on the Work of its Twenty-Eight Session, A/CN.9/447, 2 April 1998.

<sup>84</sup> UNCITRAL Analytical Commentary on the Draft Convention on Assignment of Receivables in International Trade, A/CN.9/489/Add 1, 22 May 2001 para 27.

particular right under the contract. Thus, for example, where the right of the assignee is a right to payment accruing under a contract, the assignor is unlikely in practice to agree to a modification the effect of which is that the contract has no payment obligation. Moreover, any such modification is likely to amount to unconscionable conduct and would therefore be unenforceable against the assignee. The real practical issue then concerns an agreement to discharge the contract.

**[8.15.2]** The starting point is the right of an obligor to elect to discharge the contract for breach or repudiation by the assignor. Clearly, the assignee is subject to the exercise of that right and any rights vested in the assignee that have not unconditionally accrued by this time will be extinguished.<sup>85</sup> The reason the assignee is subject to such an election to discharge the contract follows from the principle of transfer.<sup>86</sup> Thus, although the right to terminate may be said to be a right given by law it arises because of the non-performance of a contractual term and the assignee, in taking the assignment of a contractual right, is, by reason of the principle of transfer, subject to the exercise of contractual rights and rights that arise at law by virtue of those contractual rights. The same analysis would apply to the exercise of an express right to terminate the contract at any time.<sup>87</sup> The principle of transfer would dictate that the assignee is subject to the exercise of this right as it defines and delimits the right vested in the assignee. There is no room here for the assignee to claim that the exercise of such a right amounts to unconscionable conduct. This is not merely because the contract was in existence prior to notice of the assignment, but because the right to terminate springs from contract law and the assignee in taking an assignment of a contractual right must, under the principle of transfer, take the right subject to that infirmity. That is, the right to terminate defines and delimits the right taken by the assignee.

**[8.15.3]** The situation is different where after notice of the assignment the assignor and obligor wish to agree to discharge the contract where no express or implied term exists to that effect. Intuitively, it would seem that this could amount to unconscionable conduct as it could be done solely for the purpose of destroying the assignee's interest. Moreover, in terms of first principles, it is also suggested that the exercise of this 'right'

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<sup>85</sup> [8.21].

<sup>86</sup> [8.21].

<sup>87</sup> Eg *Babson v Village of Ulysses* (1952) 52 NW 2d 320.

to agree to discharge the contract may amount to unconscionable conduct because the ability of the assignor and obligor to agree to walk away from their bargain is not a 'right' arising by reference to contract law. That is, although the assignor and obligor would not consider this course if there were no contract in existence between them, their ability to agree to walk away from their bargain is simply an inherent right (power) and not a right that has its genesis in contract law. Thus, the assignee is not automatically subject to an exercise of that power by reason of the principle of transfer.

It is difficult to determine when the exercise of this inherent power will amount to unconscionable conduct and this is clearly an issue upon which views may differ. Clearly, if the discharge is solely for the purpose of defeating the assignee's interest that would amount to unconscionable conduct. Moreover, an agreement to discharge a contract is clearly not an action taken for the purposes of ensuring the future performance or further viability of the contract. Nevertheless, there no doubt will exist circumstances where a sound commercial decision would dictate that the contract be discharged. Thus changed economic or political circumstances that fall short of frustration may provide the factual background for such a decision to be legitimately made.

**[8.15.4]** Where, the assignor and obligor agree to discharge the contract in circumstances that do not amount to unconscionable conduct and where they enter into a new substituted contract, justice would appear to require the assignee to take an interest under that contract. As already noted the UCC expressly allows for this. It was also noted above, that where the contract is merely modified then first principles would dictate that the assignee maintains its interest in the contract. However, in the case of a discharge of contract, it is difficult to see on what doctrinal basis the assignee should obtain an interest in the new contract as its interest would have been extinguished with the discharge of the contract. The answer probably lies in the notion that, except in rare cases, an agreement for discharge and substitution without a fresh assignment would probably amount to unconscionable conduct and therefore, the discharge would not bind the assignee. The same would be true of a mere modification that would have the effect of extinguishing the assignee's rights.

**[8.16] Accrued rights.** On its face, perhaps the most obvious case where it would be

unconscionable for the obligor to attempt to vary an assigned right is where the obligation to perform or pay has been earned at the time notice of the assignment is received. However, even here, an adoption of a strict rule may give rise to harsh results.

[8.16.1] The decision in *Brice v Bannister*<sup>88</sup> evidences this point. That case concerned a shipbuilding contract where payment obligations accrued upon certain aspects of the work being completed. During the course of performance it became clear to the owner that the builder could not complete the vessel unless advances were made. At the time of the assignment, the owner had made advances well in excess of what was in fact due under the contract. The assignment itself concerned an assignment of £100 out of moneys due or to become due. Despite notice of this assignment being given to the owner, the owner continued to make payments to the builder in excess of £100 'on account of the building of the vessel, pursuant to the contract'. One of the owner's arguments was that it was necessary to do this otherwise the vessel would not be completed. That is, the owner argued these amounts should still be classified as advances. It appears from the judgments of Brett LJ and Bramwell LJ, that there was a finding that, after the assignment, the obligor continued to make advances prior to the time amounts fell due under the contract.<sup>89</sup> Whether that was the case or whether the amounts had fallen due when they were paid to the assignor, it is quite clear that Cotton LJ (giving the leading judgment) was prepared to conclude that these amounts were still payments under the contract and therefore caught by the assignment.<sup>90</sup> Therefore, the obligor had to account to the assignee despite having paid all the contract price to the assignor. The basis of his reasoning was that the assignor had become incompetent to deal with the moneys to the assignee's prejudice and, after notice of the assignment, the assignor and obligor could not come to any agreement which dealt with the moneys to the prejudice of the assignee.<sup>91</sup>

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<sup>88</sup> (1888) 3 QBD 569.

<sup>89</sup> (1888) 3 QBD 569 at 579, 581.

<sup>90</sup> (1888) 3 QBD 569 at 577. This reasoning may rest on the idea that the assignment was of the 'benefit' of the contract and this would capture any payment made pursuant to the contract, eg *Re Davis & Co* (1888) 22 QBD 193. However, as noted above (above note 77), the idea of assigning the 'benefit' of a contract can be misleading because it is only possible to assign contractual rights. There is no *sui generis* chose in action represented by the term 'the benefit of the contract' under the property model of assignment.

<sup>91</sup> (1888) 3 QBD 569 at 577 per Cotton LJ.



[8.16.2] This result would appear to stifle commerce.<sup>92</sup> The majority suggested that in these circumstances the owner should have terminated the contract and got another builder or re-employed the same builder under a different contract to complete the work.<sup>93</sup> Arguably this places a premium on form over substance. The decision of the majority was subject to a powerful dissent by Brett LJ who emphasised the cost involved in the suggestion of the majority and the commercial efficacy of the decision made by the obligor to make advances to get the work done.<sup>94</sup> He did suggest that the assignee should have a right to recover if the debt had accrued, however, his reference to this occurring only when no further work remains to be done by the assignor may suggest that he meant no further work at all under the contract whereas a payment due under an instalment contract by reason of work done or a set time for payment arriving would not suffice. This was not a point he had to decide as he found that because the payments were all made in advance no amount ever fell due to be caught by the assignment. He thought that as long as the parties acted in good faith, that is, for good commercial reasons, and not solely to destroy the rights of the assignee, they should be allowed to modify their contract in the same way that the owner here could have exercised its right to terminate for breach or, alternatively, the obligor could make advances which would prevent amounts becoming due under the contract.<sup>95</sup>

[8.16.3] The other member of the majority, Bramwell LJ, reluctantly affirmed the decision of the court below adding his suggestion that this result could be prevented by

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<sup>92</sup> Cf the position regarding leases where if a landlord is obligated to keep the premises in repair and fails to do so the lessee may pay to effect those repairs and this will be considered to be payment of rent in advance. This right is a right provided by law to prevent the mischief of the house falling down around the tenant and it is irrelevant whether the landlord has mortgaged or sold the premises, see *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137 at 147-48; *Lee-Parker v Izzet* [1971] 1 WLR 1688 at 1693 per Goff J and see Derham 'Recent Issues in Relation to Set-Off' (1994) 68 *ALJ* 331 at 353-54. Compare the situation where the lessee, after receiving notice of a mortgage, agrees with the landlord to pay rent in advance, see *De Nichols v Saunders* (1870) LR 5 CP 589.

<sup>93</sup> (1888) 3 QBD 569 at 577. They distinguished *Tooth v Hallett* (1869) LR 4 Ch App 242 on this basis, see [7.13].

<sup>94</sup> (1888) 3 QBD 569 at 578-79.

<sup>95</sup> (1888) 3 QBD 569 at 579-80.

the insertion of a prohibition against assignment which he hoped would be upheld.<sup>96</sup> This suggestion puts a premium on the availability of legal advice over commercial practice. A more practical approach would be to suggest that if at the time of contract a reasonable person in the position of the promisee would conclude that the other party's continued performance is likely to be dependent upon it receiving payments from the promisee (either in advance or upon accrual) then the presumed intention of the promisee is likely to be that the right to payment is personal and not assignable.

Bramwell LJ did note that in fact no money ever became due under the contract so that the plaintiff's statement of claim should be amended. Presumably, he did not intend by this to vary the actual words of the assignment but was laying stress on the above principle that it is not possible to vary the contract after notice of the assignment so as to defeat the assignment. Nevertheless, he concluded that if the obligor had made advances not merely in good faith but in circumstances where it was compulsory to do so, such as where the assignor threatened to breach the contract or did breach the contract, and the advance was made to protect the position of the obligor, then he would have hesitated long before holding the obligor liable to the assignee.<sup>97</sup> The advances here he thought were voluntary.

[8.16.4] It would therefore appear that the result in *Brice v Bannister* comes down to a slight difference between Brett LJ and Bramwell LJ in their view of the law and how that difference operated on the facts of the case. Brett LJ only required the obligor to be acting in good faith, that is, for good commercial reasons and not solely to destroy the rights of the assignee, whereas Bramwell LJ required good faith and compulsion. It is suggested that Bramwell LJ's requirement of compulsion is misconceived. It was a clear finding of fact in the case that the builder could not complete unless advances were made.<sup>98</sup> If the law allows such an owner to protect its position by agreeing to vary the contract to make advances, then to make that protection dependent upon a further threat by the assignor to breach the contract unless an advance is made when clearly that will be the result if no advance is made is nonsensical. The only issue should be whether or not the obligor's decision to vary the contract amounts to unconscionable conduct vis-à-

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<sup>96</sup> (1888) 3 QBD 569 at 581.

<sup>97</sup> (1888) 3 QBD 569 at 581. See also *Aplin v Cates* (1860) 30 LJ Ch 6. See [8.6].

<sup>98</sup> (1888) 3 QBD 569 at 570.

vis the assignee. The investigation therefore should consider whether the decision was made in good faith, that is, for sound commercial reasons. If that is the case, then it cannot be said that the obligor is attempting to exploit the assignee's vulnerability to such variations. On a practical level, as long as the advances are needed to ensure the performance of the contract they should be upheld and the assignee should take subject to them.<sup>99</sup> This may in some cases extend to varying (by way of re-classification) payment obligations that have fallen due under instalment contracts, but it is unlikely to extend to a re-classification where no work at all remains to be done under the contract.<sup>100</sup> That is, just as the facts may be that a party needs to make an advance to obtain counter performance, it may also be that it is crucial that an accrued payment be made to the assignor for the same reason. Of course, if the contract is discharged, the assignor would no longer have the power to vary unconditionally accrued rights.

**(iv) *The rights of the obligor: Transfer and the obligor's defences against the assignor to which the assignee is subject***<sup>101</sup>

[8.17] **Introduction.** It is a principle of the assignment of choses in action that an

<sup>99</sup> See *Fricker v Uddo & Taormina Co* (1957) 312 P 2d 1085; *Peden Iron & Steel Co v McKnight* (1910) 128 SW 156 at 159. See also *Stansbery v Medo-Land Dairy* (1940) 105 P 2d 86 at 91; *St Mary's Bank v Cianchette* (1951) 99 F Supp 994 at 999-1000.

<sup>100</sup> It may be noted that UCC §9-405(b)(2) effectively states that the right to modification contained in §9-405(a) is limited in the case of payments or part payments that have been fully earned to where the debtor has not received notice of the assignment. Moreover, Article 22 of the United Nations Convention requires the assignee's actual consent to a modification if the receivable is fully earned.

<sup>101</sup> In line with the subject matter of this dissertation, the concern here is not with the operation of the 'subject to equities' rule where there is an assignment by way of security. Generally, the same principles will apply but the security aspect may give rise to different factual scenarios and is further complicated if the assignor goes into liquidation or a receiver is appointed to the assignor. See further on the operation of the 'subject to equities' rule in this regard, *Derham Set-Off* (2nd ed, 1996) para 13.3; *Oditah Legal Aspects of Receivables Financing* (1991) paras 8.5-8.6. More generally, I do not consider here the ramifications that follow when either the assignor, assignee or obligor become insolvent, see *Derham Set-Off* (2<sup>nd</sup> ed, 1996) paras 13.2.9, 13.2.10, 13.2.11.

assignee takes subject to the equities.<sup>102</sup> The expression 'subject to the equities' is generally used to describe those defences the obligor has against the assignor which may be raised against the assignee in any action brought by the assignee. It therefore does not include direct claims against the assignee. The rule has always applied to equitable assignments and is preserved by statute in the case of legal assignments of choses in action.<sup>103</sup>

[8.17.1] Despite the subject to equities rule being a rule of some antiquity, it has never been entirely clear what it entails. Often, to simplify this area, treatments of this rule deal separately with the position before the obligor receives notice of the assignment and the position after notice is received.<sup>104</sup> The type of defences arising against the assignor after notice of the assignment to which the assignee is subject is much narrower than the position prior to notice.

There is perhaps an historical reason for this demarcation. Prior to the statutory regime for legal assignment, all enforcement proceedings (as regards legal choses in action) were generally brought in the name of the assignor before the common law courts. A natural consequence of this procedure, particularly prior to the time the common law courts recognised the interest of the equitable assignee, was that the obligor could raise any defence it had against the assignor at the time the action was brought. Equity would then step in granting an injunction to prevent certain defences being raised which arose against the assignor after the obligor had received notice of the assignment. Equity

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<sup>102</sup> The rule may be varied by statute, eg Bills of Exchange Act 1882 (UK) s 38(2); Bills of Exchange Act (Cth) s 43(1)(b) or by agreement between the assignor and obligor, [8.11]. Moreover, the obligor may also be estopped in certain cases from claiming that the assignee's right is subject to a certain equity.

<sup>103</sup> [5.3]. However, as the assignor in such an action need not be joined, the obligor cannot in the action brought by the assignee counterclaim for any amount due from the assignor which is in excess of that owed to the assignor, see *Mitchell v Purnell Motors Pty Ltd* [1961] NSW 165 at 168. Moreover, generally where the claim of the obligor against the assignor exceeds that of the assignee, the obligor cannot obtain the difference from the assignee as the assignee is not responsible for the claim, see *Young v Kitchen* (1878) 3 Ex D 127. Whether or not the assignee should take subject to counterclaims is dealt with at [8.33].

<sup>104</sup> Eg Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (4<sup>th</sup> ed, 2002) para 6.500.

generally did not step in to prevent the raising of defences that accrued prior to notice on the basis that at that stage the equities were equal.<sup>105</sup> However, it was considered unconscionable after notice 'by payment or otherwise [to] do anything to take away or diminish the rights of the assignee as they stood at the time of notice'.<sup>106</sup> Hence the demarcation.

[8.17.2] Professor Goode has suggested that the subject to equities rule was developed by equity to protect the obligor from injustices that may arise from assignment.<sup>107</sup> There is no doubt that many statements of the rule express it as a rule which governs the position prior to notice and these would appear to back up Professor Goode's view.<sup>108</sup> However, the analysis suggested above shows that the ability of the obligor to raise defences it had against the assignor was a natural consequence of the procedure adopted and not because of any positive rule or intervention by equity.<sup>109</sup> Equity only intervened to protect the assignee. This, however, does not lead to the conclusion that the rule should be abandoned due to procedural reforms or the recognition by the common law of the assignee's interest, because the rule also has doctrinal force. That is, an assignment of a chose in action results in the assignee taking title to what was a right of the assignor. It necessarily follows that where the assignee seeks to enforce those rights it should generally be subject to defences that could be raised against the assignor.

[8.17.3] The aim of this section is to identify the content of this rule and provide an organisational structure for its operation.<sup>110</sup> It is at first tempting to suggest that if an assignee takes subject to a defence by reference to the principle of transfer then that

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<sup>105</sup> *Wilson v Gabriel* (1863) 4 B & S 243 at 248, 122 ER 450 at 452 per Blackburn J.

<sup>106</sup> *Roxburghe v Cox* (1881) 17 Ch D 520 at 526 per James LJ.

<sup>107</sup> Goode *Legal Problems of Credit and Security* (2<sup>nd</sup> ed, 1988) at 165-7.

<sup>108</sup> Eg *The Southern British National Trust Ltd v Pither* (1937) 57 CLR 89 at 102 per Latham CJ referring to *White and Tudor's Leading Cases in Equity* (9<sup>th</sup> ed, 1928) Vol 1 at 136 note 6, see also at 108 per Dixon J.

<sup>109</sup> See further *Re The Gwelo (Matabeleland) Exploration and Development Co Ltd* [1901] 1 IR 38.

<sup>110</sup> In contracts made for the benefit of third parties, because the third party does not obtain a contractual right, the principles governing the defences and counterclaims available to the promisor against an action by the third party are different to that pertaining in the case of an assignment, see Law Commission for England and Wales *Privity of Contract: Contracts for the Benefit of Third Parties* (1996) paras 10.1-10.32.

defence can be taken out of the subject to equities rule. The aim of that exercise would be to delimit the subject to equities rule and perhaps come to a result that it is (as history might suggest) a discrete rule governing the position prior to notice. Thus, defences arising after notice could only be raised if the assignee takes subject to them by reason of the principle of transfer. If that simple demarcation in fact explained the law it would greatly increase the simplicity of the subject to equities rule. Moreover, there is some doctrinal appeal in this approach to the extent that if the relevant defence is identified by reference to the principle of transfer, then it is concerned with the relationship between the assignor and assignee and what is assigned rather than the relationship between the obligor and assignee, which, under this argument, would be the sole focus of the subject to equities rule. In addition, as already noted, many statements of the rule refer to it as a rule that governs the position prior to notice.

[8.17.4] Nevertheless, there are a number of reasons for including all such defences within the subject to equities rule. First, the case law has developed to include defences identified by reference to the transfer principle within the subject to equities rule.<sup>111</sup> Moreover, the statutory regime for legal assignments makes such assignments 'subject to the equities', but under that regime there is no assignment until notice is given. It is therefore doubtful that this provision was meant to be only concerned with issues that arise pre-notice. This forms part of the generally accepted approach of not interpreting 'equities' here in a narrow way. In *Re Harry Simpson & Co Ltd and Companies Act*,<sup>112</sup> Jacobs J, in one of the most authoritative statements of the rule suggested that the word 'equities' had to be given a wide meaning.<sup>113</sup> He stated that the idea behind the 'subject to the equities' rule was that the 'assignee can be in no better position than the assignor was, prior to the assignment'.<sup>114</sup>

Second, an assignee takes subject to the obligor's equitable right of set-off whether

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<sup>111</sup> See *The Southern British National Trust Ltd v Pither* (1937) 57 CLR 89 at 109 per Dixon J. In the case of Bills of Exchange, prior to the enactment of Bills of Exchange legislation, defects in title were referred to as 'equities', see Guest *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (15<sup>th</sup> ed, 1998) para 981.

<sup>112</sup> [1964-5] NSW 603.

<sup>113</sup> See also *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at 20-21 per Mason J.

<sup>114</sup> [1964-5] NSW 603 at 605.

arising before or after notice of the assignment and this has always been referred to as an 'equity' the assignee takes subject to.

Third, and perhaps most importantly, although the principle of transfer may dictate that an assignee takes subject to a certain defence, at times, the obligor may be estopped from raising this against the assignee, that is, the relationship between the obligor and assignee may impact on matters arising from the relationship between the assignor and assignee. It makes sense then to continue to deal with all these issues under the rubric of the subject to equities rule.

**[8.18] Approach to this section.** It is suggested in this section that the principle of transfer is the most important factor in identifying those types of claims an assignee will be subject to regardless of notice. This follows simply from the fact that the principle of transfer dictates that an assignor cannot assign a different right to that vested in it and therefore the assignee must take subject to the inherent infelicities or weaknesses in the right assigned.<sup>115</sup> It should also be noted that the principle of transfer focuses on the relationship between the assignor and assignee.

The other part of the subject to equities rules concerns the relationship between the obligor and assignee. It is suggested that because the validity of an assignment results in the obligor owing an obligation to the assignee and the assignee owning the right to that obligation, the law recognises a formal legal relationship between the assignee and obligor which is policed to prevent unconscionable conduct. It will be seen that this notion, and the relationship itself, helps to explain the special position that pertains prior to receipt of notice of the assignment. Prior to receiving notice of the assignment, it would be unconscionable for the assignee to insist that it did not take subject to certain defences the obligor had against the assignor at that time. Interestingly, at least under the statutory regime for legal assignments, the rule is expressed in terms of the assignee taking subject to those equities having priority. The better view may be that the reference to priority here is not a reference to the rules determining priority between competing interests<sup>116</sup> but rather it points to the fact that there must be a legal or

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<sup>115</sup> Eg *Redman v Permanent Trustee Co of NSW Ltd* (1916) 22 CLR 84 at 91 per Griffith CJ and Barton J ('The assignee ... takes subject to all the equities and infirmities of his assignor's title.')

<sup>116</sup> [5.10.4].

equitable reason given for why the assignee must be subject to a defence and that reason, it is suggested, is either because of the operation of the principle of transfer or because it would be unconscionable for the assignee to deny the defence. More generally, it is suggested, that it will be unconscionable when a failure to recognise the defence would amount to an exploitation of the obligor's inherent vulnerability to assignment without its consent. Clearly, this is most relevant in that period where the obligor has no notice of the assignment. It follows that it cannot be said that in the period prior to notice that there is a strict rule that the assignee takes subject to all *claims* and *defences* and there is an important debate, which will be discussed later, as to whether the assignee should take subject to counterclaims. It is also important to note that although the defences that can be raised against the assignee prior to notice cannot all be explained purely on the basis of transfer (in a strict sense), they can be explained by reference to transfer in a loose sense in that the subject to equities rule here is still (as suggested by Jacobs J in *Re Harry Simpson & Co Ltd and Companies Act*) ensuring that the assignee is in no better position than the assignor prior to the receipt of notice by the obligor.

With the above in mind, the approach to this section is not to deal with the positions both before and after notice but to identify those defences which the assignee takes subject to regardless of whether they arise before or after notice of the assignment. As noted, it will be suggested that these can all be identified by reference to the principle of transfer. In the next section, the special position pertaining prior to notice will be investigated.

**[8.19] The bona fide purchaser rule.** Before moving on, it is important to note that it has always been the law that an assignee of a chose in action cannot claim to have taken legal title free of any defects by reason of being a bona fide purchaser for value of the chose in action.<sup>117</sup> In some cases, this result has been explained by reference to the 'subject to equities' rule, that is, an assignee cannot have recourse to the bona-fide

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<sup>117</sup> *The Official Manager of the Athenæum Life Assurance Society v Pooley* (1858) 3 De G & J 294, 44 ER 1281; *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150 at 161-62.



purchaser rule because an assignee is bound by the subject to equities rule.<sup>118</sup> To some extent this is correct in that, originally, all assignments of legal choses in action were only upheld in equity and enforcement procedures were brought either by or in the name of the assignor. Clearly, when a party to a contract is enforcing its rights under the contract, there is no room for the bona fide purchaser rule to operate as there is no purchaser. However, it is also important to note that the bona fide purchaser rule is a rule that prevents a person recovering property, or, in the alternative, it allows a person to take something away from another person.<sup>119</sup> An obligor, in relation to a chose in action, in challenging the assignee's right to enforce the chose in action, is not trying to recover property and therefore the rule has no place.<sup>120</sup>

**[8.20] Defences to which the assignee will always be subject.** Once the obligor receives notice of an assignment, then, it cannot raise against the assignee any fresh equities arising against the assignor after notice of the assignment unless they are equities 'flowing out of and inseparably connected with' the assigned right.<sup>121</sup> This expression does have its problems and is discussed later,<sup>122</sup> however, for the moment, it is only important to note that it recognises that some 'equities' arise after notice. It is suggested that these equities can be identified by the principle of transfer.

The principle of transfer dictates that the assignor cannot assign a right greater than or different from the one it has. It is readily accepted that this means the assignor cannot

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<sup>118</sup> Eg *The Official Manager of the Athenæum Life Assurance Society v Pooley* (1858) 3 De G & J 294, 44 ER 1281.

<sup>119</sup> See *The Southern British National Trust Ltd v Pither* (1937) 57 CLR 89 at 108, 110, 111 per Dixon J. See also *The Wakefield and Barnsley Banking Co v The Nomanton Local Board* (1881) 44 LT 697 at 698 per Stephen J (affirmed (1881) 44 LT 697).

<sup>120</sup> There is, however, an important distinction to be drawn between an assignee taking a transfer of the rights of the assignor (which is the subject of this dissertation) and the 'assignee' taking a transfer of the subject matter of a contract. In the latter, assuming the transfer is valid, there is more scope for the bona fide purchaser rule to operate, see *Derham Set-Off* (2<sup>nd</sup> ed, 1996) para 10.12.1 at 465.

<sup>121</sup> *Tooth v Brisbane City Council* (1928) 41 CLR 212 at 223-4 per Isaacs J. See also *Government of Newfoundland v Newfoundland Railway Co* (1888) 13 App Cas 199 at 211, 213; *Stoddart v Union Trust Ltd* [1912] 1 KB 181 at 188, 189 per Vaughan Williams LJ.

<sup>122</sup> [8.33.1].

unilaterally change the characteristics of a contractual right and it is readily accepted that if a right (that is, a chose in action) is subject to some interest, such as a charge, it is not possible to unilaterally transfer the right free of that interest.<sup>123</sup> However, the principle of transfer also dictates that a transferee takes subject to the inherent infirmities that may exist in an assigned right. Importantly, such infirmities are not limited to legal infirmities, but may include equitable weaknesses inherent in the right.<sup>124</sup> It is this aspect of transfer that helps understand the defences which an obligor has against an assignor and which may be raised against the assignee whether or not they arise before or after notice. It is now intended to look in more detail at these defences.

**[8.21] Transfer and discharge of contract for breach, repudiation or frustration.** In taking an assignment of a contractual right, the principle of transfer dictates that the assignee's vested right must be subject to the effects of discharge, in particular, the rule that only unconditionally accrued rights survive discharge.<sup>125</sup> This is an inherent characteristic of a contractual right. If the effects of discharge did not affect the assignee, the assignor would, contrary to the principle of transfer, have assigned a right greater than the one it had. The point is perhaps clearer if one reasons from a property perspective: For an assignee to enforce the contractual right (or other chose in action), it relies on its ownership of that contractual right, that is, it relies on a property right and a property right cannot survive the destruction of the res, that is, the contract or more particularly the obligor's obligation. An example of this was given earlier concerning the termination of a contract of hire where hire was payable in arrears and the goods

<sup>123</sup> *Cockell v Taylor* (1852) 15 Beav 103 at 118-19; 51 ER 475 at 481-82. See also *The Southern British National Trust Ltd v Pither* (1937) 57 CLR 89 at 110-112 per Dixon J; *Hooper v Smart* (1875) LR 1 Ch D 90. For the position of third parties claiming against the assignor after assignment, see *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1, and in respect of revocable mandates, see *Rekstin v Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestvo Komseverputlj and the Bank for Russian Trade Ltd* [1933] 1 KB 47.

<sup>124</sup> Such equitable defences may be lost if the obligor is guilty of delay, see *Hill v Caillovel* (1748) 1 Ves Sen 122, 27 ER 931.

<sup>125</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 849 per Lord Diplock; *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-7 per Dixon J. Cf *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 at 597 per Lord Lloyd.

were not available during the hire period.<sup>126</sup> Of course, if the assignee's right is unconditional at the time of discharge it will survive the discharge as it is no longer dependent on the continued existence of the contract.

**[8.22] Transfer and rescission of contract.** An assignee will take subject to the obligor's right to rescind a contract or its right to approach a court for an order of rescission by virtue of some vitiating factor.<sup>127</sup> In addition, the assignee can take advantage of situations where the obligor has lost the right to rescind.<sup>128</sup> Clearly, a right to rescind a contract will usually arise from an event occurring prior to the formation of the contract between the assignor and obligor and, therefore, prior to notice of the assignment. Thus, the fact the assignee takes subject to such a right could simply be explained by reference to the special position that applies prior to notice. However, it can also be readily explained by reference to the principle of transfer because it is accepted that a vitiating factor constitutes a defect in title.<sup>129</sup>

Despite this clear legal position, it is interesting to speculate how this result can be explained analytically. It is generally accepted, that if a buyer purchases goods under a contract that may be set aside by the seller due to some vitiating factor, then, unless the contract is void, a third party purchaser from that buyer may obtain good title to the goods so long as that third party purchases the goods prior to the seller exercising its right to rescind and is a bona fide purchaser who acts without notice of the seller's right to rescind. This is said to be a sale under a voidable title. If this occurs, the seller can no longer rescind the contract. One view may be that the law here focuses on the bona fides of the purchaser so that the result is seen as an exception to the *nemo dat* rule. If that is right, it is easy to see why an assignee of a contractual right cannot take a free title as it cannot have recourse to the bona fide purchaser rule.<sup>130</sup>

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<sup>126</sup> [8.7].

<sup>127</sup> Eg *Graham v Johnson* (1869) LR 8 Eq 36. See also *The Wakefield and Barnsley Banking Co v The Normanton Local Board* (1881) 44 LT 697; *The Southern British National Trust Ltd v Piher* (1937) 57 CLR 89 at 111 per Dixon J.

<sup>128</sup> See the discussion in *The Wakefield and Barnsley Banking Co v The Normanton Local Board* (1881) 44 LT 697.

<sup>129</sup> *The Southern British National Trust Ltd v Piher* (1937) 57 CLR 89 at 108 per Dixon J. See also *Re Palmer's Decoration & Furniture Co* [1904] 2 Ch 743 at 751 per Buckley J.

<sup>130</sup> [8.19].

However, the weight of authority holds that the result in the sale of goods context flows from the fact that until the buyer's title is avoided by the seller, the buyer has a good title and may therefore pass good title to a third party purchaser prior to that title being avoided.<sup>131</sup> The requirement that the third party be a bona fide purchaser is thus not the main requirement and, more importantly, this is not an application of the true bona fide purchaser rule operating as an exception to the *nemo dat* rule or operating to defeat the prior equity of rescission. This makes some sense in that a contract voidable for duress is voidable at common law so that the right to rescind cannot in all cases be expressed as an equity in this sense. If this is correct, then the notion of a 'voidable title' is really a defeasible title where the factor that renders it defeasible does not actually attach to the title until there is an election made to avoid it. There would appear to be merely a contingent defect in title. It can be only on this basis that it is possible to recognise the buyer as having 'good title'.

However, if this analysis is correct, why should an assignee of a contractual right not be able to claim good title? That is, why should the assignee not be able to claim that this 'defect in title' is not a present defect (but a contingent defect) and therefore the assignee should be able to take free of it? The answer, it is suggested, lies in the fact that in a contract for the sale of goods, the third party buyer is attempting to purchase title in the goods to which the first buyer has good (although potentially voidable) title. The ability of the first seller to avoid the first buyer's title lies in the fact that the original contract of sale is avoidable. If the seller elects to avoid that contract this will then have an affect on the first buyer's title as its title is dependent on the existence of this contract. Thus, it is the rescission of the contract that affects the buyer's title by avoiding it. However, if this rescission does not take place prior to the second sale, it cannot affect the second buyer as its title is not dependent upon the existence of this first contract. In the case of an assignment of a contractual right, the assignee is not taking a transfer of the subject matter of the contract, the assignee is in fact buying an interest in

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<sup>131</sup> *Whithorn Brothers v Davison* [1911] 1 KB 463 at 481. Cf *The Southern British National Trust Ltd v Pither* (1937) 57 CLR 89 at 112 per Dixon J (here, Dixon J suggests the analysis is that the bona fide third party obtains title from the actual owner; this analysis would allow for the 'voidable' title to immediately attach to the title of the first purchaser with the bona fide third party purchaser being able to bypass that defect by taking title from the actual owner).

the contract which is voidable. Thus, this defect in title immediately impacts on the assignee's title to the right to performance.<sup>132</sup>

**[8.23] Transfer and illegality.** It was noted in Chapter Seven, that public policy may impact on an assignment. That discussion was concerned with public policy issues affecting the assignment itself. However, clearly, if the contract between the assignor and obligor is affected by illegality, this will impact upon the title of the assignor and therefore also the assignee. An assignee can no more call for the performance of an illegal act than the assignor.

**[8.24] Transfer and true equitable set-off.**<sup>133</sup> It is generally accepted that an assignee of a contractual right takes subject to the obligor's rights of true equitable set-off which it has against the assignor.<sup>134</sup> Moreover, given that the obligor can rely on a true equitable set-off, whether arising before or after notice of the assignment, the obligor should also be able to rely on such a set-off arising out of a contract entered into after notice of the assignment.<sup>135</sup>

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<sup>132</sup> There is a tension in the notion of rescinding a contract that is effectively discharged by performance. An election to rescind here seems to have the nonsensical effect of reinstating the contract for it then to be rescinded. It may be that a better explanation is to put aside the notion of rescinding a contract and accept that rescission is a remedy that effects restitution (and can have the effect of revesting title) and is based on there being an unjust enrichment. If that were adopted, however, it may be difficult to argue that an assignee takes subject to this on the basis of the principle of transfer and it would need to be explained by reference to the special position that pertains prior to notice.

<sup>133</sup> The expression 'true equitable set-off' distinguishes this type of set-off from other procedural forms of set-off, that is, equitable set-off by analogy, legal set-off under the Statutes of Set-Off where they continue to apply and other set-offs created by legislation, see *Derham Set-Off* (2<sup>nd</sup> ed, 1996) para 1.12 at 137-140.

<sup>134</sup> Eg *Young v Kitchin* (1878) 3 Ex D 127; *Government of Newfoundland v Newfoundland Railway Co* (1888) 13 App Cas 199; *Lawrence v Hayes* [1927] 2 KB 111; *Mitchell v Purnell Motors Pty Ltd* [1961] NSW 165; *Coba Industries Ltd v Millie's Holdings (Canada) Ltd* [1985] 6 WWR 14; *Telford v Holt* (1987) 41 DLR (4<sup>th</sup>) 385. See also *Aboussafy v Abacus Cities Ltd* [1981] 4 WWR 660.

<sup>135</sup> Opinions on this point, however, differ, see *Derham Set-Off* (2<sup>nd</sup> ed 1996) para 13.2.8 and compare Wood *English and International Set-Off* (1989) para 14-80 at 793, para 16-22 at 856.

This is not the place to enter into a long discussion about the requirements of equitable set-off as that has been done by other commentators.<sup>136</sup> In practice, as regards assignment, the question is simply one of whether the obligor has such a right against the assignor and this is better left to works on set-off. Generally, however, an equitable set-off will arise when a claim and cross-claim are so closely connected that it would be inequitable for the plaintiff's claim to proceed without giving credit for the cross-claim.<sup>137</sup> Traditionally, that close connection will exist only when the defendant's claim impeaches the title of the plaintiff's demand.<sup>138</sup> For example, first principles would dictate that if a defendant had a claim against a plaintiff for fraud, and it was that fraud which in fact led the defendant to enter into the transaction which the plaintiff is seeking to enforce, there will be an equitable set-off as the resolution of the plaintiff's claim can be said to be dependent on the resolution of the defendant's claim.<sup>139</sup>

The test has not always been applied in a strict manner and some cases taking a broad approach to impeachment have become leading authorities or examples of set-off.<sup>140</sup> In addition, the impeachment test has been reformulated. For example, in *Bank of Boston Connecticut v European Grain and Shipping Ltd*,<sup>141</sup> Lord Brandon<sup>142</sup> approved the test

<sup>136</sup> See Derham *Set-Off* (2<sup>nd</sup> ed, 1996); Wood *English and International Set-Off* (1989).

<sup>137</sup> Derham 'Recent Issues in Relation to Set-Off' (1994) 68 *ALJ* 331 at 332.

<sup>138</sup> *Rawson v Samuel* (1841) Cr & Ph 161 at 179, 41 ER 451 at 458. See also *Hill v Zymack* (1908) 7 CLR 352 at 360 per Griffith CJ; *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10 at 17 per Woodward J; *Aries Tanker Corp v Total Transport Ltd* [1977] 1 WLR 185 at 191 per Lord Wilberforce at 193 per Lord Simon. See further *James v Commonwealth Bank of Australia* (1992) 37 FCR 445 at 458 per Gummow J (explaining how the requirement of impeachment has not been narrowly construed). In the case of true equitable set-off, there is no need for mutuality, although usually it would only be just to allow set-off if the same parties are involved, see Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 1.7.6; Derham 'Recent Issues in Relation to Set-Off' (1994) 68 *ALJ* 331 at 345-349. Nor must the demands arise out of the same contract, Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 1.7.7.

<sup>139</sup> Spry 'Equitable Set-offs' (1969) 43 *ALJ* 265 at 268. See also Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 1.7.1. See further *The Wakefield and Barnsley Banking Co v The Normanton Local Board* (1881) 44 LT 697. Cf *Stoddart v Union Trust Ltd* [1912] 1 KB 181 discussed at [8.26].

<sup>140</sup> Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 1.7.1 at 43-44. See also Derham 'Recent Issues in Relation to Set-Off' (1994) 68 *ALJ* 331 at 332-337.

<sup>141</sup> [1989] 1 AC 1056.

<sup>142</sup> With whom Lords Keith, Oliver, Goff and Jauncey agreed.

expressed by the Privy Council in *Government of Newfoundland v Newfoundland Railway Co*,<sup>143</sup> that the defendant's cross-claim must flow out of and be inseparably connected with the dealings and transactions which also give rise to the claim.<sup>144</sup> There has been much debate over whether or not this test merely reformulates the impeachment test or broadens it<sup>145</sup> and whether, given that set-off exists to prevent injustice, it should be and has been expanded beyond the impeachment test to adopt a broader notion of fairness.<sup>146</sup> It would appear from a strict reading of Lord Brandon's speech that he only intended a reformulation or 'different version' suggesting that the 'impeachment' concept is no longer a familiar one.<sup>147</sup> This point is taken up further below.<sup>148</sup>

[8.24.1] The principle of transfer identifies true equitable set-off as a claim to which the assignee takes subject to, whether the set-off arises before or after notice of the assignment, because it results in an 'impeachment' of the 'title' taken by the assignee. This is an inherent weakness in any contractual right. It does not matter that this inherent weakness has its origins in equity and it does not matter that the right of set-off only exists so long as it remains unconscionable for a creditor to deny the debtor's claim.

<sup>143</sup> (1888) 13 App Cas 199.

<sup>144</sup> [1989] 1 AC 1056 at 1102-3, 1110-1. Prior to this decision there were attempts at other formulations, see *Henriksens Rederi A/S v THZ Rolimpex (The Brede)* [1974] 1 QB 233 at 248 per Lord Denning; *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1978] 1 QB 927 at 975 per Lord Denning. See also *Compania Sud-Americana de Vapores v Shipmair BV (The Teno)* [1977] 2 Lloyd's Rep 289 at 297 per Parker J. For discussion of Australian authorities taking a broader approach see *Derham Set-Off* (2<sup>nd</sup> ed, 1996) para 1.7.3 at 54-56.

<sup>145</sup> See *Derham Set-Off* (2<sup>nd</sup> ed, 1996) para 1.7.1 at 51, 1.7.7 at 72; Oditah *Legal Aspects of Receivables Financing* (1991) at para 8.2 at 228.

<sup>146</sup> McCracken *The Banker's Remedy of Set-Off* (2<sup>nd</sup> ed, 1996) ch 3.

<sup>147</sup> [1989] 1 AC 1056 at 1102-1103, 1106. The question arising, however, is whether the language chosen by Lord Brandon was sufficiently precise. As Derham has pointed out, Lord Brandon's formulation would appear to always be satisfied if the claim and cross-claim arise out of the same transaction, whereas, traditionally, this was just one factor taken into account, Derham 'Recent Issues in Relation to Set-Off' (1994) 68 *ALJ* 331 at 333. See further *James v Commonwealth Bank of Australia* (1992) 37 FCR 445 at 460 per Gummow J and *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50.

<sup>148</sup> [8.33.1].

[8.24.2] Even if the reformulations of true equitable set-off do not continue to emphasise the need for an impeachment of title, the principle of transfer further dictates that an assignee must take subject to true equitable set-off because it is a substantive defence. A substantive defence destroys all or part of a plaintiff's claim. Inasmuch as the assignee is generally dependent upon the continued existence of the contract, as it sustains the existence of any conditional right vested in the assignee, it is also subject to the continued existence of its claim. Anything that destroys all or part of that claim affects the assignee by reason of the principle of transfer. Thus, if an assignee were not subject to such defences, the assignor could assign a right greater than the one it had which is at odds with the principle of transfer.

[8.24.3] The substantive nature of equitable set-off is not, however, universally accepted. For example, Professor Goode has argued that it is procedural because it involves an admission of liability to the plaintiff's claim and does not take effect until judgment. He suggests that if it were substantive, it should allow the defendant to refuse to pay prior to proceedings being commenced.

However, recent case law<sup>149</sup> has taken the view that true equitable set-off is a substantive defence. Moreover, equitable set-off has been successfully used independently of a court order.<sup>150</sup> This is why it impeaches title rather than impeaching a right to obtain a judgment.<sup>151</sup> Derham states:

[T]he view that the defence is substantive does not mean that it operates as an automatic extinction of cross-demands... [I]f there is an entitlement to an equitable set-off, the creditor *as a matter of equity* is not entitled to treat the debtor as being indebted to him to the extent of the debtor's own claim against him. The cross-demands as a matter of law remain in existence between the parties until extinguished by judgment or agreement, though as far as equity is concerned, it is unconscionable for the creditor even before then to regard the debtor as being in

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<sup>149</sup> See the authorities collected in Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 1.7.4 note 347; Derham 'Recent Issues in Relation to Set-Off' (1994) 68 *ALJ* 331 at 337 note 58 and see *Fuller v Happy Shopper Markets Ltd* [2001] 1 WLR 1681 at 1690.

<sup>150</sup> Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 1.7.4 note 349 citing *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1978] 1 QB 927 at 982 per Goff LJ.

<sup>151</sup> Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 1.7.4 at 57.



default to the extent of the cross-demand if circumstances exist which support an equitable set-off. A court of equity will protect the debtor's position by way of injunction, and it may also be the subject of a declaration. This is an illustration of the maxim that equity acts *in personam*, and it provides an explanation of how equitable set-off operates substantively without working an automatic discharge.<sup>152</sup>

This statement, which is adopted as correct in this dissertation, further shows the importance of accepting inherent equitable weaknesses in a right for the purposes of the principle of transfer. It would follow, that if circumstances arose which extinguished a debtor's right to claim equitable set-off, then it would be no longer unconscionable for a creditor to hold the debtor to be in default for the entire sum owing. It would be otherwise if set-off automatically extinguished rights.<sup>153</sup>

**[8.25] Transfer, true equitable set-off and the need for the subject to equities rule.**

It may be argued that if the principle of transfer dictates that an assignee takes subject to true equitable set-off, whether arising before or after notice of the assignment, then it must follow that an assignee would take subject to such a claim even where the 'subject to equities' rule is not preserved, such as where there is a transfer at law.<sup>154</sup> The decision in *Reeves v Pope*,<sup>155</sup> may be raised as evidence to the contrary, that is, to suggest that an assignee only takes subject to true equitable set-off where the subject to equities rule is preserved. Thus, the identification of such defences cannot be predicted by the principle of transfer and subject to equities rule must operate in a discrete way even after notice.

The arguments for preserving the subject to equities rule as regards post notice defences have already been discussed. It is necessary here, however, to deal with this argument that appears to flow from *Reeves v Pope*. That case is essentially authority for the point that if a landlord mortgages property<sup>156</sup> and the mortgagee brings an action for rent having gone into possession, then the tenant cannot raise against the mortgagee an

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<sup>152</sup> Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 1.7.4 at 57. See also Derham 'Recent Issues in Relation to Set-Off' (1994) 68 *ALJ* 331 at 337.

<sup>153</sup> See further Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 1.7.4 at 64-5.

<sup>154</sup> As to instruments transferable at law see Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 13.2.18.

<sup>155</sup> [1914] 2 KB 284. See also *Citibank Pty Ltd v Simon Fredericks Pty Ltd* [1993] 2 VR 168.

<sup>156</sup> That is, where the property is leased prior to entry into the mortgage.

equitable set-off it had against the mortgagor.<sup>157</sup> The common law or old system mortgage of land is an example of the common law applying the principle of transfer, that is, it operated to transfer ownership to the mortgagee. It followed that the mortgagee was legally entitled to possession from the moment the mortgage took effect.<sup>158</sup> Usually, however, some contractual promise or 'attornment clause' was agreed to for the purposes of allowing the mortgagor to maintain possession.<sup>159</sup> Moreover, because the mortgage was effective at law the mortgagee was entitled to the rent and would usually claim that rent if it entered into possession.<sup>160</sup> The mortgagor and mortgagee generally had an agreement that allowed the mortgagor to continue collecting the rent for its own benefit. However, this could be terminated by the mortgagee.<sup>161</sup> Why then could the lessee not raise an equitable set-off it had against the mortgagor against a claim for rent by the mortgagee whether that set-off arose before or after entry into the mortgage? The result has been criticised as giving a special insulation to mortgagee's who should take subject to such claims.<sup>162</sup>

[8.25.1] It is suggested that the result of *Reeves v Pope* is entirely correct. As to claims for set-off arising after the mortgage, the answer must be that, generally, because the mortgage is immediately operative at law without notice, the mortgagee would not be affected by any claims against the mortgagor arising after the mortgage. As to claims arising prior to the mortgage, one answer may be that because this transfer was effective at law, the rule that an assignee takes subject to the equities does not apply (unless

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<sup>157</sup> As to whether *Reeves v Pope* applies to Torrens title land, see Butt *Land Law* (4<sup>th</sup> ed, 2001) para 1879; Derham 'Recent Issues in Relation to Set-Off' (1994) 68 *ALJ* 331 at 351-352.

<sup>158</sup> Butt *Land Law* (4<sup>th</sup> ed, 2001) para 1869.

<sup>159</sup> Butt *Land Law* (4<sup>th</sup> ed, 2001) para 1870.

<sup>160</sup> *Burrows v Gradin* (1843) 12 LJQB 333 at 335; *Re Ind, Coope & Co Ltd* [1911] 2 Ch 223 at 231 per Warrington J. See also *Re Partnership Pacific Securities Ltd* [1994] 1 Qd R 410 at 418 per Williams J.

<sup>161</sup> Moreover, until receiving notice of the mortgage, the lessee could obtain a good discharge by paying rent to the mortgagor, that is, even though the transfer was complete at law before notice. This protection for the lessee was enshrined in legislation but has been suggested to represent the position at law in any case, see Derham 'Recent Issues in Relation to Set-Off' (1994) 68 *ALJ* 331 at 350. Thus, even in the case of a true transfer at law, there may (in some cases) be aspects of the 'subject to equities' rule operating.

<sup>162</sup> Wood *English and International Set-Off* (1989) para 16-106.

preserved by legislation). However, this explanation (so expressed) may also suggest that the notion that an assignee of a chose in action always takes subject to rights of equitable set-off can only be explained by reference to the existence of the subject to equities rule because, if it were explicable by transfer, then presumably all transfers, legal or equitable, would be subject to such claims.

[8.25.2] There are two answers to this issue, The first, and more general answer, is simply that where a transfer is effective at common law, there may be no reason for equity to intervene. Therefore, it would not be surprising that in the case law on common law transfers there is no mention of transferees taking 'subject to the equities'.<sup>163</sup>

[8.25.3] Second, and as regards *Reeves v Pope*, it must be kept in mind that such a mortgagee in possession is still under an equitable obligation to account to the landlord/mortgagor for rent received.<sup>164</sup> Equitable set-off operates to prevent unconscionability and given the existence of this obligation, the finding that it cannot be raised against such a mortgagee may simply reflect a view that it would not be operating to provide justice when such an accounting is to take place. This, however, is not a complete answer because if the property is sold rather than mortgaged, it must be the case that the purchaser does not take subject to any equitable set-off that existed against the vendor/lessor. It is suggested, that a full answer lies in a proper characterisation of the transaction in question. It must be kept in mind that such a purchaser or mortgagee takes subject to the lease as a matter of real property law. That is, they are only subject to, or benefited by, those covenants that touch and concern the land by reason of the privity of estate that exists between them.<sup>165</sup> There is no separate assignment of the lease, that is, there is no assignment of contractual rights. Generally, at common law, the landlord and tenant both remained liable on their contractual covenants by virtue of privity of contract throughout the entire term of the lease. The purchaser or mortgagee

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<sup>163</sup> Eg *Ashwin v Burton* (1862) 7 LT 589; *Taylor v Blakekock* (1886) 32 Ch D 560 at 567.

<sup>164</sup> Butt *Land Law* (4<sup>th</sup> ed, 2001) para 1874.

<sup>165</sup> The notion that an assignee of the lessor takes subject to covenants that touch and concern the land appears to have its historical basis in legislation rather than the common law and that legislation resulted from an 'accident' of history, see *A History of the Land Law* 2<sup>nd</sup> ed (1986) at 255-256.

obtains an estate in the land. Once this is recognised, it is obvious why such a party would not take subject to a personal equitable set-off existing against the vendor or mortgagor/lessor, that is, because there is no transfer of the lease contract and therefore no title to impeach.<sup>166</sup> The privity of estate doctrine operates at law to create independent rights and obligations which parallel the contractual rights and obligations.<sup>167</sup> Thus, the buyer's or mortgagee's rights and obligations in respect of the lease are not derivative because there is no assignment.<sup>168</sup> The mortgagee's rights arise from the fact they are entitled to the reversion and therefore entitled in their own right to the arrears of rent.

[8.25.4] If it were not for the above factors, it is suggested, there may be much to be said for the transferee being subject to the lessee's claim except, as Derham has pointed out, since the transfer is effective at law, the claim by the lessee may not sufficiently impeach the title of the mortgagee/purchaser in any case. The principle of transfer merely identifies the type of claim that an assignee may be subject to. It is still necessary for the requirements of that claim or doctrine to be made out in any given case.<sup>169</sup>

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<sup>166</sup> See further *Re Partnership Pacific Securities Ltd* [1994] 1 Qd R 410. The same reasoning would apply to a sale of goods where the goods are the subject of a hire agreement at the time of sale and where the goods are in the possession of the lessee at the time of sale. In such a case the purchaser should take subject to the lessee's interest. However, the purchaser would not be subject to the lessee's claims of set-off against the seller because there is no assignment of the contract of hire, the purchaser is simply getting ownership of the goods and if it takes subject to the hire it is because that hiring affects the title of the seller. This is an application of the *nemo-dat* rule. Arguably, in such a case, and, analogous to sale of land subject to a lease, generally, the purchaser should only be subject to those obligations that arise at law by reason of the law of bailment.

<sup>167</sup> *City of London Corp v Fell* [1994] 1 AC 458 at 465 per Lord Templeman.

<sup>168</sup> *Reeves v Pope* [1914] 2 KB 284 at 287 per Lord Reading CJ, at 289-90 per Buckley LJ. Of course the result may be different if there is in fact an assignment agreed to, see *Re Partnership Pacific Securities Ltd* [1994] 1 Qd R 410 at 422-23 per Williams J.

<sup>169</sup> Thus, although generally the onus is on the assignee to investigate any infelicities in the right it intends to take an assignment of (see *Mangles v Dixon* (1852) 3 HLC 702, 10 ER 278), there may be circumstances that would make it unconscionable for the obligor to raise the set-off against an assignee. For example, if the obligor knew that the assignor was deceiving the assignee, the obligor should notify the assignee, see *Mangles v Dixon* (1852) 3 HLC 702, 10 ER

[8.26] **Set-off and the case of *Stoddart v Union Trust Ltd.*** Although it is not intended here to set out the facts of numerous decisions exemplifying that an assignee takes subject to equitable set-off, one case that has caused much controversy over the years should be dealt with. That case in *Stoddart v Union Trust Ltd.*<sup>170</sup> In this case, the defendant obligor was prevented from raising against the assignee a claim for damages for fraud which it had against the assignor. That fraud, it was claimed, induced the defendant to enter into the transaction with the assignor. The assignor had sold a newspaper to a debtor fraudulently misrepresenting both the value and circulation of the paper. The debtor then on sold the newspaper to a third party and the assignor assigned the balance of the purchase price to the assignee. The defendant, by on-selling the newspaper, had in fact lost its right to rescind the contract for fraud and was left with merely an action for damages. It was held that in such circumstances that action was ‘dehors’ the contract and amounted to a mere personal claim against the assignor.<sup>171</sup> Some emphasis was placed on the fact that the assignee had no notice of the fraud and was an assignee for value.<sup>172</sup> It was suggested that the result would have been different if the representation in fact had become a term of the contract.<sup>173</sup> The decision has been defended on the basis that in not rescinding the contract or not being able to rescind, the obligor was attempting to have his cake and eat it in that the defendant was recognising

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278. See also *Wilson v Gabriel* (1863) 4 B & S 243 at 247, 122 ER 450 at 452 per Cockburn CJ (suggesting that if the obligor by its own act placed the assignee in a worse position such as by standing by and allowing the assignment to go ahead knowing there is a set-off, it would be inequitable to allow the obligor to then raise that equity against the assignee). See further *Rolt v White* (1862) 3 De GJ & S 360, 46 ER 674; *Bickerton v Walker* (1885) 31 Ch D 151; *Bateman v Hunt* [1904] 2 KB 530. Generally, in the case of a transfer at law where the transferee can sue in its own name, then where the debtor has a claim against the transferor, there would not be sufficient mutuality between the obligor and transferee for the purposes of statutory set-off, see *Derham Set-Off* (2<sup>nd</sup> ed, 1996) para 13.2.18.

<sup>170</sup> [1912] 1 KB 181. See also *Cummings v Johnson* (1913) 4 WWR 543; *Provident Finance Corp Pty Ltd v Hammond* [1978] VR 312. See further *Birchal v Birch, Crisp & Co* [1913] 2 Ch 375 at 379 per Cozens-Hardy MR; *AMP v Specialist Funding Consultants Pty Ltd* (1991) 24 NSWLR 326 at 332.

<sup>171</sup> [1912] 1 KB 181 at 194 per Kennedy LJ.

<sup>172</sup> [1912] 1 KB 181 at 188 per Vaughan Williams LJ, at 192 per Buckley LJ.

<sup>173</sup> [1912] 1 KB 181 at 192 per Buckley LJ. See also *Sun Candies Pty Ltd v Polites* [1939] VLR 132.

its liability under the contract but also attempting to repudiate its obligations under the contract.<sup>174</sup>

With respect, the only way this decision can be upheld is if it is accepted that there may be set-offs available against an assignor which it would be unconscionable to raise against the assignee. It is difficult to think of a claim that impeaches the title of the assignor more than a claim based on fraud where that fraud was perpetrated by the assignor and induced the obligor to enter into the transaction with the assignor which was the subject matter of the assignment.<sup>175</sup> The result, therefore, cannot rest with the court's reasoning that the claims were not sufficiently connected. Rather, it must rest on its reasoning that the claim for damages was personal in the sense that the claim was not associated with the contract the same was that a claim for damages for breach of contract would be. However, if the claim is, as suggested, sufficient to raise an equitable set-off, it is difficult to see how much closer a cross-claim needs to be. It must be kept in mind that an assignee will always take subject to the defence of equitable set-off and that defence is not dependent upon the cross-claim arising out of the same transaction as the assignee's claim even though that will often be the case. Clearly, no weight can be put in the notion that the assignee was a bona fide purchaser without notice.<sup>176</sup> Ultimately, the decision can only be upheld by putting some weight in the notion that this was an equity that did not take 'priority'. However, it is suggested that the better view is that the decision was wrong.

**[8.27] Contractual set-off.**<sup>177</sup> It appears to be accepted that where a contract between an assignor and obligor contains a provision for set-off to automatically take place so that only the balance of two cross-debts is owed, then the assignee takes subject to that

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<sup>174</sup> Marshall *The Assignment of Choses in Action* (1950) at 182.

<sup>175</sup> See *The Southern National Trust Ltd v Pither* (1937) 57 CLR 89 at 105 per Rich J. There appears to be no good reason for simply denying that a claim for damages for misrepresentation can give rise to a set-off, see *Tomlinson v Cut Price Deli Pty Ltd* (1992) 38 FCR 490 at 494. As regards claims arising out of separate transactions see *Provident Finance Corp Pty Ltd v Hammond* [1978] VR 312. Cf *Wilsons (NZ) Portland Cement Ltd v Gatx-Fuller Australasia Pty Ltd (No 2)* [1985] 2 NZLR 33. See further Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 1.7.8.

<sup>176</sup> [8.19].

<sup>177</sup> In respect of assignees being subject to a combination of bank accounts see Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 11.13.

set-off agreement whether or not it has notice of the agreement.<sup>178</sup> It is suggested, that this result is perfectly correct on the basis that the set-off agreement defines the extent of the right held by the assignor and thus the characteristics of the right transferred to the assignee.

The leading case is *Mangles v Dixon*.<sup>179</sup> In this case A (the appellant) wanted to charter a vessel from B but the only vessel available was too large for A's requirements. It was decided that B itself would charter half the vessel and A and B would share the profits or losses of the adventure accordingly. To achieve this purpose and get over the problem of the owner B chartering its own vessel three documents were executed.<sup>180</sup> First A and B entered into a charterparty at a rate of 16s per ton. Second, on the same day, a further agreement was entered into which recited that A had entered into the charterparty and agreed that C shall take a half share in the profit and risk of the venture. C was merely a nominee for B and effectively represented B. This second agreement thus included a contractual set-off. Third, on the same day, B executed a guarantee (in favour of A) of C's obligations under the second agreement. Later B assigned the benefit of the charterparty to D who waited a number of months before giving notice of the assignment to A. A then made payments to D. D had no knowledge of the latter two documents. A made all the payments it was required to make under the contract, that is, it made payments of half the amount required under the charterparty. As it turned out, the venture was a loss and A contended that B were therefore liable for half the loss. D refused to accede to this and brought an action contending that A was liable to pay the balance of the whole freight. A then sought to restrain D's action and was successful. It was held that the three documents constituted one contract and the assignee took subject to the assignor's liability for its share of the risk.<sup>181</sup> It did not matter that D had no notice of the terms of the second and third documents as the onus

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<sup>178</sup> *Mangles v Dixon* (1852) 3 HLC 702, 10 ER 278. See also *Watson v Mid Wales Railway Co* (1867) LR 2 CP 593 at 600 per Willes J, at 601 per Montague Smith J. See further *Re The Moss Bay Hematite Iron and Steel Co Ltd* (1892) 8 TLR 63 (affirmed 8 TLR 475); *Toronto-Dominion Bank v Block Bros Contractors Ltd* (1980) 118 DLR (3d) 311; *Commercial Factors Ltd v Maxwell Printing Ltd* [1994] 1 NZLR 724.

<sup>179</sup> (1852) 3 HLC 702, 10 ER 278.

<sup>180</sup> Query whether the transaction adopted was sufficient to overcome the problem of a person contracting with itself.

<sup>181</sup> (1852) 3 HLC 702 at 732, 10 ER 278 at 291.

was on them to make inquiries.<sup>182</sup> The only exception to this would be if A, the obligor, was involved in some deception or knew that D was being deceived.<sup>183</sup> Here the transaction was not a fraud but structured the way it was because of what it was trying to achieve<sup>184</sup> and A was not aware and did not have to take steps to know whether or not B had told the assignee that the transaction in fact consisted of 3 documents unless it had come to the notice of A that D was being deceived.

The result should be the same even if the obligor has only an option to set-off cross-debts. Nor should it matter that such a provision may allow for the set-off of claims that would not at law give rise to a set-off and thus claims that would not equate to a defence.<sup>185</sup> The issue is simply one as to the meaning of the contract which in turn shapes the chose in action vested in the assignee.<sup>186</sup> For that reason, if the provision allowed for the obligor to set-off unliquidated or contingent claims, the assignee should also take subject to this.<sup>187</sup> It should also not matter if the cross-demand arose from a transaction entered into by the obligor and assignor after notice of the assignment so long as the agreement for set-off contained in the contract,<sup>188</sup> on construction, catches

<sup>182</sup> (1852) 3 HLC 702 at 733, 10 ER 278 at 291. Arguably upon seeing that A was only ever paying half the amount stated in the charterparty, D should have made some enquiries, see (1852) 3 HLC 702 at 721, 10 ER 278 at 286.

<sup>183</sup> (1852) 3 HLC 702 at 733, 10 ER 278 at 291. See also *The Wakefield and Barnsley Banking Co v The Normanton Local Board* (1881) 44 LT 697.

<sup>184</sup> (1852) 3 HLC 702 at 722, 10 ER 278 at 287.

<sup>185</sup> See *Derham Set-off* (2nd ed, 1996) para. 13.2.14.

<sup>186</sup> *Mangles v Dixon* (1852) 3 HLC 702 at 729, 10 ER 278 at 289.

<sup>187</sup> Because it is not possible to actually 'set-off' the claims until each is quantified, Goode has suggested that what is intended by such a provision is that one party has a right to withhold payment pending quantification of its claim. It thus first gives a right to suspend payment and then a right of set-off once quantification occurs. Alternatively, where the contingent claim has a known maximum amount, it may be intended that the obligor has an immediate right of set-off for that amount, 'upon terms of recrediting the [assignee] with the appropriate amount if the actual liability proves to be the less', see Goode *Legal Problems of Credit and Security* (2<sup>nd</sup> ed, 1988) at 172-73. Cf *Oditah 'Financing Trade Credit: Welsh Development Agency v Exfinco'* [1992] *JBL* 541 at 559.

<sup>188</sup> Where the agreement for set-off is contained in a separate agreement but one entered into prior to notice of the assignment, it will effectively vary the rights of the subject contract and the nature of the choses in action that are assigned under that contract, even if the assignee has no notice of this variation.



that cross-demand.<sup>189</sup> If it were otherwise the assignee would be vested with a different right to the right held by the assignor which is not possible because of the governance of the principle of transfer.<sup>190</sup> The onus is on the assignee to acquaint itself with the terms of the contract from which its assigned right derives. Moreover, because this right of the obligor defines and delimits the right taken by the assignee, there is no room here for the assignee to raise its relationship with the obligor and to suggest that the obligor's decision to exercise the set-off in a particular case is unconscionable. However, in any given case, it may be that on construction, the contractual set-off was only intended to govern the relationship between the assignor and obligor and therefore it would not define and delimit the right (as a chose in action) assigned to the assignee.<sup>191</sup>

**[8.28] Abatement.** An assignee takes subject to a right of abatement the obligor has against the assignor. For example, an assignee will be subject to the obligor's right under a building contract to deduct from the debt owed, amounts equivalent to the damages suffered by reason of the non-performance of the assignor.<sup>192</sup> However, opinions are split over whether an assignee takes subject to rights of abatement where the obligor's claim arises after notice of the assignment. Oditah suggests the assignee is not subject to such claims.<sup>193</sup> Professor Goode suggests that the assignee is subject to such claims.<sup>194</sup> Oddly, there appears to be no case definitively deciding this point. Ultimately, the answer to this question depends on whether abatement constitutes a

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<sup>189</sup> See Derham *Set-off* (2nd ed, 1996) para. 13.2.14 at 587-88. Cf Oditah *Legal Aspects of Receivables Financing* (1991) at para 8.2 at 229 (suggesting that the law appears to be that post-notice cross-claims can only be set up under a contractual set-off against an assignee if they arose from a pre-notice obligation. However, the result should simply depend on the construction of the provision, see generally *The First National Bank of Chicago v The West of England Shipowners Mutual Protection and Indemnity Assoc (Luxembourg) (The 'Evelpidis Era')* [1981] 1 Lloyd's Rep 54.) If the set-off agreement itself was not entered into until after notice of the assignment, it could only bind an assignee if it satisfied the requirements for a legitimate post notice variation of the main contract, [8.14].

<sup>190</sup> *Mangles v Dixon* (1852) 3 HLC 702 at 731, 735, 10 ER 278 at 290, 292. See further Derham *Set-off* (2nd ed, 1996) para. 13.2.14 at 588.

<sup>191</sup> [8.11].

<sup>192</sup> *Young v Kitchen* (1878) 3 Ex D 127; *Mitchell v Purnell Motors Pty Ltd* [1961] NSWLR 165. See also *Hanak v Green* [1958] 2 QB 9 at 19 per Morris LJ.

<sup>193</sup> Oditah *Legal Aspects of Receivables Financing* (1991) para 8.3 at 236.

<sup>194</sup> Goode *Legal Problems of Credit and Security* (2<sup>nd</sup> ed, 1988) at 167.

procedural or substantive defence. It may be noted at this point that Professor Goode's conclusion is based on what he perceives the law in England to be, that is, abatement is a substantive defence, however, he does not agree with that position as the following discussion will show.

**[8.28.1]** Professor Goode has suggested that the common law doctrine of abatement was created to overcome some of the harsh results that followed from the now outdated presumption that contractual obligations were independent.<sup>195</sup> In particular, where the defendant's obligation to pay was independent of the plaintiff's performance obligation. He suggests that abatement was clearly not required where the plaintiff's obligation of performance was a condition precedent to the defendant's obligation to pay.

**[8.28.2]** Generally, abatement applies where a seller or service provider claims the contract price and the buyer cross-claims for damages for breach of contract where that breach diminishes the value of the goods or services, for example, by reason of a breach of an implied term as to the quality of the goods or services.<sup>196</sup> In such circumstances the buyer may deduct the amount of its cross-claim and set this up as a defence. The adoption of abatement did away with having to raise a breach of warranty by way of counterclaim, that is, a cause of action, and allowed the breach to be raised by way of defence.

**[8.28.3]** Nevertheless, there still remains a conflict as to whether or not abatement is a procedural or substantive defence. Professor Goode has suggested that an assignee takes subject to rights of abatement for the same reason that an assignee takes subject to rights of set-off, namely, that the assignee cannot stand in any better position than its assignor.

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<sup>195</sup> Abatement is expressly provided for in Anglo-Australian sale of goods legislation, see Sale of Goods Act 1954 (ACT) s56; Sale of Goods Act 1923 (NSW) s54; Sale of Goods Act 1972 (NT) s54; Sale of Goods Act 1896 (Qld) s54; Sale of Goods Act 1895 (SA) s52; Sale of Goods Act 1896 (Tas) s57; Goods Act 1958 (Vic) s59; Sale of Goods Act 1895 (WA) s52; Sale of Goods Act 1979 (UK) s53(1)(a). These provisions may in fact extend the common law doctrine of abatement, see Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 1.10 at 126.

<sup>196</sup> See *Mellowes Archital Ltd v Bell Products Ltd* (1997) 87 BLR 26. Query, however, whether the abatement provisions under sale of goods legislation have abrogated, to some extent, the need for a diminished value, see Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 1.10 at 126.

This he sees as simply an application of the *nemo dat* rule.<sup>197</sup> However, like his view of set-off, he prefers the view that abatement is merely procedural.<sup>198</sup> He suggests that this is not merely historically true, it forms the basis of the decision of Parke B in *Mondel v Steel*,<sup>199</sup> which is without doubt the most important decision on abatement. Goode, in pointing out that abatement was developed to avoid the necessity of bringing a cross claim,<sup>200</sup> makes the important point, viz:<sup>201</sup>

It is easy to see why abatement came to be seen by modern lawyers as a substantive defence, for at first sight it appears to have amounted to a plea that the plaintiff was not entitled to the full contract price since he had failed to give the performance which was a condition precedent to his right of recovery. But such an interpretation stands the rule in *Mondel v Steel* on its head. If the defendant can show that the plaintiff has not earned the contract sum because he has failed to perform a condition of his entitlement to payment, the plea of abatement is unnecessary; the defendant simply takes his stand on the terms of the contract. Moreover, he is entitled to do this no matter what kind of contract is involved. The reason why the doctrine of abatement came into being was precisely to deal with those cases involving the supply of goods or the provision of work and labour where the defendant was bound to pay the price because the plaintiff's counter-performance was not a condition of his right to be paid or alternatively was a condition which had been waived. This is expressly stated in the judgment of Parke B and in the case of contracts of sale is made manifest ... [under the sale of goods legislation], which applies where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of condition on the part of the seller as a breach of warranty, in which event the breach of warranty may be set up in diminution of the price. Now it is elementary law that on a breach of warranty, as opposed to a breach of condition, the innocent party remains bound to perform his part of the contract and is restricted to damages. The buyer is thus liable for the price but to avoid a cross action is permitted as a matter of procedure to set up the breach of warranty in diminution of the seller's claim.

In Australia, the High Court in *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd*,<sup>202</sup> also

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<sup>197</sup> Goode *Legal Problems of Credit and Security* (2<sup>nd</sup> ed, 1988) at 165-7.

<sup>198</sup> Goode *Legal Problems of Credit and Security* (2<sup>nd</sup> ed, 1988) at 149-151.

<sup>199</sup> (1841) 8 M & W 858, 151 ER 1288.

<sup>200</sup> *Mondel v Steel* (1841) 8 M & W 858 at 870, 151 ER 1288 at 1293 per Parke B. See also *Davis v Hedges* (1871) LR 6 QB 687 at 691 per Hannen J.

<sup>201</sup> Goode *Legal Problems of Credit and Security* (2<sup>nd</sup> ed, 1988) at 150-51.

<sup>202</sup> (1968) 121 CLR 584 at 593 per Barwick CJ and Menzies J, at 601, 602, 603 per Kitto J, at 619 per Windeyer J. See also *Cellulose Products Pty Ltd v Truda* (1970) 92 WN (NSW) 561 at 570 per Isaacs J (also holding that the right to abatement under the sale of goods legislation is

relying on *Mondel v Steel*, took the view that abatement is procedural. Kitto J, in particular, emphasised that abatement is dependent upon the buyer choosing to defend the action for the price by proving how much less the goods are worth by reason of the seller's breach.<sup>203</sup> The breach itself does not work the reduction and, therefore, it is a procedural concession. He noted that it would produce no reduction if the buyer chooses to pay the price and bring a separate action for damages to recover the full amount of his or her loss.<sup>204</sup> In addition, he stressed that the effect is not to reduce the price but to reduce the seller's ultimate verdict and only then is there a diminution of the price.<sup>205</sup>

**[8.28.4]** However, in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*,<sup>206</sup> Lord Diplock relied on *Mondel v Steel* to make the modern statement governing English law that abatement is substantive.<sup>207</sup> He thought this was the very point decided in *Mondel v Steel*.

**[8.28.5]** Despite the comments of Professor Goode, it is difficult to see how an assignee can be subject to a mere procedural defence on the basis of the *nemo dat* rule, as that rule is concerned with the transfer of title and a mere procedural defence does not impeach title. The extent of the substantive effect of a procedural defence is that the court hands down only one judgment whereas, in the case of a counterclaim it hands down two judgments and then sets them off. If abatement is truly procedural, and if an assignee is subject to all claims of abatement arising before or after notice of the assignment, then this would have to be explained by reference to the broader notions of

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personal and not assignable). Cf *Gough v Timbalok New Zealand Ltd* [1997] 1 NZLR 303 at 308 (referring to abatement as extinguishing a claim).

<sup>203</sup> (1968) 121 CLR 584 at 601.

<sup>204</sup> (1968) 121 CLR 584 at 602. See also *Davis v Hedges* (1871) LR 6 QB 687.

<sup>205</sup> Cf (1968) 121 CLR 584 at 616 per Windeyer J at 616 where he emphasises that the effect is to reduce the price. See also United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention) Article 50, which speaks of the ability of the buyer to reduce the price rather than setting up a 'breach of warranty in diminution or extinction of the price' as per domestic sale of goods legislation.

<sup>206</sup> [1974] AC 689.

<sup>207</sup> *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717. See also *Aectra Refining and Marketing Inc v Exmar NV* [1994] 1 WLR 1634 at 1649-1650 per Hoffmann LJ.

the subject to equities rule that focus on the relationship between the assignee and obligor and seek to prohibit unconscionable conduct. If this is the case then abatement would be the odd person out as all other claims to which the assignee is subject, whether arising before or after notice, are identified by the principle of transfer.

[8.28.6] Derham has suggested the following as the basis for any substantive view, viz:<sup>208</sup>

Presumably the basis of the substantive view is that the availability of the defence is determined as at the date of delivery of the goods or the completion of the work. The value of the goods delivered or the work performed as at that date is reduced because of the breach of contract, and the nature of the defence is such that the purchaser, if he so chooses, can defend himself in a subsequent action for the price by showing the true value of what in fact was received at that date.<sup>209</sup>

He goes on to note that the difficulty with this explanation is that it should continue to apply even if the damages claim ceases to exist as a result of the expiration of a limitation period, that is, where the expiration of the limitation period extinguishes the remedy and the right. Yet there is authority suggesting abatement here would not continue.<sup>210</sup> However, there is also authority for the view that if the limitation period merely prevented enforcement without extinguishing the right, then abatement is

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<sup>208</sup> Derham *Set-off* (2nd ed, 1996) para 1.10 at 127-28.

<sup>209</sup> However, it should be noted that the defence is not predicated on the basis that the defendant need only pay the true value. If it were there would be no hesitation in concluding that the effect is substantive - although, such a calculation would be at odds with the principles governing contract law damages. Rather, the price is reduced by the amount of damages suffered. In an action for breach of warranty, in the context of sale of goods, the buyer is entitled to recover the difference between the value which the goods would have had had the warranty been true, and their actual value, but this does not mean the buyer has to pay the true value of the goods. For example, if a buyer agrees to pay \$100 for goods which, if a warranty had been true, would have been worth \$120 and in fact the goods are worth \$100, then the buyer is entitled to refuse to pay any more than \$80, which is less than the true value of the goods.

<sup>210</sup> *Aries Tanker Corp v Total Transport Ltd* [1977] 1 WLR 185 at 188 per Lord Wilberforce. Cf *Sidney Raper Pty Ltd v Commonwealth Trading Bank of Australia* [1975] 2 NSWLR 227 at 238 per Moffitt P.

available.<sup>211</sup> This would make sense if the defence is substantive but not if it is procedural.<sup>212</sup>

However, it is suggested that the fact abatement is not possible where the limitation provision extinguishes the right and remedy does not necessarily mean it is not substantive. The defence requires the buyer to exercise its right to abate. If it fails to do so within time, it should lose that right if the limitation provision is to this effect. It is not an automatic defence. It should be noted that equitable set-off is a recognised substantive defence and it too would not survive a limitation provision that extinguished the right and remedy. It is because the diminution or extinction of the price is based on the buyer setting up a breach of contract, (that is a secondary *right* to damages) as a defence, that it must follow that, substantive or not, it would not survive a limitation provision that extinguished the right.

[8.28.7] It is difficult to come to any firm conclusion whether abatement is a procedural or substantive defence. There is perhaps little doubt that it certainly started off as a procedural defence. Nevertheless, the view that it originated to offset some of the harshness of the presumption of dependency is not entirely persuasive. The classic case of an independent obligation is an agreement to purchase goods and pay the price on a day certain irrespective of delivery. How could abatement ever help a buyer in that case? The buyer must pay even if the goods are not delivered. It would appear that the right to abate the price arose in cases where a purchaser had lost its right to reject the goods. And, it originated prior to the modern distinction between conditions and warranties. It allowed the breach of contract to be set up against the claim for the full price. It is these types of examples that are given by Parke B in *Mondel v Steel*<sup>213</sup> to explain the doctrine and these are not concerned with the dependency or independency of obligations.

The fact that historically the defence was procedural does not necessarily mean it should

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<sup>211</sup> *Henriksens Rederi A/S v THZ Rolimpex (The Brede)* [1974] 1 QB 233 at 248 per Lord Denning at 260 per Roskill LJ. See also *Atlantic Lines & Navigation Co Inc v The Ship 'Didymi' and Didymi Corp (The 'Didymi')* [1988] 1 Lloyd's Rep 97 at 102.

<sup>212</sup> See Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 1.10 at 128, see also para 1.7.4 at 64.

<sup>213</sup> (1841) 8 M & W 858 at 870-72, 151 ER 1288 at 1293.

stay procedural and Lord Diplock's statement in *Gilbert-Ash* can perhaps be taken as a statement of the modern rule. Moreover, today, equitable set-off would be available in most cases where abatement is available and perhaps there is therefore little reason to be too concerned at explaining abatement.<sup>214</sup> In addition, it would appear odd to have one of these defences procedural and the other substantive. Nevertheless, the case for it being a substantive defence would be stronger if its effect was that the defendant only had to pay the value of the plaintiff's performance. It is perhaps not possible to read too much into the words under sale of goods legislation which allow a breach of warranty to be set up in diminution or extinction of the price. On its face, this may be interpreted as being substantive in effect, however, it appears to be generally accepted that the sale of goods legislation in Anglo-Australian law merely followed the law as laid down in *Mondel v Steel*, which as already noted is open to either interpretation.<sup>215</sup> Moreover, if the legislator intended to change the defence from procedural to substantive, one would expect a reference to the 'obligation to pay the price' rather than 'the price'. In addition, as already noted, in *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd*, Kitto J, in adopting the procedural view, emphasised that abatement does not reduce the price but merely the seller's verdict and it is only in this sense that there is a diminution of the price.

Two further points may be noted. First, where an abatement is raised, the fact the outcome may not be known until a verdict is given is not at odds with it being substantive. The point is that the buyer can use the breach of warranty to resist the seller's claim for the full price (when it accrues) and will not be held to be in breach of contract for not paying if it is proven there was a breach of warranty.<sup>216</sup> This in fact evidences a substantive effect, whereas, if the buyer brings a separate action for breach of warranty, he or she remains liable for the price.<sup>217</sup> Second, the view expressed by Kitto J in *Healing* that abatement is not substantive as it requires an election and is not automatically executing, cannot be correct because if it were it would also apply to the

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<sup>214</sup> See *Sim v Rotherham Metropolitan Borough Council* [1986] 3 All ER 387 at 412, 413 per Scott LJ. See further Derham *Set-off* (2nd ed, 1996) para 1.10 at 129.

<sup>215</sup> See *Benjamin's Sale of Goods* (5<sup>th</sup> ed, 1997) para 17-047; Bridge *The Sale of Goods* (1997) at 591; Sutton *Sales and Consumer Law* (4<sup>th</sup> ed, 1995) para 22.25.

<sup>216</sup> See *Newman v Cook* [1963] VR 659.

<sup>217</sup> See *Newman v Cook* [1963] VR 659.

right to elect to terminate a contract for breach which clearly has a substantive effect on the obligation to perform.

In the result, it is suggested that today, abatement should be viewed as a substantive defence. If it is not, then claims for abatement arising after notice of the assignment should not be capable of being raised against the assignee.

[8.29] **Rectification.** It appears to be accepted that an equity to rectify a lease is an equity of a proprietary kind.<sup>218</sup> It may follow from this that an 'equity' to rectify a contract is, in any case, a sufficient defect in title to bind an assignee of contractual rights.

**(v) *The rights of the obligor: Unconscionable conduct and the obligor's defences against the assignor to which the assignee is subject***

[8.30] **Introduction.** This section is concerned with defences to which the assignee of a contractual right to performance will be subject only if arising prior to notice of the assignment.<sup>219</sup> A number of expressions have been formulated to describe the position that pertains prior to the obligor receiving notice of the assignment. It is said that 'an assignee takes subject to the state of account between the debtor and original creditor at the date when notice is received by him.'<sup>220</sup> While that expression on its face appears to capture payments being made to the assignor prior to notice, other expressions have focused on the idea that as against any claim made by the assignee, an obligor can rely on any defence that has accrued against the assignor by the time the obligor received

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<sup>218</sup> See *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1238 per Lord Upjohn; *Smith v Jones* [1954] 2 All ER 823.

<sup>219</sup> Where the assignment is of the fruits of the contract, clearly, the obligor can raise against the assignee any defence arising prior to that assignment taking effect.

<sup>220</sup> Marshall *The Assignment of Choses in Action* (1950) at 181. See *Mathews v Wallwyn* (1798) 4 Ves 118, 31 ER 62; *Norrish v Marshall* (1821) 5 Madd 475, 56 ER 977; *Dixon v Winch* [1900] 1 Ch 736 at 742 per Cozens-Hardy J; *Turner v Smith* [1901] 1 Ch 213 at 219 per Byrne J; *De Lisle v Union Bank of Scotland* [1914] 1 Ch 22; *Parker v Jackson* [1936] 2 All ER 281.



notice of the assignment. For example in *Roxburghe v Cox*,<sup>221</sup> James LJ said an assignee 'takes subject to all rights of set-off and other defences which were available against the assignor'.<sup>222</sup> In *Edward Nelson & Co Ltd v Faber & Co*,<sup>223</sup> Joyce J said that an assignee takes subject 'to all equities - in other words, whatever defence by way of set-off or otherwise the debtor would be entitled to set up against the assignor's claim up to the time of his receiving notice of the assignment'.<sup>224</sup>

These statements dictate that the type of defences that an obligor can raise against claims made by the assignee, are not limited by the principle of transfer if the defences arose prior to receiving notice of the assignment.

It is suggested that the legal position here can be explained by recognising that a legal relationship exists between an assignee and an obligor that is policed to prevent unconscionable conduct. The prevention of unconscionable conduct represents the guiding legal principle governing the operation of the 'subject to equities' rule prior to notice. The relationship arises simply by virtue of the efficacy of the assignment which entitles the assignee to the performance of the relevant contractual obligation. However, neither party can be guilty of unconscionable conduct prior to receiving notice of the assignment. As soon as the assignee is aware of the assignment, its conscience is bound. This, of course may be well before the obligor is given notice of the assignment. It also follows that the obligor's conscience is only bound upon it having notice of the assignment.<sup>225</sup> It is at this point that the obligor becomes limited by the principle of transfer in terms of what 'equities' it can raise against the assignee if they arise after notice. Prior to this point it would be unconscionable for the assignee to deny existing defences available against the assignor because that would be to exploit the obligor's vulnerability to assignment. It should be noted, that although 'notice' here will generally be when formal notice of the assignment is given and mere knowledge 'of the

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<sup>221</sup> (1881) 17 Ch D 520.

<sup>222</sup> (1881) 17 Ch D 520 at 526.

<sup>223</sup> [1903] 2 KB 367.

<sup>224</sup> [1903] 2 KB 367 at 375.

<sup>225</sup> The few authorities that suggest the relevant date is the date of the assignment rather than the date of notice must therefore be taken to be wrong, see *Dixon v Winch* [1900] 1 Ch 736 at 742 per Cozens-Hardy J; *Turner v Smith* [1901] 1 Ch 213 at 219 per Byrne J.

assignment is not sufficient, an obligor may be estopped from raising an equity if it knows one exists and has knowledge that the assignee is being deceived by the assignor and fails to speak up.<sup>226</sup>

**[8.31] Approach to section.** The approach to this section is to outline the main pre-notice 'defences' that may be raised to show how unconscionable conduct underpins this area. Prior to doing this, it should be noted that the primary concern are defences that arise after the assignment but prior to notice. Obviously this concerns equitable assignments rather than legal assignments as there is no legal assignment until notice is given to the obligor. Clearly, in the case of a debt, if, prior to the assignor entering into any assignment, the obligor pays off part of that debt, then the principle of transfer will dictate that the assignee will only obtain a right to the amount that remains unpaid. There is no need here for a special 'non-transfer' subject to equities rule. However, because an equitable assignment is operative prior to the obligor receiving notice, a special rule is required if the obligor is going to be able to raise against the assignee the fact that it has made a payment to the assignor after the assignment but prior to receiving notice of the assignment. The principle of transfer clearly cannot explain a result that makes the assignee subject to that payment unless one adopts the position that all such cases involve bona fide contract variations. However, the case law clearly has not taken that route.

**[8.32] Main categories of pre-notice equities: by way of defence.** In the context of the assignment of contractual rights, the main examples of 'equities' an assignee will be subject to if they arise prior to notice are:<sup>227</sup>

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<sup>226</sup> [8.26.4]. As regards mere knowledge of an assignment, as already noted, there are many assignments that take place in the market where the obligor/debtor may know of the assignment but it is accepted that the obligor/debtor will continue to perform to the assignor. For example, many people would know that their home loans with their bank have been securitised but continue to make payments to the bank and obtain a discharge.

<sup>227</sup> I do not discuss separately the rule in *Cherry v Boulton* (1839) 4 My & Cr 442, 41 ER 171, as it does not generally arise in the context of assignments of contractual rights. That rule requires a person to make any contribution they are required to make to a fund prior to being able to participate in that fund. The right to any benefit from the fund is treated as paid, pro tanto, out of the assets of the fund the legatee has in its pocket, see Meagher, Heydon and Leeming *Meagher Gummow and Lehane's Equity, Doctrines and Remedies* (4<sup>th</sup> ed, 2002) paras 37.125-37.190.

- (1) *Statutory set-off*.<sup>228</sup> Where they continue to apply,<sup>229</sup> a right of set-off under the statutes of set-off, although procedural, is a defence to a claim and therefore an assignee will take subject to such a defence where there exists mutual debts between the assignor and assignee at the time of notice.<sup>230</sup> It is sufficient if the

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Generally, the same principles apply, a debt due to the fund by the assignor which accrues prior to notice of the assignment being received by the fund administrator, may be 'set-off' against the assignor's share in the fund and the assignee takes subject to this. The assignee, however, does not take subject to a debt due after notice, see *Stephens v Venable (No 1)* (1862) 30 Beav 625, 54 ER 1032 and see *Derham Set-Off* (2<sup>nd</sup> ed, 1996) para 10.12.1.

<sup>228</sup> The concern here is not with the availability of statutory set-off in assignments by way of security. In particular, I am not concerned with the assignment that occurs upon the crystallisation of a floating charge. Moreover, I am not concerned with the particular issues that arise as regards the availability of statutory set-off when crystallisation occurs by virtue of the appointment of a receiver. Although the general principles discussed in this section continue to apply here, these circumstances do throw up their own unique problems which fall outside this dissertation and have, in any case, been well documented and critically analysed elsewhere, eg see *Derham Set-Off* (2<sup>nd</sup> ed, 1996) para 13.3. In addition, I do not deal here with the situation where an assignor is owed two debts by the one debtor and assigns one of those debts (or assigns both of them but to different assignees). In such cases, if the debtor has a right of set-off against the assignor, the question may arise whether the debtor must exercise the set-off against the assignor rather than the assignee and if both debts are assigned whether one assignee can claim contribution against the other. This issue falls outside the scope of this dissertation and is to be decided by reference to contribution, subrogation and perhaps marshalling and has been discussed at length by Derham, see Derham 'Set-Off Against and Assignee: The Relevance of Marshalling, Contribution and Subrogation' (1991) 107 *LQR* 126; *Derham Set-Off* (2<sup>nd</sup> ed, 1996) para 13.2.16.

<sup>229</sup> In New South Wales and Queensland the statutes of set-off have been repealed.

<sup>230</sup> Eg *Chick v Blackmore* (1854) 2 Sm & Giff 274, 65 ER 398; *Stephens v Venable (No 1)* (1862) 30 Beav 625, 54 ER 1032; *Roxburghe v Cox* (1881) 17 Ch D 520; *Biggertaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93; *Lawrence v Hayes* [1927] 2 KB 111; *Banco Central SA and Trevelan Navigation Inc v Lingoss & Falce Ltd and BFI Line Ltd (The Raven)* [1980] 2 Lloyd's Rep 266 at 271 per Parker J. See further *Derham Set-Off* 2<sup>nd</sup> ed (1996) at para 13.2.4. It has been suggested that the reason why such a set-off cannot be raised after notice is because there is a lack of mutuality. If that is correct then a cross-debt arising after assignment but before notice could not be raised as a set-off because an equitable assignment is operative prior to notice and mutuality would be lost at that point. The better view is that mutuality is determined by the legal title to the cross-debt, see *Derham Set-Off* (2<sup>nd</sup> ed, 1996) paras 13.2.1, 13.3.1 esp at 568 and 609-612. Therefore, the ability to raise the set-off is better explained by reference to unconscionable

debt owed by the assignor has accrued by the time of notice.<sup>231</sup> That is, it is sufficient if the debt exists prior to notice and a debt will exist when an obligation to pay exists.<sup>232</sup> It follows that the debt need not be payable prior to notice,<sup>233</sup> although it would need to be payable (on one view) at the commencement of the action or (perhaps the better view) by the time the defence is filed.<sup>234</sup> There is some authority suggesting that if the debt owed by the assignor is not payable by the time of notice, then it is necessary that it be payable before the assigned debt becomes payable.<sup>235</sup> There appears to be no doctrinal or policy reasons why that should be so and (adopting the better view) it should be sufficient if the debt is payable at the time the defence is filed.<sup>236</sup> Moreover, prior to notice, it is possible for the debtor to have a cross-debt owed

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conduct. In addition the assignee cannot in good conscience attempt to circumvent such set-offs by seeking to only enforce its equitable right rather than joining the assignor to enforce the legal right.

<sup>231</sup> *Christie v Taunton, Delmard, Lane & Co* [1893] 2 Ch 175 at 181-82. See also *Wilson v Gabriel* (1863) 4 B & S 243, 122 ER 450; *Watson v Mid-Wales Railway Co* (1867) LR 2 CP 593; *Downes v Bank of New Zealand* (1895) 13 NZLR 723 at 733; *Re Pinto Leite and Nephews* [1929] 1 Ch 221 at 233; *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 1 WLR 578 at 585.

<sup>232</sup> [7.6.6].

<sup>233</sup> *Christie v Taunton, Delmard, Lane & Co* [1893] 2 Ch 175 (prior to notice of the assignment the debtor made a call on shares held by the assignor which brought a debt into existence but was not payable until after notice; in the circumstances of the case, the assigned debt became payable prior to the cross-debt, however, the debtor was still allowed to raise the cross-debt against the assignee; although, the debtor was not allowed to set-off calls made after notice of the assignment). See also *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at 21-22 per Mason J. Cf *Jeffreys v Agra & Masterman's Bank* (1866) LR 2 Eq 674 at 681 (here it was suggested that the transaction from which the set-off arises must exist prior to the receipt of notice and the set-off will be available if the amount claimed as a set-off is due and payable at the time the assigned debt is due and payable). In *Re Pinto Leite and Nephews* [1929] 1 Ch 221, the decision in *Jeffreys* was interpreted as requiring an obligation to pay to exist prior to notice (and for the cross-debt to be payable at the time the assigned debt is payable) rather than merely requiring the contract from which the cross-debt arises to be existing prior to notice.

<sup>234</sup> See *Derham Set off* (2nd ed, 1996) para 13.2.4, 1.2.2.

<sup>235</sup> *Jeffreys v Agra & Masterman's Bank* (1866) LR 2 Eq 674; *Re Pinto Leite and Nephews* [1929] 1 Ch 221.

<sup>236</sup> See further *Derham Set off* (2nd ed, 1996) para 13.2.4 at 571.

by the assignor to a third party assigned by that third party to the debtor and for this debt to be used by way of set-off.<sup>237</sup>

An issue, however, arises as to conditional or contingent obligations to pay. That is, where at the time of notice there is a transaction in place between the assignor and obligor under which the assignor may or will be required to pay the obligor but where that obligation to pay is at the time of notice of the assignment conditional or contingent upon the occurrence of some event. Can the obligor raise such liabilities against the assignee if it turns out that the obligation to pay accrues and becomes payable by the assignor by the time the obligor is required to file its defence?

There is authority for the view that it is not sufficient simply for there to be in existence (prior to notice) a contract between the assignor and debtor that may give rise to a debt owing by the assignor to the debtor.<sup>238</sup> This on its face may be innocent enough because it could still be said that this allows for a set-off to be raised if the debt becomes payable prior to the time a defence has to be filed. The only limit it places is that the transaction from which the set-off arises must exist and be vested in the obligor prior to notice. This latter requirement is readily accepted. However, this initial statement can also be construed as suggesting that it is not merely *sufficient* for the debt to accrue prior to notice but that it *must* accrue prior to notice, that is, it requires there to be an accrued obligation to pay even though it does not go so far as to require the debt to be payable at the time of notice.<sup>239</sup> This interpretation carries the weight of

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<sup>237</sup> *Bennett v White* [1910] 2 KB 643; *Tony Lee Motors Ltd v M S MacDonald & Son (1974) Ltd* [1981] 2 NZLR 281. Cf *NW Robbie & Co Ltd v Witney Warehouse Co Ltd* [1963] 1 WLR 1324 at 1339 per Russell LJ (here it was held that after notice of the assignment, a debtor cannot seek to improve its position by taking an assignment of debts incurred by the assignor to a third party).

<sup>238</sup> *Jeffryes v Agra* (1866) LR 2 Eq 674 at 680 and cf at 681. See also the interpretation of this case in *Re Pinto Leite and Nephews* [1929] 1 Ch 221.

<sup>239</sup> Cf *Holt v Telford* [1987] 6 WWR 385 (here the parties (A & B) entered into loan transactions by which at the time set for repayment A would repay B only the amount by which its loan from B exceeded its loan to B. A assigned its rights to C. As regards C's request for payment from B, the Supreme Court of Canada held that although B had a right to equitable set-off, it had no right

authority,<sup>240</sup> and would not allow for the obligor to have recourse to what at the time of notice constituted an existing conditional or contingent contractual obligation to perform which had become an unconditional obligation to pay by the time a defence must be filed.<sup>241</sup> In short, it is not sufficient for there to be in place, at the time of notice, a contract from which a debt payable by the assignor to the obligor may accrue.<sup>242</sup> For example, in *Watson v Mid Wales Railway Co*,<sup>243</sup> the assignor assigned a debt to the assignee, however, the assignor was also the tenant of the obligor and this lease was entered into before notice of the assignment was received but after the creation of the debt. It was held that the

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to statutory set-off because at that time A's loan from B was not repayable; however if the loan was taken out by this time an obligation to pay must have existed at the time of notice; moreover, the matter could have been dealt with simply by holding that by virtue of the principle of transfer the assignee took subject to what was in fact an express right of set-off).

<sup>240</sup> *Stephens v Venables (No 1)* (1862) 30 Beav 625, 54 ER 1032; *Watson v Mid Wales Railway Co* (1867) LR 2 CP 593; *Re China Steamship Co* (1869) LR 7 Eq 240 at 243; *Re Pinto Leite and Nephews* [1929] 1 Ch 221; *Christie v Taunton, Delmard, Lane & Co* [1893] 2 Ch 175 at 181, 185; *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 1 WLR 578 at 585.

<sup>241</sup> Moreover, there is authority for the view that in addition to the necessity of there being an accrued obligation to pay at the time of notice, the cross-debt must be payable by the time the assigned debt is payable, see *Jeffryes v Agra* (1866) LR 2 Eq 674. See also the interpretation of this case given in *Re Pinto Leite and Nephews* [1929] 1 Ch 221.

<sup>242</sup> The same position applies in the case of an assignee taking subject to the rule in *Cherry v Boulton*, see *Stephens v Venables (No 1)* (1862) 30 Beav 625, 54 ER 1032. See generally Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 10.12.3 at 468-71.

<sup>243</sup> (1867) LR 2 CP 593. See also *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 1 WLR 578 (here a charge crystallised upon the appointment of a receiver; at the time of notice of the assignment (to debenture holders) that occurred by virtue of this crystallisation the debtor was owed a sum by the assignor which was payable and this could be set-off against the claim of the assignee; in addition, at the time of notice the assignor was in breach of contract in failing to make a payment under a lease to the debtor; however, the debtor did not exercise an express right to terminate the contract for this breach and perhaps could be said to have elected to affirm the contract despite that breach (cf at 582-83 per Templeman J); later after notice, the receiver repudiated the lease and the debtor then terminated the lease; this brought into operation a liquidated damages provision which the debtor then sought to set-off against claims by the assignee; this set-off was refused; the unconditional right to the liquidated sum arising from the election to terminate accrued after notice but from a contract entered into prior to notice and from which it could only be said that a right to such a sum at the time of notice was merely contingent).

obligor could not set-off against the assignee rent that accrued after notice of the assignment.<sup>244</sup>

Derham questions this authority and suggests that a 'set-off should be allowed where there is a possibility of a perception of a form of security in the existence of cross-demands' and that 'this should be ascertained by reference to the state of affairs existing when a binding contractual relationship was entered into, as opposed to when a debt arose as a result of that contract.'<sup>245</sup> On his view it should be sufficient that there are presently payable cross-debts (arising from contracts entered into prior to notice) at the date of the assignee's action.<sup>246</sup> That is, it is not necessary that the debt exist prior to notice.

It certainly appears as if the line drawn in these cases is somewhat arbitrary. It is suggested that there should be only two requirements that need be satisfied, first, the transaction from which the set-off arises must exist and be vested in the obligor prior to notice and second the cross-debt must be payable prior to the

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<sup>244</sup> Marshall has made the point that rent under the lease should have been constantly accruing even though not payable until a fixed time and therefore some partial set-off should have been allowed, see Marshall *The Assignment of Choses in Action* (1950) at 191.

<sup>245</sup> Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 13.2.4 at 572.

<sup>246</sup> He cites *Handley Page Ltd v Commissioners of Customs and Excise and Rockwell Machine Tool Co Ltd* [1970] 2 Lloyd's Rep 459 at 464-5 (in this case A agreed to purchase goods from B; Customs required import deposits to be charged on imported goods; it was agreed that A should accept bills of exchange drawn by B and then B would pay the deposit and A would receive repayments; B then discounted the bills and paid the deposit; later a receiver was appointed to A and the bills were dishonoured; B discharged its liability under the bills and sort repayment of the deposit from Customs; A argued that B was in breach of contract in trying to obtain the deposit from customs and that B could not set-off A's liability for the face value of the bills as it had only obtained those bills after notice of the assignment which occurred upon the appointment of the receiver; it was held that B could assert the set-off on the basis that, when the bill came back to B (after B discharged its liability under the bill), the legal position was that B was considered to have never departed with it; it would therefore appear that the case turned on a particular aspect of bills of exchange and is in any case perhaps not strong authority as regards the conditional or contingent obligations point here being discussed because, when a bill of exchange is accepted, although it is not immediately payable, it still encapsulates an unconditional obligation to pay and therefore a debt, it is just that credit is given and so actual payment is deferred).

time the obligor must file its defence. This does not go much further than Derham's suggestion but I am not clear as to what he envisages by introducing the requirement of 'a possibility of a perception of a form of security in the existence of cross-demands'. It is quite clearly the case that an assignee may be bound by such a set-off even though they had no idea at all that an accrued debt against the assignor existed at the time of notice. As has already been noted, the debtor can set-off a claim it obtained by way of assignment from a third party. There appears to be no added reprieve from surprise for the assignee by drawing a line that says an assignee may be subject to a set-off for a debt that accrued before notice (and is payable prior to the time a defence has to be filed) but an assignee is not subject to a debt that becomes payable before a defence has to be filed but which did not accrue prior to notice even though it arose from a contract entered into prior to notice. It is difficult to see why a failure to recognise the first of these cross-demands would amount to unconscionable conduct by the assignee but a failure to recognise the latter would not. It clearly cannot be said that it would be unconscionable for the debtor to try to exert the latter. The debtor has no control over whether or not the other party to the contract will assign its rights under the contract and, if such an assignment occurs, it is then totally out of the debtor's control as to whether he or she will have an accrued debt against the assignor prior to or after notice or whether he or she will merely have a contract with the assignor from which such a debt may arise. The subject to equities rule must be applied by reference to principle not luck.

Ultimately, however, the 'subject to equities' rule here is attempting to give effect to the notion that the obligor is to be no worse off by virtue of the assignment. When not governed by a strict rule such and the principle of transfer, this is a notion upon which views may differ as regards results. However, the important point for this dissertation is that the guiding legal principle which gives effect to this notion is that of the prevention of unconscionable conduct.<sup>247</sup>

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The idea that unconscionable conduct governs the application of this type of set-off here is also adopted by Derham, see Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 13.2.1 at 568.



Finally, something needs to be said about assignments of future property. The question that arises is whether a debtor can raise as a set-off, a cross-debt that arose from a transaction entered into after notice of the assignment but before the subject matter of the assignment actually came into existence. In such a case, there is in fact no assignment at the time of notice even though the assignee's interest prior to the property coming into existence is said to be more than merely contractual.<sup>248</sup> The current weight of authority suggests that so far as formalities are concerned, a notice given prior to the subject property coming into existence, or a notice given while there only exist an agreement to assign, is not good notice.<sup>249</sup> If that is right, then, the obligor can continue to have resort to such set-offs arising after the property comes into existence until the time a proper notice is provided.

However, it may be questioned whether, for the purposes of the subject to equities rule, the conscience of the obligor should be bound by such a notice even if, for other purposes, the view is taken that such a notice is not sufficient. Again, ultimately this is an issue upon which views may differ because the result is based on what one considers unconscionable. The subject to equities rule can appear harsh as it draws a line as regards the defences that may be raised against the assignee even though, because of the contract or relationship existing between the assignor and obligor, the obligor is bound to continue dealing with the assignor which brings the risk of equities being created that the obligor cannot raise against the assignee. Therefore, where the assignor and debtor enter into a contract and then later the assignor agrees to assign an unconditional right to payment under the contract prior to that right unconditionally accruing, that is,

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<sup>248</sup> [4.16].

<sup>249</sup> See *Roxburghe v Cox* (1881) 17 Ch D 520 at 527 Baggally LJ; *Shaw v Foster* (1872) LR 5 E Ir App 321; *Canadian Admiral Corp Ltd v LF Dommerich & Co Inc* (1964) 43 DLR (2d) 1. Compare the views of Wood *English and International Set-Off* (1989) para 16-117 with Odith *Legal Aspects of Receivables Financing* (1991) para 8.3 at 240. Clearly it is not good notice for the purpose of preserving priority, see *Somerset v Cox* (1865) 33 Beav 634, 55 ER 514. See also *Re Dallas* [1904] 2 Ch 385. There may be an argument for accepting such notice, see [7.6.5]. See further [8.6].

an assignment of future property, then the debtor, arguably, should be able to ignore any notice which is received prior to that debt unconditionally accruing. However, where there is an assignment of a right under a contract not yet entered into, then, if the obligor is given advance notice of that assignment, prior to entry into the contract, then he or she may be in a better position to control future equities than in the former case as there may still be the opportunity of not going on with the contract thus defeating the assignment.<sup>250</sup>

- (2) Where after assignment, but prior to notice, the debtor pays the assignor, this discharges the debtor from all or part of the debt, as the case may be, and the assignee takes subject to this.<sup>251</sup> This is an issue that is only relevant to equitable assignments of legal rights because in the case of a legal assignment there is no assignment until notice and, in that case, the assignee takes subject to a payment made to the assignor prior to notice by reference to the principle of transfer. However, the principle of transfer does not explain this result where the assignment is effectual prior to notice and where a payment is made to the assignor. The notion that the assignee takes subject to the 'state of account'<sup>252</sup> between the assignor and obligor prior to notice best encapsulates the operation of the subject to equities rule here. Moreover, it is suggested that the reason why the assignee must take subject to this payment, despite being the beneficial owner of the legal right at the time the payment is made, is because it would be unconscionable to do otherwise. It is within the assignee's power to give notice,<sup>253</sup> and until it does so the assignor would still appear to the obligor to be the person entitled to payment. To assert otherwise would be to exploit the obligor's vulnerability to assignment.

<sup>250</sup> See further Derham *Set-Off* (2<sup>nd</sup> ed, 1996) para 13.2.7 at 575-577.

<sup>251</sup> *Williams v Sorrell* (1799) 4 Ves Jun 389, 31 ER 198; *Re Lord Southhampton's Estate* (1880) 16 Ch D 178. See also *Dixon v Winch* [1900] 1 Ch 736 (here the obligor effectively made the assignor his agent and since the assignor had notice of the assignment, that notice was imputed to the obligor who then could not take advantage of the rule that the assignee takes subject to payments made to the assignor before notice). See further *Stocks v Dobson* (1853) 4 De GM & G 11, 43 ER 411.

<sup>252</sup> [8.30].

<sup>253</sup> Cf [4.9.2].

- (3) Similarly, and for the same reasons, if after the assignment, but before notice is received, the assignor releases the debtor from the debt then the assignee takes subject to that release.<sup>254</sup>

### **(vi) The debate over counterclaims**

**[8.33] Introduction.** So far the discussion has focused on defences available to the obligor. It is still necessary to consider the position as regards cross-demands that can be heard in the same proceedings as the assignee's claim, that is counterclaims. In such actions, if both the plaintiff and defendant are successful, the court will issue two judgments and then set-off the sums owed under each judgment so that only the balance is payable.<sup>255</sup> Thus, the device of a counterclaim is purely procedural and is unlike procedural defences which, although procedural, are substantive in effect as only one judgment issues.

**[8.33.1]** It was noted above,<sup>256</sup> that in *Bank of Boston Connecticut v European Grain and Shipping Ltd*,<sup>257</sup> Lord Brandon,<sup>258</sup> approved a test for set-off that was earlier formulated by the Privy Council in *Government of Newfoundland v Newfoundland Railway Co*,<sup>259</sup> to the effect that the defendant's cross-claim must flow out of and be inseparably connected with the dealings and transactions which also give rise to the claim. Judges and commentators<sup>260</sup> who have doubts over whether this formulation merely updated the language of the impeachment test have noted that the *Newfoundland*

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<sup>254</sup> *Stocks v Dobson* (1853) 4 De GM & G 11, 43 ER 411. Cf the position after notice *De Pothonier v De Mattos* (1858) 27 LJ QB 260.

<sup>255</sup> *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50 at 62 per Dixon J. In Victoria there is continuing debate as to whether legislation has done away with the distinction between set-off and counterclaim, see Derham 'Recent Issues in Relation to Set-Off' (1994) 68 *ALJ* 331 at 340-344; Derham 'Set-Off in Victoria' (1999) 73 *ALJ* 754.

<sup>256</sup> [8.24].

<sup>257</sup> [1989] 1 AC 1056.

<sup>258</sup> With whom Lords Keith, Oliver, Goff and Jauncey agreed.

<sup>259</sup> (1888) 13 App Cas 199.

<sup>260</sup> In practice it is difficult to see how it could be argued that this formulation is not broader than the impeachment test, see further Derham 'Recent Issues in Relation to Set-Off' (1994) 68 *ALJ* 331 at 333.

case was in fact a case dealing with the position between an assignee and obligor, that is, it was an assignment case and not a straight forward set-off case.<sup>261</sup> The suggestion then runs that the rule that an assignee takes subject to the equities is broader in scope than equitable set-off and the *Newfoundland* decision should not be seen as a case of equitable set-off, or as a case formulating a statement of when an equitable set-off arises, but rather, as a case formulating a statement of the subject to equities rule as it applies to cross-demands. Thus, in cases where there needs to be a determination as to the availability of a true equitable set-off, a court may come to an incorrect conclusion if it relies on a 'set-off' formulation from a case which was in fact concerned with the subject to equities rule as it is broader than the impeachment test which governs true equitable set-off.<sup>262</sup>

[8.33.2] However, to maintain this distinction between equitable set-off and the 'subject to equities' rule it is necessary to accept that the *Newfoundland* test is wide enough to include counterclaims as well as equitable set-offs so that an assignee must take subject to mere counterclaims arising before or after notice of the assignment if they satisfy the 'inseparably connected' test.<sup>263</sup> That this is so follows from the argument that if the

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<sup>261</sup> *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50 at 60 per Dixon J; *James v Commonwealth Bank of Australia* (1992) 37 FCR 445 at 461-2 per Gummow J; *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 1 WLR 578 at 585-86; *Roadshow Entertainment Pty Ltd v ACN 053 006 269 Pty Ltd* (1997) 42 NSWLR 462 at 482. See also Spry 'Equitable Set-offs' (1969) 43 ALJ 265 at 269; Derham 'Recent Issues in Relation to Set-Off' (1994) 68 ALJ 331 at 334-337. See further *Sun Candies Pty Ltd v Polites* [1939] VLR 132 at 135; *Re KL Tractors Ltd* [1954] VLR 505 at 508; *Bayview Quarries Pty Ltd v Castley Development Pty Ltd* [1963] VR 445 at 449; *Edward Ward & Co v McDougall* [1972] VR 433 at 438; *Provident Finance Corp Pty Ltd v Hammond* [1978] VR 312 at 319-20.

<sup>262</sup> Perhaps the most well known of such cases is *Hanak v Green* [1958] 2 QB 9, where it was held that a defendant was entitled to set-off against the plaintiff's claim for breach of contract for failure to properly carry out certain building work, cross-claims for additional work done on the basis of quantum meruit, damages for trespass to tools and damages for preventing the defendant's workmen completing the work. It has been suggested that only the third ground would appear to give rise to a set-off on the impeachment test, see Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (4<sup>th</sup> ed, 2002) para 37.050.

<sup>263</sup> It does not appear that this debate is necessarily limited to counterclaims arising before notice. That this would appear to be the case follows from the fact that equitable set-offs are relevant

*Newfoundland* formulation was not intended as stating a test for when a set-off is available and if the formulation there is wider than that governing set-off then it can only be that it also intended to capture some if not all counterclaims. That is, there is nothing in between set-off and counterclaim for it to be referring to. There is authority and academic opinion that this should be the case and is the case.<sup>264</sup> There is also authority and academic opinion that this is not the case and should not be the case.<sup>265</sup>

**[8.34] Analysis.** It is true that the Privy Council in *Newfoundland* did state that they were considering the question of a counterclaim.<sup>266</sup> In that case, the assignor had agreed to build a railway line in 5 years. Upon the construction and continuous operation of the line, the assignor was to be paid an annual subsidy for 35 years. This subsidy was 'to attach in proportionate parts and form part of the assets of the [assignor] as and when each five mile section [was] completed and operated.'<sup>267</sup> The assignor was also to be granted a fee simple of 5000 acres of land for each one mile of railway completed on the completion of each section of five miles. The assignor breached the contract but only after it had completed a portion of the line and received the proportionate grant of land together with the subsidy. The assignment took place a number of years prior to the breach of contract and it was assumed the Government/obligor had notice of the assignment.<sup>268</sup> The plaintiff assignees sued the government for unpaid subsidies. It was

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equities whether arising before or after notice and if the inseparable connection test is at least close to the test for equitable set-off, it too cannot be limited to the position prior to notice.

<sup>264</sup> See *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50 at 60 per Dixon J; *Provident Finance Corp Pty Ltd v Hammond* [1978] VR 312 at 319-20 per Lush J; *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at 20 per Mason J; *James v Commonwealth Bank of Australia* (1992) 37 FCR 445 at 461 per Gummow J; *Re Partnership Pacific Securities Ltd* [1994] 1 Qd R 410 at 423-4 per Williams J. See also *Walker v Department of Social Security* (1995) 129 ALR 198 at 210 per Drummond J. See further Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (4<sup>th</sup> ed, 2002) para 37.050; Spry 'Equitable Set-offs' (1969) 43 ALJ 265 at 269-70 and see Oditah *Legal Aspects of Receivables Financing* (1991) para 8.2 at 230-32.

<sup>265</sup> See *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10 at 26 per Woodward J; *Colonial Bank v European Grain & Shipping Ltd (The Dominique)* [1987] 1 Lloyd's Rep 239. See also Derham 'Recent Issues in Relation to Set-Off' (1994) 68 ALJ 331 at 334-37.

<sup>266</sup> (1888) 13 App Cas 199 at 209.

<sup>267</sup> (1888) 13 App Cas 199 at 204.

<sup>268</sup> (1888) 13 App Cas 199 at 210.

held that the assignee took subject to a claim for damages against the assignor for not completing the line.<sup>269</sup> The Privy Council here reached its decision without hesitation suggesting there was no need to cite authorities 'for a conclusion resting on such well-known principles'.<sup>270</sup> Nevertheless, two authorities were referred to, *Smith v Parkes*<sup>271</sup> and *Young v Kitchen*.<sup>272</sup>

[8.34.1] It is in *Smith v Parkes* that the inseparable connection test is in fact first formulated.<sup>273</sup> However, whatever one thinks of this formulation, it is quite clear that Sir John Romily MR concluded that the obligor had a right of equitable set-off. His judgment is not premised on the basis that he thought he had to decide whether an assignee takes subject to counterclaims.<sup>274</sup>

In *Young v Kitchen*, the assignee sued for a debt due under a building contract. The obligor sought to set-off a claim for damages resulting from the failure of the assignor to complete the work on time. The judgment, short though it is (less than one page) is not an easy one and in fact it has probably received far more attention than it deserves. Cleasby B held that the principal question was disposed of 'by holding that the defendant was entitled, by way of set-off or deduction from the plaintiff's claim, to the damages which he has sustained by the non-performance of the contract on the part of the plaintiff's assignor'.<sup>275</sup> This on its own is perhaps equivocal because it is not clear what he meant by a 'deduction from the plaintiff's claim'.<sup>276</sup> If he had referred to a

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<sup>269</sup> This case in fact concerned an instalment contract and the breach related to performance obligations which accrued after the performance by the obligor which earned it the unpaid subsidies.

<sup>270</sup> (1888) 13 App Cas 199 at 213.

<sup>271</sup> (1852) 16 Beav 115, 51 ER 720.

<sup>272</sup> (1878) 3 Ex D 127.

<sup>273</sup> (1852) 16 Beav 115 at 119, 51 ER 720 at 722 per Lord Romily. See further *Baker v Adam* [1908-10] All ER 632 at 637 per Hamilton J, (1910) 15 Com Cas 227 at 235; *Watson v Mid Wales Railway Co* (1867) 2 CP 593 at 598 per Bovill CJ.

<sup>274</sup> (1852) 16 Beav 115 at 119-20, 51 ER 720 at 722 per Lord Romily.

<sup>275</sup> (1878) 3 Ex D 127 at 130-31.

<sup>276</sup> It has been suggested that this case has been misunderstood and is no more than an example of abatement, see Van Der Watt 'The Clarification of Equitable Set-Off' (1998) 72 *ALJ* 516 at 521. The reference to 'deduction' could evidence this. However, it is difficult to see how a failure to

deduction from the plaintiff's judgment then clearly this expression would have been a reference to a counterclaim. The fact he did not say this, however, does not on its own clearly show that his decision is solely based on set-off. The rest of the judgment concerned the form of the 'defence and counterclaim' that was filed and the word 'counterclaim' is constantly used in it. The 'counterclaim' was in the form of a suit against the assignee and this clearly could not be correct as the assignee cannot be liable for a breach of contract by the assignor but may take subject to such a claim. This may in fact be a telling point, a counterclaim is not a defence and the subject to equities rule is generally formulated in terms of taking subject to defences and defects in title. It appears odd to suggest that an assignee may take subject to a counterclaim which is merely a procedure to allow an action by way of cross-demand to be brought in the same proceedings and which is offensive in nature and which will result in a judgment against the assignor. Clearly, the assignee can never be liable in respect of the counterclaim. In the case of a set-off, although the assignee is not liable for any claim the obligor has against the assignor, at least the set-off acts as a true defence to the assignee's claim. Moreover, in assessing this case, it is important, as Derham has pointed out, to look carefully at the submission put by counsel and which was upheld by the court. Counsel for the defendant submitted that, 'Whatever defence might be set up against the assignor may be set up against his assignee, for the assignee cannot be in a better position than his assignor.'<sup>277</sup> Given that a counterclaim is not a defence, and given that this was the successful submission, this would suggest the better interpretation of the case is that Cleasby B was of the view that a true set-off arose on the facts. That is, when the reference to 'set-off or deduction' is put in context it would appear that it was solely a finding as to the availability of a set-off.<sup>278</sup> Therefore, although some may think that he came to the wrong decision and that the test for a true set-off was not satisfied, this of itself provides no reason for viewing the judgment as authority for an expansive 'subject to equities' rule which encompasses counterclaims.<sup>279</sup>

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complete the work on time would diminish the value of the work in the sense required for abatement.

<sup>277</sup> (1878) 3 Ex D 127 at 129. Derham 'Recent Issues in Relation to Set-Off' (1994) 68 *ALJ* 331 at 336.

<sup>278</sup> See further *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 *ACTR* 10 at 22; *Colonial Bank v European Grain & Shipping Ltd (The Dominique)* [1987] 1 *Lloyd's Rep* 239 at 253.

<sup>279</sup> Cf Meagher, Heydon and Leeming *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (4<sup>th</sup> ed, 2002) para 37.050 and see *Re KL Tractors Ltd* [1954] *VLR* 505 at 508 per

[8.34.2] It is therefore suggested that the results in *Smith v Parkes* and *Young v Kitchen* appear to be that these were cases decided on the basis that there was available an equitable set-off. It is a separate issue as to whether or not one agrees with these Courts' formulation or the application of the rule governing the availability of equitable set-off.

[8.34.3] Moreover, whatever one may think of the decision in *Newfoundland*,<sup>280</sup> as already noted, the House of Lords in *Bank of Boston Connecticut v European Grain and Shipping Ltd*,<sup>281</sup> interpreted the case as one of set-off, approved the 'inseparable connection' test as a test for set-off and, arguably, rejected the view that the obligor may raise against an assignee a claim it has against the assignor even though there is no right of set-off in respect of that claim. In that case an assignee of freight earnings brought an action to recover freight and the charterer sought to set-off a claim it had against the owners for damages caused by their repudiation of the contract. The claim for set-off was denied, the Court upholding a long established rule which prevents cargo owner's setting up such defences and requires them to bring a counterclaim. Lord Brandon made

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O'Bryan J. Cf *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10 at 22 per Woodward J. See further Spry who after referring to the procedural rules of court which provide that a defendant might 'set-off or set up by way of counter-claim against the claims of the plaintiff any right or claim, whether such set-off or counterclaim sound in damages or not', writes, 'In these circumstances the judgment of Cleasby B in *Young v Kitchen* in 1878 must be read with great care. What was at issue there was not whether an equitable set-off should be allowed between the original parties to the transactions in question, but rather whether an assignee of a debt or chose in action took it subject to a claim or right which existed against the assignor. The question was accordingly not simply as to the procedure by which the defendant might establish his rights against the plaintiff, but as to the very existence of rights against a plaintiff assignee. In such circumstances equitable considerations might well require protection of the debtor by the issue of an injunction although before the assignment there was no right to an equitable set-off', Spry 'Equitable Set-offs' (1969) 43 ALJ 265 at 269.

<sup>280</sup> See *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50 at 60 per Dixon J (who clearly sees the case as one of counterclaim and not set-off). Cf *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10 at 18 where Woodward J notes that Dixon J appears to have misquoted the passage from *Newfoundland* which he relied upon as showing that the Court was there dealing with a counterclaim and in fact the passage was contrasting legal and equitable set-off. See further Granat 'The Doctrine of Equitable Set-Off' (1965) 5 *Melb L Rev* 76 at 78.

<sup>281</sup> [1989] AC 1056 at 1103. See also *Colonial Bank v European Grain & Shipping Ltd (The Dominique)* [1987] 1 Lloyd's Rep 239 at 255.



a number of important points throughout his speech that should be noted. First, he described the *Newfoundland* formulation as simply a different version<sup>282</sup> of the impeachment test and went on to apply both in his speech.<sup>283</sup>

Second, he referred to a statement made by Lord Simon in *Aries Tanker Corp v Total Transport Ltd (The Aries)*,<sup>284</sup> to the effect that the cases on assignment (in particular the *Newfoundland* case) can be distinguished from other cases of set-off because they are based on a broader principle that an assignee cannot take the benefit of an assignment without assuming the burden because both flow out of and are inseparably connected, and suggested that Lord Simon was in error in this regard.<sup>285</sup>

Third, he clearly held that the decision in *Newfoundland* was based on there being an equitable set-off available.<sup>286</sup>

Fourth, he rejected the argument that even though the charterers could not raise a set-off against the owners they should be able to raise the counterclaim against the assignees on the basis of the subject to equities rule. This argument was based on the *Newfoundland* decision and, in answering it, Lord Brandon re-emphasised that that was a case of equitable set-off. However, his speech is not an unequivocal rejection of the notion that an assignee takes subject to counterclaims because he added that no distinction can be drawn between the rights the obligor has against the assignor and the rights the obligor has against the assignee and here the obligor had no right to counterclaim against the assignor in any case.<sup>287</sup> Thus earlier, in a section of his speech which dealt with the position that would have applied if the action was between the charterers and the owners, Lord Brandon rejected the argument that the charterers could obtain a procedural set-off by bringing a counterclaim in the same proceedings and obtaining judgment and having that set-off against the judgment of the owners. He thought this

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<sup>282</sup> [1989] AC 1056 at 1102.

<sup>283</sup> [1989] AC 1056 at 1106.

<sup>284</sup> [1977] 1 WLR 185 at 193.

<sup>285</sup> [1989] AC 1056 at 1105-6. See also *Colonial Bank v European Grain & Shipping Ltd (The Dominique)* [1987] 1 Lloyd's Rep 239 at 257.

<sup>286</sup> [1989] AC 1056 at 1106.

<sup>287</sup> [1989] AC 1056 at 1109-1111.

would be an improper use of the Court's discretion, saying, 'for the court to act in the manner suggested would constitute a wrong exercise of its discretion, because it would involve using rules of procedure to bring about a result contrary to the rights of the parties under substantive law'.<sup>288</sup>

[8.34.4] Arguably, Lord Brandon's speech still leaves open the door for an assignee to take subject to a counterclaim that could be brought in the same proceedings as the principal claim. Moreover, clearly this decision does not govern the law in Australia and there has been some dissent from it.<sup>289</sup> However, although the cases discussed here may give some cause for concern about how the law of set-off is developing, unless good reasons can be shown as to why an assignee should take subject to counterclaims, it would not be right to attempt to 'fix' set-off by taking advantage of the fact that the principal cases involved assignments and to explain those cases away on the basis that the 'subject to equities' encapsulates counterclaims and that this is what the cases were really about. In the result there would appear to be no authoritative decision making an assignee subject to a counterclaim.

[8.35] **Conclusions.** The question then arises, putting aside the debate over the above mentioned authorities, whether an assignee should take subject to some counterclaims whether arising before or after notice of the assignment.<sup>290</sup> As has already been

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<sup>288</sup> [1989] AC 1056 at 1109. However, earlier in his speech, when reviewing the historical rule that prevented the charterer claiming a set-off in such cases, (see generally *Derham Set-Off* (2<sup>nd</sup> ed, 1996) para 1.7.14) he expressly noted that procedure now exists for the defendant to bring its cross-claim by way of counterclaim in the shipowner's action, see [1989] AC 1056 at 1099-1100.

<sup>289</sup> See *James v Commonwealth Bank of Australia* (1992) 37 FCR 445 at 461-2 per Gummow J. See also Dixon J's view of the *Newfoundland* decision, *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50 at 60. Cf *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10 at 22 per Woodward J. See also *Altarama Ltd v Camp* (1980) 5 ACLR 513 at 519 where McLelland J adopts the *Newfoundland* formulation as a test for set-off.

<sup>290</sup> It may be noted that under the UNIDROIT Convention on International Factoring (1988) Article 9, the debtor may raise 'all defences arising under [the] contract of which the debtor could have availed itself if such claim had been made by the supplier'. Moreover, the debtor may assert any right of 'set-off' in respect of claims existing against the assignor if available to the debtor at the time of notice. Under the United Nations Convention on Assignment of Receivables in International Trade Article 20, the debtor may raise all 'defences and rights of set-off arising

mentioned, most classic formulations of the 'subject to equities' rule refer to the assignee taking subject to defences and other defects in title. A counterclaim is strictly not a defence, however, it may be argued that it should be a 'defence' against an assignee.<sup>291</sup> If an assignee is to take subject to such counterclaims then clearly this cannot be explained by reference to the principle of transfer, and, if this was to extend to post notice counterclaims, it would be the exception to the rule because, as noted earlier, apart from the uncertainty surrounding abatement, the post notice position appears to be completely explicable on the basis of transfer.

Resort could be had to the idea mentioned earlier that an obligor may be worse off in fact by reason of an assignment but not worse off in law.<sup>292</sup> From this it may be argued that the assignee need not take subject to counterclaims because, in any case, the obligor will still have its right of action against the assignor. Thus, the obligor is not worse off in law. The weakness in this reasoning is that the fact/law distinction is not a means to an end. However, it may be an effect of the operation of the rules of assignment. Thus, the principle of transfer, which is the basis for most of the rules governing the assignment of contractual rights, is directed to the assignor/assignee relationship and it

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from the original contract, or any other contract that was part of the same transaction, of which the debtor could avail itself if such claim were made by the assignor.' Moreover, the 'debtor may raise again the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received.' The Uniform Commercial Code § 9-404(1) relevantly provides that an assignee takes subject to 'all the terms of the contract between the account debtor and assignor and any defence or claim arising therefrom and any other defence of claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.' The UCC provisions appear the most likely of these to include counterclaims. In the first instance it refers to 'claims' arising out of the same contract as the assignment. Most of these would probably give rise to equitable set-offs, and, if not, would fulfil the 'inseparable connection test'. However, the position prior to notice would, if applying to counterclaims, appear to capture all counterclaims. See also Restatement of Contracts 2d (1979) Article 336(2) comment (c). See also in the context of contracts for the benefit of third parties, the Law Commission's recommendation not include counterclaims, see Law Commission for England and Wales *Privity of Contract: Contracts for the Benefit of Third Parties* (1996) Law Com 242 paras 10.10-10.12.

<sup>291</sup> Cf *Colonial Bank v European Grain & Shipping Ltd (The Dominique)* [1987] 1 Lloyd's Rep 239.

<sup>292</sup> [6.27].

protects the obligor's position at law but generally has no regard to the obligor's position in fact. However, whether or not an assignee takes subject to counterclaims concerns the obligor/assignee relationship and this is governed by unconscionable conduct. If it is not unconscionable for the assignee to deny counterclaims, then the obligor will not be able to raise them and the law will tolerate the obligor being worse off in fact. However, if that is not the case, then the obligor may raise them and here, the obligor's position in fact will be protected as a result of the application of the rules.

It is necessary to ground an explanation on unconscionable conduct, that is, would it amount to an exploitation by the assignee of the obligor's vulnerability to assignment to deny counterclaims. Arguably, the assignee should not be subject to all counterclaims and no doubt this is the point that the inseparable connection test seeks to address.<sup>293</sup> Oditah has argued that the fairest rule is 'one which allows the debtor to set off all his cross-claims based on the contract irrespective of whether they arise before or after notice of assignment.'<sup>294</sup> There is perhaps not much difference between these positions. Oditah's justification is that 'in many cases there is no way in which the debtor could have avoided giving effective credit to the assignor short of canceling the contract and possibly exposing himself to damages for breach.'<sup>295</sup> This is no doubt true in many cases and in such cases it may suggest exploitation and perhaps the assignee should be subject to the counterclaim but have resort against the assignor for allowing such a cross-claim to arise.<sup>296</sup> Interestingly it is also said that the notice rule exists to prevent the obligor bringing into existence further cross-claims and enabling him or her to diminish the value of the assigned right, that is, the obligor carries the risk of continuing to deal with the assignor.<sup>297</sup>

Ultimately, it is suggested that an assignee should not take subject to counterclaims

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<sup>293</sup> Marshall put forward the notion that an assignee should take subject to counterclaims where the assignee can be fairly 'deemed to have notice of the transaction which is the basis of the counterclaim', see Marshall *The Assignment of Choses in Action* (1950) at 184.

<sup>294</sup> Oditah *Legal Aspects of Receivables Financing* (1991) para 8.3 at 239.

<sup>295</sup> Oditah *Legal Aspects of Receivables Financing* (1991) para 8.3 at 239.

<sup>296</sup> See United Nations Convention on the Assignment of Receivables in International Trade Art 14(1)(c).

<sup>297</sup> Goode *Legal Problems of Credit and Security* (2<sup>nd</sup> ed, 1988) at 166.

whether arising before or after notice of the assignment. The reasons for this are, firstly, that such claims cannot be identified by the principle of transfer and so far as unconscionability is concerned there is, it is suggested, an important difference between a claim that can be raised by way of a true defence, albeit a procedural defence, and which is based on recognised doctrinal principles and a cross demand that can be brought in the same proceedings as the principal claim merely by virtue of a procedural rule of court that provides a mechanism for hearing claims and cross demands in the one proceeding and which in any case results in two distinct judgments being made. It is difficult to see how the latter can be viewed as an exploitation by the assignee of the obligor's vulnerability to assignment.

### **(e) Successive Assignments**

**[8.36] Introduction.** The operation of the 'subject to equities' rule in the case of successive assignments is not without difficulty. The typical factual situation is where creditor A assigns a debt to B who then assigns it to C. In an action by C to enforce the debt, can the debtor raise equities it may have against A and B.

**[8.37] Equities against the original assignor.** There is authority for the view that an ultimate assignee only takes subject to the equities existing against the original assignor so that 'equities' does not include claims the debtor may have against intermediate assignees.<sup>298</sup> Putting aside the issue of intermediate assignees, it must be right that the debtor can raise equities existing against the original assignor. If the assignments between A, B and C consist of a series of legal assignments of a debt, then although C's title is derived from B's, the subject matter of the assignment is still the right to the promise made by the debtor to A because this the 'thing' that is actually assigned. C then must be subject to equities that exist between A and the debtor. This follows as of course in respect of those 'equities' which are identified by reference to the principle of transfer as these will affect the right assigned no matter how many hands it goes

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<sup>298</sup> *The Southern British National Trust Ltd v Pither* (1937) 57 CLR 89 at 108-9 per Dixon J; *Banco Central SA and Trevelan Navigation Inc v Lingoss & Falce Ltd and BFI Line Ltd (The Raven)* [1980] 2 Lloyd's Rep 266 at 273 per Parker J. Cf *Cavendish v Geaves* (1857) 24 Beav 163, 53 ER 319 and *E Pellas & Co v The Neptune Marine Insurance Co* (1879) 5 CPD 34 at 39 per Bramwell LJ. See also UNIDROIT Convention on International Factoring (1988) Article 11.

through. However, it must also be that the ultimate assignee takes subject to those equities arising prior to the debtor receiving notice.<sup>299</sup>

If the assignment from A to B is legal but the assignment from B to C is equitable, then C, in terms of subject matter, will be the beneficial owner of a debt that was promised by the debtor to A. Although, C's title will be derived from B, who is now the legal owner of the debt, C must still be subject to equities that exist between the debtor and A where C is seeking to enforce that legal right. Where the assignment from A to B is equitable and the assignment from B to C is equitable then (assuming the assignment from B to C was of B's entire equitable interest) again, C will be the beneficial owner of a debt which is a right to an obligation promised by the debtor to A and therefore C must be subject to equities existing between the debtor and A.

Where C, as an equitable assignee, is merely seeking an equitable remedy, for example, if it is enforcing the debt in equity, it will then bring an action against the debtor in its own right. Nevertheless, the result must be the same. That is, although C is enforcing its equitable title as equitable creditor, it is still enforcing its title to a right which consists of an obligation promised to A.

**[8.38] Equities against intermediate assignees.** The issue here is whether or not the debtor can raise against C any equities it may have against B arising before or after notice of the assignment to C. As already noted, there is authority for the view that the ultimate assignee never takes subject to equities existing against an intermediate assignee.

Clearly, the intermediate assignee can only assign a right equivalent to that which he or she has. Therefore, if prior to receiving notice of the second assignment, the obligor and intermediate assignee enter into an agreement to reduce the debt owed, or if part of the

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If no notice of the first assignment is received or is received only after notice of the second assignment, it may be that the prior notice of the second assignment should be sufficient to prevent further equities arising as the regards the first assignee. This can only be the case if the notice clearly evidences the first assignment, if it does not, it is likely then to refer only to parties unknown to the debtor and lead to confusion, in which case it could not bind the conscience of the debtor as regards either assignment.

debt is paid, the second assignee must take subject to this.<sup>300</sup> This is a straight forward application of the principle of transfer. The ultimate assignee derives its title from the intermediate assignee and therefore can only obtain that which the intermediate assignee has to transfer. That is, all defects in title are transmitted.<sup>301</sup> It is unlikely that the ultimate assignee would have to concern itself with the possible discharge or rescission of the contract by reason of an act of the intermediate assignee as the obligation to perform will lie with the first assignor and the first assignor will also be the person responsible as regards any vitiating factor. However, in the rare case of an assignment of a contractual duty, the issue of discharge for breach by the intermediate assignee may be raised and it would be an equity affecting title and therefore the ultimate assignee would take subject to it. Moreover, if (in the unlikely event) the debtor did have a claim for an equitable set-off against the intermediate assignee, given that this amounts to a defect in title of that assignee then the ultimate assignee should also take subject to this.<sup>302</sup> Usually, however, unless the claim can be identified by reference to the principle of transfer, claims arising against the intermediate assignee after notice of the second assignment cannot be raised against the ultimate assignment.

The ground left is where the liability of the intermediate assignee arises prior to notice being given to the debtor of the second assignment and where the equity is one that is identified by reference to unconscionable conduct. Doctrinally, where the intermediate

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<sup>300</sup> *The Southern British National Trust Ltd v Pither* (1937) 57 CLR 89 at 108-9 per Dixon J.

<sup>301</sup> *The Southern National Trust Ltd v Pither* (1937) 57 CLR 89 at 109-110, 112 per Dixon J.

<sup>302</sup> It is important to keep in mind that for the debtor to raise an equity based on the principle of transfer, it must affect the chose in action vested in the first assignee. The debtor generally cannot raise some defect in the contract of assignment between the assignor and first assignee, see *The Southern National Trust Ltd v Pither* (1937) 57 CLR 89 at 102 per Latham CJ, nor can the obligor raise some right of the assignor's that exists in the contract of assignment, see *Gatoil Anstalt v Omennial Ltd (The Balder London)* [1980] 2 Lloyd's Rep 489. Note, however, at 103 Latham CJ goes on to state that 'the rule (in its strict sense) that an assignee of a chose in action takes subject to equities refers only to equities affecting the debt, and not to equities affecting intermediate assignments of the debt'. This is no doubt correct, the debtor cannot generally raise issues affecting a contract of assignment to which it is not a party, however, this formulation leaves out the possibility of the intermediate assignee's title being defective and that defect arising after the assignment to that assignee. Here the debtor is not attacking the contract of assignment, but the character of the chose in action as it stands vested in the intermediate assignee.

and ultimate assignees of a legal interest both take under equitable assignments, then, if the ultimate assignee wishes to enforce the legal debt, that is, enforce legal rights, it would be enforcing the legal rights of the original assignor and not the intermediate assignee. If that is the case, the result, doctrinally, would be that the debtor could not raise against the ultimate assignee a claim it had against the first assignee.<sup>303</sup> Clearly, as regards statutory set-off, mutuality would be missing. However, and to reiterate, it is suggested that this does not apply where the equity against the intermediate assignee relates to a defect in title of that intermediate assignee (which was not a defect in title of the assignor) because here the ultimate assignee derives its beneficial title subject to that defect and cannot circumvent this by arguing that it is merely enforcing the legal rights of the original assignor. Its beneficial title in that case may be something less than the equitable equivalent of the legal right as vested in the assignor.

However, where the ultimate assignee of a legal interest takes under an equitable assignment and the intermediate assignee takes under a legal assignment, then, although in terms of characterising the subject matter of the assignment it is identified (in the example being discussed) as a right to an obligation promised by the debtor to the assignor, the second assignee would be enforcing the rights of the intermediate assignee and not the assignor. Thus, the legal assignment to B would result in the debt being owned and legally owed to B. When B assigns that chose in action to C, then, although C will still obtain the beneficial ownership of a debt which keeps its character as a promise made by the debtor to A, B will nevertheless be passing on its ownership of that same chose in action. C's beneficial title is derived from B's ownership of the chose in action and not simply A's ownership. Therefore, one would expect that the second assignee must then take subject to all the equities the obligor has against the intermediate assignee where they arise prior to notice of the second assignment.<sup>304</sup> However, the case law is against this proposition and takes the view that the fact the assignment is a legal assignment makes no difference to the application of principle, namely that equities existing against intermediate assignees cannot be raised against

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<sup>303</sup> *Re Milan Tramways Co* (1884) 25 Ch D 587 at 593 per Cotton LJ; *The Southern National Trust Ltd v Pither* (1937) 57 CLR 89 at 108-9 per Dixon J. See further *Derham Set Off* (2nd ed, 1996) para 13.2.15.

<sup>304</sup> See further *Derham Set Off* (2nd ed, 1996) para 13.2.15.



ultimate assignees.<sup>305</sup> It is suggested, however, that the result of these cases can only be upheld by adopting a procedural view of the statutory regime which has been rejected in this dissertation.<sup>306</sup>

## (f) Conclusion

[8.39] **Conclusion.** This Chapter has shown how the principle of transfer underpins much of the content of the rules governing the position of the obligor and assignee. It explained the existence of those rules that dictate that the assignee is to be no better off than the assignor and the obligor is to be no worse off by virtue of the assignment. It also called into question the strict validity of the rule that prevents a diminishing of the assignee's rights after notice of the assignment by allowing for the assignor and obligor to agree to vary the contract. In addition, it was shown that the principle of transfer explains much of the subject to equities rule. Moreover, by recognising the role of the principle of transfer, some of what are in practice considered to be the more problematical areas of the assignment of contractual rights are more readily explained and understood. In particular, the extent of damages recoverable by an assignee for breach of contract, and again, the ability to vary a contract after notice of the assignment. However, the principle of transfer has limits and those limits flow from the fact that it is a principle that predicts and explains matters that arise from the assignor/assignee relationship. It cannot explain matters that flow from the obligor/assignee relationship. However, it was suggested that by recognising the latter as a true legal relationship, it is possible to explain the content of the rest of the rules governing the assignment of contractual rights by reference to unconscionable conduct.

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<sup>305</sup> *Re Milan Tramways Co* (1884) 25 Ch D 587 at 593 per Cotton LJ; *The Southern National Trust Ltd v Pither* (1937) 57 CLR 89 at 109 per Dixon J.

<sup>306</sup> See generally Chapter 5.

# **PART 5**

## **CONCLUSION**

## 9. Conclusion

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### *(a) Introduction*

**[9.1] Introduction.** This dissertation has sought to explain the existence and meaning of the rules governing the assignment of contractual rights. The reasons for this review were the importance of such transactions to commerce and the total lack of any detailed study of the rules governing such transactions.

The starting point was the accepted legal position that an assignment involves a transfer. After an investigation of the legal concept of transfer, it was concluded that it was sensible to speak of the transfer of title to a contractual right as well as the actual transfer of a contractual right to performance. This to some extent aligned the transfer of intangibles with the transfer of tangibles. In short, it was suggested that a transaction should only be termed an assignment when there is a transfer of title, that is, ownership of the contractual right in question and that, in the case of contractual rights, that transfer of title will automatically result in an actual transfer of the contractual right. Moreover, it was suggested that it was perfectly sensible to speak of a transaction as involving a transfer when title was not transferred by way of the extinction and creation of rights but merely by way of creation. This allowed for equitable assignments of contractual rights to be legitimately termed 'assignments'. In addition, it was concluded that the hallmark of the legal concept of transfer was that all transfers are governed by the *nemo dat* rule. It followed, that since assignments can legitimately be termed 'transfers' then the rules governing assignment must conform to this rule. This was referred to in the dissertation as the principle of transfer.

From here an investigation of equitable and legal assignments was carried out to determine whether the principle of transfer, as explained in this dissertation, was not merely theoretically coherent but is also a concept that is applied to such transactions even though not articulated in the manner suggested in this dissertation. It was

concluded that in both cases the law does adopt the principle of transfer. After this, there followed three chapters that dealt with distinct parts of transactions involving the assignment of contractual rights. Within those chapters the rules governing such assignments were placed in context and explained by reference to the principle of transfer. In remainder of this Chapter, by way of conclusion, the explanation for each rule is dealt with separately.

## ***(b) The rules***

### ***(i) The assignor can assign no greater right than it has nor can an assignee obtain a right greater than that held by the assignor.***

[9.2] **Rule 1.** As noted in Chapter Six, little needs to be said about this rule as it is a clear adoption of the *nemo dat* rule which is the hallmark of all legal transfers. As an assignment involves a transfer, the principle of transfer dictates the existence of this rule and provides the meaning of this rule.

### ***(ii) Only non-personal contractual rights may be assigned.***

[9.3] **Rule 2.** The personal rights rule on its face would appear the most difficult rule to explain by reference to the principle of transfer. However, it was suggested, that because contractual rights owe their existence to the intention of the parties then it must follow that that intention not only moulds the character of contractual rights as personal rights but also as choses in action. From this analysis it becomes clear why the principle of transfer would dictate the existence of a rule that gave such prominence to party intention and autonomy. That is, if the parties rob a chose in action of its inherent assignability by evidencing an intention that the obligor should only perform for the other party to the contract, then to allow the assignment of that right would be to allow the assignment of a right greater and different to the one vested in the assignor which would breach the principle of transfer.

The same reasoning explains the efficacy of contractual provisions prohibiting assignment or provisions investing assignability to a right that might otherwise be construed as personal.

***(iii) It is not possible by assignment to increase or vary the obligations or burdens of the obligor.***

[9.4] **Rule 3.** Like Rule One above, this rule is a clear adoption of the *nemo dat* rule. If the assignor cannot assign a right different to or greater than the one vested in him or her, then the effect of that assignment must be that the obligation of the obligor is also not capable of variation. However, generally the issue here is one of law not of fact. So long as the obligor is being asked to perform for the assignee the exact same obligation as that promised to the assignor, then the obligor cannot complain that there has been a variation to its obligation. However, it is accepted that there may be some increased inconvenience in fact by reason of an assignment.

In practice, this rule is also used to state the conclusion (or sub rule) that the assignee can recover by way of damages for breach of contract no more than the assignor could have recovered. It was shown that the principle of transfer dictates that the assignee should, as owner of the right to performance, recover for its own personal loss, but that the potential loss of the assignor should operate as a cap on liability because the right to performance does not change its character when assigned but remains a right to an obligation promised to the assignor. This impacts on the value of the right vested in the assignee and this result is dictated by the principle of transfer.

***(iv) It is only possible to assign rights and not obligations.***

[9.5] **Rule 4.** This rule is easily explained by reference to the principle of transfer. It is only possible to transfer something one owns and a person cannot own an obligation that that person owes to another. The principle of transfer cannot recognise the transfer of such obligations and therefore there is necessarily a rule governing the assignment of contractual rights that such obligations cannot be assigned. Nevertheless, because the character of a contractual right as a chose in action is shaped by the intention of the

parties to the contract, it is theoretically possible to make an obligation an intrinsic part of a right. In such cases, the principle of transfer would dictate that any transferee taking the right must also accept the obligation, because if this were not the case, a right greater than and different to that vested in the assignor would have been transferred which is at odds with the principle of transfer.

***(v) After receiving notice of the assignment, the obligor may not do anything to diminish the rights of the assignee.***

[9.6] **Rule 5.** It was suggested in Chapter Eight that this rule was not a rule dictated by the principle of transfer. This is an obvious point when one recognises that it is a 'rule' that raises the obligor/assignee relationship which is not the relationship under which the transfer takes place. The 'transfer relationship' is that of the assignor/assignee.

In practice, this rule has been used in Anglo-Australian law to prohibit the assignor and obligor from varying the contract after notice of the assignment. It was pointed out that this was out of step with the law in the United States and under one international convention. Moreover, it was suggested that the principle of transfer would not prohibit such variations. Thus, in taking the assignment of a contractual right, the assignee must accept that that right in its nature as a chose in action may be varied by the obligor and assignor because this power is inherently vested in the parties to a contract. Such an act may put the assignor in breach of contract with the assignee, but that alone does not call into question the inherent power of the assignor to agree to such variations in its capacity as party to the contract with the obligor. It follows that the rule can only be explained by recognising a formal legal relationship between the obligor and assignee which allows the assignee to resist such variations to the contract when the obligor's agreement to the variation amounts to unconscionable conduct.

***(vi) The assignee can be in no better position than the assignor was prior to the assignment.***

[9.7] **Rule 6.** The notion that an assignee can be in no better position than the assignor is a clear adoption of the *nemo dat* rule as recognised in Rule One above. However, this

Rule Six is more often referred to when the question being asked concerns the extent of performance the assignee can demand from the obligor.

***(vii) The obligor should be no worse off by virtue of an assignment.***

[9.8] **Rule 7.** Rule Seven is the mirror image of Rule Six but is generally used to express the reason why the damages awarded to an assignee for breach of contract by the obligor cannot exceed that which would have been awarded to the assignor. This is clearly a result dictated by the principle of transfer as the discussion of Rule Three above shows.

***(viii) The assignee takes subject to the equities.***

[9.9] **Rule 8.** It was suggested in Chapter Eight that although the origins of this rule probably lie in the early procedure adopted for enforcing assignments, it is also dictated by the principle of transfer. That is, the *nemo dat* rule demands that an assignee take subject to all the inherent weaknesses or infelicities of the subject right. Thus, in the case of a contractual right, the assignee must take subject to such things as the obligor's right to terminate the contract for breach or repudiation by the assignor or to rescind the contract by virtue of some misrepresentation, duress, undue influence or unconscionable conduct on the part of the assignor. In addition, the principle of transfer dictates that the assignee take subject to substantive defences the obligor has against the assignor such as a right to true equitable set-off

It was also suggested that part of the operation of the subject to equities rules can be explained by recognising a formal legal relationship between the obligor and assignee which is policed to prevent unconscionable conduct. This would then explain why the assignee would be subject to such things as statutory set-offs, payments to the assignor and releases given by the assignor where these arise or occur prior to the obligor receiving notice of the assignment.

### ***(c) Final remarks***

**[9.10] Final remarks.** The assignment of contractual rights is a difficult area of the law. Some of that difficulty arises from the very complex factual backgrounds in which such transactions takes place. Moreover, the process of construing and interpreting assigned contractual rights to determine exactly what performance the assignee should expect can be a difficult issue in itself. No doubt some of the difficulty also flows from the fact that this is an area of law that sits on the margins of contract and property. However, this review has attempted to show that, at the most fundamental level, the essence of such transactions and the essence of assignment is transfer. Ultimately, this is not a difficult concept and it helps in bringing such assignments in line (to a certain extent) with other legal transfers of tangible property and allows for the rules governing the assignment of contractual right to be predicted and understood.



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