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Notice of assignment and discharge by performance

Chee Ho THAM
Singapore Management University, chtham@smu.edu.sg

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"A debtor (A) who makes payment to the creditor (B) after having been given notice of its assignment to an assignee (C) is at risk of having to make payment again." This appears to be a "well settled" aspect of the "transfer" of the legal rights to a debt effected by either equitable or statutory assignment. Yet it contradicts the common law rules as to invariability of a contractual obligation and the automatic discharge of an obligation when it is precisely performed. It is suggested that neither the doctrine underlying equitable assignment nor the legislative framework for statutory assignment provides any basis for abrogating these two common law rules. It may therefore be time to upset this "well settled" rule.

I. INTRODUCTION

Notice plays an important role in the equitable assignment of legal *choses* in action, such as a contractual debt.[1] As noted in a recent treatise,[2] once the debtor is given notice of the equitable assignment:

(i) should she pay the sum owed to her creditor, she is not discharged from her obligation but will have to make payment again to the assignee [the "no discharge after notice" rule];

(ii) the assignee's right against the debtor has priority against subsequent assignments by the assignor, in order of precedence of notice [the rule as to priorities]; and

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The following abbreviations are used:

Chitty: *Chitty on Contracts*, 29th edn (London, 2002).

Halsbury: *Halsbury's Laws of England*, 4th edn (Reissue).

Judicature Act 1873: Supreme Court of Judicature Act 1873.

Marshall: OR Marshall, *The Assignment of Choses in Action* (London, 1950).

Meagher, Gummow & Lehane: RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 4th edn (Australia, 2002).

Smith: M Smith, *The Law of Assignment* (Oxford, 2007).

Treitel: E Peel, *Treitel on the Law of Contract*, 12th edn (Oxford, 2007).

Tolhurst: G Tolhurst, *The Assignment of Contractual Rights* (Oxford, 2006).

1. The discussion in this paper generally leaves aside discussion of assignments of leases, in particular, assignments of the reversion. Differences in analysis arise primarily because there is privity of estate, as well as privity of contract, as between the original lessor and his lessee. Some of these differences are discussed at n 90, *infra*.

2. *Smith*, [7.68].

(iii) the debtor is no longer entitled to assert such equities as may arise between herself and the creditor post-notice to reduce her liability to the assignee by way of set-off [the rule as to equities].

Leaving aside discussion of the second and third of these rules for another day, this paper will focus on an examination of the "no discharge after notice" rule. This is prompted because the rule as applied in the context of equitable assignment of a debt presents a contradiction: it does not explain how it is that the common law rules as to discharge by precise performance and the invariability of contractual obligations are displaced by what appear to be equitable doctrines relating to assignment and notice thereof. By examining the mechanics and subject matter of an equitable assignment of a *chose* in action, this paper will demonstrate that the rule may, perhaps, have been too broadly stated and that the true position is quite otherwise: that a debtor *is* discharged from her obligation to make payment so long as she precisely performs her obligations as set out in the contract, even if the rights under that contract have been assigned to a third party to that contract, the equitable assignee, and even if she has been notified of such assignment. The paper will then examine whether the same may be true in the case of a statutory assignment.

II. ''NO DISCHARGE AFTER NOTICE''

Say A owes B £1,000; but B owes £1,000 to C. It would not be unusual for B to wish for C to be "paid", not directly by himself, but by A. One way to achieve this involves B's assigning the debt owed to him by A over to C, the assignment being in consideration of C's releasing B's indebtedness to him upon receipt of the £1,000 from A.[3]

The assignment of the legal[4] *chose* in action may be statutory if all the requirements in the Law of Property Act 1925, s 136(1) are complied with. If not, it may be equitable should the intention to make such an assignment be sufficiently made manifest. Should C not be paid, as a statutory assignee, C is entitled to bring legal proceedings against A on the debt[5] directly in his own name. Should C be an equitable assignee, similar proceedings

3. Others would include: appointing C as B's agent or attorney for the purposes of accepting payment from A, coupled with a mandate that C need not account to B for such receipts; promising to permit C to use B's name (on an indemnity for costs) to bring legal proceedings against A on the debt, if unpaid; entering into a tripartite agreement wherein in consideration for A's obligation to make payment to B being discharged, A promises to make payment to C (ie, a novation); or where, following a request by B that A make payment of the debt owing to B to C, A "acknowledges" to C that A will pay to C the sum otherwise payable to B on account of the loan agreement between them, eg, *Shamia* v. *Joory* [1958] 1 QB 448.

4. The *chose* in action arising from the debt owed by A to B is legal and not equitable, since such *chose* in action would have been recovered or enforced by an action at law, prior to the enactment of the Judicature Act 1873. References to *choses* in action hereafter should be taken to refer to legal and not equitable *choses*, unless indicated otherwise.

5. For ease of exposition, this paper will concentrate on the question as to whether a debtor is entitled to claim to be discharged by precise performance of her contractual obligation to pay her creditor. The same arguments may be applied in relation to other contractual obligations, as the doctrine of precise performance does not discriminate between obligations to pay money and obligations to perform other acts. So the arguments set out below may apply, *mutatis mutandis*, to assignments of legal *choses* in action arising out of contract other than debt.

may be initiated, but only by joining B as either co-claimant[6] (if B wishes to cooperate with C) or as co-defendant (if not).[7]

Within the context of equitable assignment,[8] it is often asserted that a debtor (A) who is given notice of an equitable assignment of the debt makes payment to the creditor-assignor (B) at her peril.[9] Which is to say, she is at risk of having to make payment again to the equitable assignee (C). This has been said to be a "well settled" aspect of the role of notice in equitable assignment;[10] and, in the context of an equitable assignment of a part of a debt,[11] Simon Brown LJ noted in *Deposit Protection Board* v. *Dalia*[12] that:

"4. Once notice of an equitable assignment is given to the debtor, he cannot thereafter deal inconsistently with the assigned interest, for instance by making payment to the assignor: *Jones* v. *Farrell*;[13] *Brice* v. *Bannister.*[14]

5. In the case of an equitable assignment consisting of the assignment of part of a debt . . . the assignee cannot give a good discharge in respect of the assigned part of the debt nor can he sue the debtor to judgment without first joining the assignor as a party to the proceeding—as co-plaintiff if he co-operates, co-defendant if he does not . . .

6. Conversely in such cases, the assignor likewise cannot give a good discharge even in respect of the non-assigned part of the debt and he, too, must join the assignee in any proceedings brought against the debtor. . . . ".[15]

Smith cites the first of these three paragraphs, as well as *Brice* v. *Bannister*, and *Yates* v. *Terry*[16] to support the proposition that, "[o]nce the debtor has notice of the assignment, he must account to the assignee and not to the assignor",[17] and that, "[i]f the debtor disregards the notice [and pays the assignor], then he must pay again [to the assignee]".[18]

6. Formerly the plaintiff—but the terminology has been amended: Civil Procedure Rules 1998, CPR 2.3(1).

7. *Walter & Sullivan Ltd* v. *J Murphy & Sons Ltd* [1955] 2 QB 584 (CA), 588; *Three Rivers District Council* v. *Bank of England* [1996] QB 292 (CA), 311.

8. The same dilemma is seemingly faced by debtors who are given notice of a statutory assignment; but the discussion in Part VIII queries whether this is truly the case.

9. Eg, *Walter & Sullivan Ltd* v. *J Murphy & Sons Ltd* [1955] 2 QB 584 (CA), 588, *per* Parker LJ.

10. Ong Chin-Aun, "Notice in Equitable Assignment of *Choses in Action*: Divergence in the Common Law and its Impact" (2002) 18 JCL 107, 107. Ong cites *William Brandt's Sons & Co* v. *Dunlop Rubber Co Ltd* [1905] AC 454 and *Walter & Sullivan Ltd* v. *J Murphy & Sons Ltd* [1955] 2 QB 584; [1955] 1 All ER 843 (CA) as authority for this proposition. The authoritativeness of these cases on the point is examined in Part VII.

11. Following *In re Steel Wing Co Ltd* [1921] 1 Ch 349.

12. [1994] 2 AC 367 (CA), 381.

13. (1857) 1 De G & J 208; 44 ER 703. This case is further examined in Part VII.

14. (1878) 3 QBD 569. This case is further examined in Part VII.

15. Simon Brown LJ's comments here echo the views of James LJ in *Roxburghe* v. *Cox* (1881) 17 Ch D 520, 526: "Now an assignee of a *chose* in action according to my view of the law, takes subject to all rights of set-off and other defences which were available against the assignor, subject only to this exception, that after notice of an assignment of a *chose* in action the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice. That is the sole exception. Therefore the question is, Was this right of set-off existing at the time when the notice was given by the Duke of Roxburghe?" No authority was cited by James LJ for the proposition, though, that precise performance of the obligation of payment has the effect of *diminishing* the rights of the assignee as they stood at the time of the notice.

16. [1902] 1 KB 527 (CA).

17. *Smith*, [13.21].

18. *Ibid*, [13.22].

In this, in common with many other Commonwealth authors on the law of assignment,[19] Smith shares the views set out in *Treitel on the Law of Contract*[20] that:

"it has been held that if the debtor [to whom notice of an equitable assignment has been given] ignores the notice and pays the assignor he is not discharged and will have to make a second payment to the assignee".

In the present edition of *Treitel*, *Brice* v. *Bannister* is cited as authority for the point, although *Jones* v. *Farrell*,[21] *Durham Bros* v. *Robertson*[22] and *Ex p Nichols*[23] are also cited in support.

The consensus, therefore, is that payments by a debtor to her creditor will discharge the payment obligation if made prior to receiving notice of an assignment of that debt, but not if made post-receipt. Implicitly, it has been accepted that notice of the assignment has substantive effects on the manner in which the debtor is to discharge her debt obligation. But how does an equitable doctrine operate to *modify* what it is that the debtor must *do* in order to count herself to be quit of her contractual obligations? For that is what the "no discharge after notice" rule does.

That difficulty has been hitherto overlooked because two different, though interrelated, questions may have been conflated. These are: (i) *to whom* the debtor is liable; and (ii) *for what* the debtor is liable. Equitable assignment has quite a lot to say in answer to the first question.[24] It is not obvious that equitable assignment necessarily has anything to do with the second. To answer *that* question, we look to the terms of the contract binding the debtor and her creditor.

III. INVARIABILITY OF TERMS AND AUTOMATIC DISCHARGE BY PRECISE PERFORMANCE

Generally, unless the contract expressly (or impliedly) provides that one of the contracting parties is to have a unilateral power of variation, "[a] mere unilateral notification by one party to the other, in the absence of any agreement, cannot constitute a variation of a contract".[25] Accordingly, as a matter of common law, the "double liability" which

19. Eg, *Tolhurst*, [4.20] and [8.06]; and *Marshall*, 106–107. Similar views may be found in more specialist works. N Ruddy, S Mills, N Davidson, *Salinger on Factoring*, 4th edn (London, 2006), [8.09] cites *William Brandt's Sons & Co* v. *Dunlop Rubber Co Ltd* as authority for the proposition that "in addition to assisting the factor in his claims to priority against competing interests in the debts, receipt of notice by the debtor also prevents the discharge of the debtor by subsequent payment to the client [ie, the creditor-assignor] . . . ". Likewise, H Beale, M Bridge, L Gullifer, and E Lomnicka, *The Law of Personal Property Security* (Oxford, 2007), [5.93] rely on *Brice* v. *Bannister* as authority for the proposition that, "After notice, the debtor does not obtain a good discharge by paying the assignor."

20. *Treitel*, 725–726, n 95. The very first edition of this work stated: "If [the debtor] disregards the notice [of assignment] and pays the assignor, he is not discharged and will have to make a second payment to the assignee": GH Treitel, *The Law of Contract* (London, 1962), 440, citing as authority *Jones* v. *Farrell* (1857) 1 D. & J 208 and *Brice* v. *Bannister* (1878) 3 QBD 569.

21. (1857) 1 De G & J 208; 44 ER 703.

22. [1898] 1 QB 765, 774. This case is further discussed in Part VII.

23. (1883) 22 Ch D 782, 787. This case is re-examined in Part VII.

24. See Part V(B)(ii).

25. *Chitty*, [22.032], citing *Cowey* v. *Liberian Operations Ltd* [1966] 2 Lloyd's Rep 45.

necessarily arises once the "no discharge after notice" rule is applied ought not to be possible.

Such an outcome is inconsistent with the common law principle of invariability of contractual obligations once they have been set out in the form of contract terms;[26] and with the common law principle that contractual obligations are discharged automatically once they have been fully performed in compliance with the terms of the contract.[27] Keeping these two principles in mind, it seems indisputable that a contractual obligation will be discharged once it is precisely performed;[28] and such obligations are invariable without further valuable consideration being furnished to the debtor/obligor, who must, needless to say, assent to such variation.[29]

Suppose, for good consideration provided by Q, P promises Q to pay £100 to Z. Q then equitably assigns his legal rights in the debt, the *chose* in action, to R. Can R now demand that P pay to himself instead of to Z? Even in equity, R may *not* assert any such right, unless P's contractual promise was to pay to Q's assigns/nominees.[30] R, as assignee, takes no better right than Q, the assignor,[31] and it is difficult to see how Q would have been able to persuade any court of Equity that P ought to be ordered pay anyone other than Z:[32] surely no equitable order could issue to *prevent* a debtor from paying the contractually-

26. This follows logically from the need for an enforceable agreement of variation between the original contracting parties for the contract to be varied: n 25, *supra*.

27. Perhaps because a contract discharged by performance seldom attracts litigation, authority for this seemingly obvious proposition has been rather difficult to locate. *Treitel*, [17.001] assures us, however, that "[a] party who performs a contract in accordance with its terms is thereby discharged from his obligations under it". To similar effect: "Full performance consistent with the terms of the agreement discharges a legal duty": JM Perillo (Gen ed), *Corbin on Contracts—Discharge*, vol 13 (rev edn) (Newark, 2003), § 67.3. In *Chambers* v. *Miller* (1862) 32 LJ CP 30, 33, Williams J noted: "where money is paid, not in satisfaction of a prior breach of contract, but in performance of a duty at the proper time, no acceptance by the taker is necessary at all. The party making the payment has performed his duty as soon as he has handed the money to the person to whom it is due, and the transaction is complete".

28. "The general rule is that a party to a contract must perform exactly what he undertook to do": *Chitty*, [21.001].

29. As we are concerned only with the "variation" of the debtor's executory obligation of payment, the broader concepts of estoppel and waiver (which apply to both executed and executory obligations) need not detain us: see S Wilken, *Wilken and Villiers on The Law of Waiver, Variation and Estoppel*, 2nd edn (Oxford, 2002) where at [2.04], it is observed that, "The Courts have historically analysed variation of contract as analogous to the entry by the parties into a new contract. The requirements of offer, acceptance and consideration were therefore imposed". If contract obligations once formed *were* variable without such requirements, the elaborate analysis in cases such as *Goss* v. *Lord Nugent* (1883) 5 B & Ad 58, 64–65; 110 ER 713, 716 as to what is required for an effective variation would have been wholly unnecessary. For another view, suggesting that consideration is merely a sufficient but not a necessary reason to enforce a promise to vary contractual obligations and that estoppel ought to play a greater role in these matters, see C Ulyatt, "Should consideration be required for the variation of contracts?" (2002) 9 Auckland ULRev 883 and D Halyk, "Consideration, Practical Benefits and Promissory Estoppel: Enforcement of Contract Modification Promises in Light of *Williams* v. *Roffey Brothers*" (1991) 55 Sask L Rev 393.

30. Whether expressly or impliedly.

31. See Parts V(A) and (B), *infra*.

32. There is some authority suggesting that an assignor who receives money from the debtor as payment for the debt will hold such money on constructive trust for the benefit of the assignee: see discussion in Part X, *infra*. If so, it follows that the creditor-assignor ought to be enjoined from receiving the debt *for his own benefit*. And Windeyer J appears in his judgment in *Norman* v. *Federal Commissioner of Taxation* (1963) 109 CLR 9, 27 to have taken *L'Estrange* v. *L'Estrange* (1850) 13 Beav 281 to have been a case where the creditor-assignor was so restrained. But it is another matter altogether to enjoin the debtor from making payment to her creditor.

named creditor if she so wishes, because to insist that she do otherwise is to compel her to act in breach of contract?[33]

Where an *equitable chose* in action has been equitably assigned, notice to the obligor may well have the effect of varying the nature and manner in which an obligor subject to equitable obligations is to perform those duties.[34] In such cases, there is no concern with the common law rule as to invariability. Since equitable obligations fall within the exclusive Equity jurisdiction, in exercise of that jurisdiction, the courts may formulate all manner of rules as may govern such obligations but which depart from what would have been the case had the obligations arisen at common law. The same cannot be true of contractual *choses* in action like the contractual debts which are the subject matter of this paper. So as to the equitable assignment of a contractual debt, it would appear the "no discharge after notice" rule embodies a case where the rules as to Equity (in relation to equitable assignment and the effect of notice) conflict with the rules of the common law. This raises two questions: (i) if there is a conflict, which is to prevail? And, (ii) is there a conflict at all?

IV. ''EQUITY FOLLOWS THE LAW''—OR PERHAPS NOT

Based on the above, there appears to be a conflict between the rules as to equitable assignment and notice thereof, and the rules at common law as to invariability of obligations and the automatic discharge of contractual obligations by precise performance. Yet despite the maxim that "Equity follows the law", it seems to have been assumed[35] that both these common law rules are overridden when a debtor makes payment to her creditor despite having been given notice that the debt had been assigned to another. Might equitable assignment and notice thereof be an instance where the converse proposition

33. It is no answer to say that notice of equitable assignment of a debt only has such effect as is commonly claimed for it in circumstances where the debtor would have been indifferent as to whom she should make payment to, for, if so, why should the principle stop there? How is one to draw any principled distinction between a contract where the debtor, A, is indifferent as to whether she should pay B, and another contract where the obligor, J, is indifferent as to whether he should paint the house of the obligee, K, white, as expressly specified in the contract, or pale green, as K now requests, having discussed the matter over with his wife after the contract had been formed? In the latter situation, the issue is typically characterised as a contract variation whereby the obligor J "purchases" a release from his obligation to paint K's house white by agreeing to paint it pale green instead. J's "indifference" in the latter case plays no significant legal role at all; it only goes towards the likelihood that the obligor might consent to the variation proposed by the obligee. That being so, the same should apply in relation to a proposed change in the identity of the payee, there being no principled difference between an obligation to pay money and an obligation to do something else.

34. Eg, *Donaldson* v. *Donaldson* (1854) Kay 709; 69 ER 303. In relation to the equitable assignment of a beneficiary's interest in a fund held by a trustee, Lord McNaghten cautioned: "[I]t has been said that notice 'converts' the trustee of the fund into a trustee for the person who gives the notice. But that, again, is hardly accurate. The trustee of the fund is trustee for the persons entitled to the fund, whether he knows their names or not. The notice, no doubt, places him under a direct responsibility to the person who gives the notice. If he disregards the notice, he does so at his peril. But before notice is given he is just as much a trustee for the persons rightfully entitled as he is after he receives the notice, though of course, in the absence of notice, he would be safe in paying away the fund to those who appear by the instrument constituting the trust, or by title properly deduced from them, to be the true owners", *Ward* v. *Duncombe* [1893] AC 369, 392.

35. Based on the authorities cited in Part II, *supra*.

applies, that "where the rules of equity and common law conflict, the rules of equity are to prevail"?[36]

That proposition now finds statutory form in the Supreme Court Act 1981, s 49,[37] which "embodies, in a concentrated form, the fundamental objectives of the Judicature Acts 1873–1875".[38] Section 49(1) of the Supreme Court Act 1981 is a re-enactment of s 44 of the Supreme Court of Judicature (Consolidation) Act 1925,[39] which, in turn, re-enacted s 25(11) of the Judicature Act 1873, the effect of which was to eliminate conflicts between common law and equitable rules "wheresoever arising" by, in effect, destroying the legal rule and replacing it for all purposes by the equitable rule. "This now prevailed not by virtue of a common injunction[40] or the procedural innovations in Supreme Court litigation wrought by s 24,[41] but by force of s 25(11)".[42]

Of that provision, Maitland observed in his *Lectures on Equity* as follows:[43]

"Now it may well seem to you that those are very important words, for perhaps you may have fancied that at all manner of points there was a conflict between the rules of equity and the rules of the common law, or at all events a variance. But the clause that I have just read [s 25(11), Judicature Act 1873] has been in force now for over thirty years, and if you will look at any good commentary upon it you will find that it has done very little—it has been practically without effect. . . . [I]t is important that even at the very outset of our career we should form some notion of the relation which existed between law and equity in the year 1875. And the first thing that we have to observe is that this relation was not one of conflict. Equity had come not to destroy the law, but to fulfil it. Every jot and every tittle of the law was to be obeyed, but when all this had been done something might yet be needful, something that equity would require. Of course now and again there had been conflicts: there was an open conflict, for example, when Coke was for indicting a man who sued for

36. The rule is derived from the jurisdictional priority given to Equity arising from the decree issued by James I in the month of July, 1616, that, " . . . [We] do will and command that our Chancellor, or Keeper of the Great Seal for the Time being, shall not hereafter desist to give unto our subjects upon their several Complaints now or hereafter to be made, such Relief in Equity (notwithstanding any Proceedings at the Common Law against them) as shall stand with the Merit and Justice of their Cause, and with the former, ancient and continued Practice and Presidency of our Chancery have done . . . ": 1 Chan Rep 49–50; 21 ER 588.

37. "Every Court exercising jurisdiction in England and Wales in any civil cause or matter shall continue to administer law and equity on the basis that, wherever there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail": Supreme Court Act 1981, s 49.

38. *The White Book Service 2009*, vol 2 (London, 2009), [9A.170].

39. The 1925 Act was repealed and replaced by the Supreme Court Act 1981 with effect from 1 January 1982.

40. Being the form of injunction that led to the battle of wills between Coke and Lord Ellesmere which was resolved only with the intervention of James I: see n 36, *supra*. One collection of precedents pre-dating the Judicature Act 1873 suggests the following form for such an injunction: "Let an injunction be awarded to restrain the Deft T, his attornies and agents, from further prosecuting the action commenced (by the Deft) against the Plt (in H M Court of &c) as in the bill mentioned, to recover the amount of principal, interest, and costs secured by the indenture dated &c, in the Plt's bill mentioned; and from commencing (or prosecuting) any other action at law (or taking any other proceeding) against the Plt for the recovery of such principal, interest, and costs, or any part thereof, until the hearing of this cause, or until the further order of this Court": Sir Henry Wilmot Seton, *Forms of Decrees in Equity*, 3rd edn (London, 1862), vol II, 874–875.

41. The common injunction was abolished by the Judicature Act 1873, s 24(5). This was re-enacted as s 41 of the Supreme Court of Judicature (Consolidation) Act 1925, s 41, before being replaced (albeit somewhat confusingly) by the Supreme Court Act 1981, s 49(3).

42. *Meagher, Gummow and Lehane*, [2.115].

43. FW Maitland, *Equity—A course of lectures* (ed AH Chaytor and WJ Whittaker) (revised by J Brunyate) (Cambridge, 1936), 16–17.

an injunction. But such conflicts as this belong to old days, and for two centuries before the year 1875 the two systems had been working together harmoniously."

Maitland chose to illustrate the partnership between equity and common law by referring to the trust:[44]

"An examiner will sometimes be told that whereas the common law said that the trustee was owner of the land, equity said that the *cestui que trust* was the owner. Well here in all conscience there seems to be conflict enough. Think what this would mean were it really true. There are two courts of co-ordinate jurisdiction—one says that A is the owner, the other says that B is the owner of Blackacre. That means civil war and utter anarchy. Of course the statement is an extremely crude one, it is a misleading and a dangerous statement . . . Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*. There was no conflict here. Had there been a conflict here, [s 25(11), Judicature Act 1873] would have abolished the whole law of trusts. Common law says that A is the owner, equity says that B is the owner, but equity is to prevail, therefore B is the owner and A has no right or duty of any sort or kind in or about the land. Of course the Judicature Act has not acted in this way: it has left the law of trusts just where it stood, because it found no conflict, no variance, even, between the rules of the common law and the rules of equity."

Accepting Maitland's observations as to the Judicature Act 1873, s 25(11), the same ought to be said of its modern-day successor, the Supreme Court Act 1981, s 49. That Act came into force on 1 January 1982. Since the law of trusts did not come to an end on that day on account of s 49, like its predecessors, that section must be taken to have had no effect on the pre-existing law as to trusts, there being no relevant conflict.[45] If that is right, the same must be true of equitable assignment of debts, for, as the next Part will demonstrate, it is more than arguable that such assignments operate by way of trust or something very much like it.

V. THE NUTS AND BOLTS OF EQUITABLE ASSIGNMENT OF A DEBT

A. The meaning of "transfer"

The verb "to transfer" has a broad range of meanings. Within the context of transfers of property, ie, a conveyance, the subject matter of the "transfer" is, on closer examination, the legal and/or equitable *right* to the subject property. As noted in *Tolhurst*:[46]

"In the context of a conveyance, the law's focus is not merely on the transfer of tangible things but on the transfer of property rights. However, a transferee never obtains the exact same property rights as those held by the transferor. All property rights at a certain level of sophistication are personal and incapable of this type of transfer. Rather, it is generally accepted that a transfer of rights occurs

44. *Ibid*, 17–18.

45. In relation to the trust, the "conflict" lay not in the *rules*, but in the effect of those rules in Equity and at common law upon the litigants; and that conflict as to *remedies* (if any) is now resolved by reference to the Supreme Court Act 1981, s 49(2) and (3). See also *Meagher, Gummow & Lehane*, [2.115–2.125].

46. *Tolhurst*, [3.10] (references omitted).

when the transferor disposes of a right (which is extinguished) and where an equivalent and derivative right is created and vested in the transferee".

Although this usage of the word "transfer" is debateable,[47] the key aspect of a "transfer" is that the transferee is to obtain an *equivalent* right to that which, formerly, had been available to the transferor.[48]

B. Is a debt "property" capable of "transfer" by equitable assignment?

Following Windeyer J's analysis that an assignment involves "the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee",[49] Dr Tolhurst accepts[50] that:

"assignment involves a transfer. One consequence of this is that the assignor cannot vest in the assignee any greater right than he or she has: *nemo dat quod non habet*. This is the hallmark of transfer. If the right did change its nature or content upon transfer it could hardly be described as being property".

However, for the "no change" and "*nemo dat*" point to hold, it seems we must disregard the change in the identity of the payee effected by notice to the debtor that the *chose* in action in the debt has been equitably assigned mandated by the "no discharge after notice" rule. Yet it is no small matter to disregard such a change.

47. The appropriateness of describing such a transaction as entailing a "transfer" of rights is not universally accepted: JE Penner, *The Idea of Property in Law* (Oxford, 1997), at p 147; JB Ames, "Disseisin of Chattels", Ch 67 of *Select Essays of Anglo-American Legal History* vol 3 (Boston, 1909), at pp 582–583.

48. Given that an equitable assignment involves the creation of a new equitable interest *simpliciter*, as opposed to the creation of a new interest that is *equivalent* to another that is simultaneously extinguished, equitable assignment does not involve any "disposition" of interests from one party to another (adopting the extended meaning of "transfer" used in *Tolhurst*: see text to n 46, *supra*). Thus, equitable assignment is "non-dispositive". This paper does not take issue with the appropriateness of using "transfer" to describe a non-dispositive doctrine, accepting that "transfer" may operate differently depending on the nature of the subject matter in question.

49. *Norman* v. *Federal Commissioner of Taxation* (1963) 109 CLR 9, 26.

50. GJ Tolhurst, "Cheques, Property and the Notion of Transfer: *Parsons* v. *R*" (1999) 14 JCL 276, 280. These points are made in the context of an attempt to explain how it is that the verb "transfer" may be appropriately applied even to a situation where there cannot be any disposition of rights, but where there is only the creation and extinction of rights. Specifically, Dr Tolhurst was concerned with the distinction drawn by Lord Jauncey in *R* v. *Preddy* [1996] AC 815 between that situation and a case where rights are simply transferred in the dispositive sense. Dr Tolhurst suggests that in both instances "transfer" is an appropriate verb to describe what is happening because, even in a case of sale of goods, "we find that the same dealing in rights occurs, that is, the seller's rights are disposed of (and extinguished) and new and equivalent rights are vested in the buyer". The same point is also made in *Tolhurst*, eg, [3.10–3.11]. It may be pointed out that, unlike a case of equitable assignment of an equitable *chose* in action as occurs where a trust beneficiary directs his trustee henceforth to hold the trust property for third parties nominated by the beneficiary which, as Lord Radcliffe points out, may be treated as a "release or surrender" of the beneficiary's equitable interest to the trustee (see *Grey* v. *Inland Revenue Commissioners* [1960] AC 1, 16), where a creditor equitably assigns his rights in the *legal chose* in action to the assignee, there is no "release" or "surrender" of any interest *to* the assignee at all. There is merely the *creation* of a brand new *equitable interest* which did not previously exist. See also discussion in Part V(B)(i), *infra*. Even if it is right to describe what happens in an equitable assignment of a legal *chose* in action as amounting to a "transfer" of that *chose* in action, such "transfer", such non-dispositive transfer, even coupled with notice, does not explain the apparent *change* in the nature of that obligation *vis-à-vis* the identity of the party to whom the debt is to be paid. Dr Tolhurst appears to suggest that this change may be explained by reference to the "unconscionability" of allowing the debtor to ignore the notice of assignment by paying her creditor. That proposition is discussed in Part V(C), *infra*.

Suppose D owes L Ltd, an English-incorporated and domiciled company, £1,000 to be repaid in two years' time. Suppose also that the contract does not provide for any specific place for payment. L Ltd equitably assigns the debt to X Ltd, and D is given express notification of the assignment before the debt becomes due. But X Ltd has neither business premises nor any agents located in England—it operates exclusively in Baghdad, Iraq. On these extreme facts, it is difficult to deny that, if D can now discharge the debt only by making payment to X Ltd in Baghdad, D's obligations will have become much more onerous than they had been at the time of contract.[51]

In principle, any change in the identity of the payee is far from trivial and, it is submitted, ought not to be ignored. But where might that leave the "no discharge after notice" rule? That proposition, seemingly so well entrenched in the cases and academic literature, mandates that the effect of equitable assignment of the debt coupled with notice is to *change* what is required for the debtor to fully discharge herself from her contractual obligations. But why would such change *not* contravene the perfectly reasonable points that Dr Tolhurst has made? If it is right to treat *choses* in action, such as a debt, as "property" that is capable of being "transferred", and that such "transfer" requires that the transferee gets only what the transferor *has*, surely it must mean that either Dr Tolhurst's conception of "property" and "transfer" is wrong, or that there is some error in the received wisdom as to the inability of a debtor to claim to have discharged her obligation by making payment to her creditor, despite having had notice of an equitable assignment of the debt. It seems they cannot both be right. To resolve the conundrum, it would be helpful to re-examine: (i) how one effects an equitable assignment of a debt; (ii) what is transferred when a debt is equitably assigned; and (iii) how equitable assignment effects that transfer.

(i) How does one effect an equitable assignment?

When A borrows £1,000 from B and promises to repay that sum to B in 60 days' time, a legal relationship arises between A and B upon the formation of that contract. Should the due date pass without payment of the stated sum to B, B will be entitled to bring an action in debt at common law against A and will, in all likelihood, do so successfully. First, the debt is a legal *chose* in action, being an obligation which would have been enforced by action at law prior to the coming into force of the Judicature Act 1873. Second, A's debt to B is still a *chose* in action, although it is payable *in futuro*.[52] Last, since it arises out of a presently existing contract, the *chose* is a present or existing *chose* in action (as opposed to a future *chose* in action).[53] Absent the formalities set out in the Law of Property Act 1925, s 136(1), any assignment by B to C of the debt will therefore be an equitable assignment of a present *chose* in action.

Equity requires very little for such an assignment to be complete. First, the equitable assignment of a legal *chose* in action vested in the assignor has the effect of *creating* an

51. At common law, it is the debtor's duty to seek out his creditor and pay him the debt when due: *Walton* v. *Mascall* (1844) 13 M & W 452, 458; 153 ER 188, 191. Where a place of payment is specified, however, it is the duty of the creditor to attend at that place to receive payment: *Robey* v. *Snaefell Mining Co* (1887) 20 QBD 152; *Thorn* v. *City Rice Mills* (1888) 40 Ch D 357.

52. *Kwok Chi Leung Karl* v. *Commissioner of Estate Duty* [1988] 1 WLR 1035 (PC), 1040.

53. *Norman* v. *Federal Taxation Commissioner* (1963) 109 CLR 9, 26, *per* Windeyer J. See also *Roxburghe* v. *Cox* (1881) 17 Ch D 520.

"equitable interest" in that *chose* in action distinct from that of the assignor. There is no disposition of the assignor's equitable interest, since, strictly speaking, he has none, prior to the assignment.[54] Therefore, the Law of Property Act 1925, s 53(1)(c), which would have required the assignment to be in writing, does not apply. Second, notice to the assignee is unnecessary for the equitable assignment to take effect as between assignor and assignee (subject to the assignee's right to disclaim a gift, if the assignment were voluntary).[55] Third, notice to the debtor is also unnecessary.[56] Fourth, in our example, since B's equitable assignment to C is supported by valid consideration (being C's release of B's indebtedness to him), we can leave aside the question whether consideration is needed for an equitable assignment to be valid.[57] For the equitable assignment to have effect between the assignor, B, and the assignee, C, B merely needs to manifest his intention immediately and irrevocably to assign the *chose* in action in question (ie, A's indebtedness to him) to C.

(ii) What does an equitable assignment transfer?

Reverting to our example involving A, B and C, *supra*, upon the formation of the contract between A and B, B will have presently existing contractual rights against A, notwithstanding that the time for A's performance still lies in the future. It is submitted that in a typically worded contract, B has at least three "rights" against A upon the formation[58] of the contract.[59]

First, B is entitled to sue A, ie, bring legal proceedings against A to contend that A is in breach of the contract. This entitlement arises out of B's *standing* as the contractual

54. Applying Lord Browne-Wilkinson's analysis in *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] AC 669, 706. Equitable assignments of a *legal chose* in action are, therefore, "non-dispositive". The same does not appear to be true in relation to equitable assignments of *equitable choses* in action: *Grey* v. *Inland Revenue Commissioners* [1960] AC 1, 15–16. For a different view, see *Tolhurst*, [7.29].

55. *Standing* v. *Bowring* (1885) 31 Ch D 282 (CA). Beyond English shores, see: *Grey* v. *Australian Motorists & General Insurance* [1976] 1 NSWLR 669 (NSW CA), 673, *per* Glass JA, 676–679, *per* Samuels JA; *Tsu Soo Sin* v. *Oei Tijong Bin* [2008] SGCA 46 (Sing CA), esp at [55]. See also the discussion of the point in *Smith*, [7.72–7.75].

56. *Fortescue* v. *Barnett* (1834) 3 My & K 36, 42–43; 40 ER 14, 17; *Donaldson* v. *Donaldson* (1854) Kay, 711, 719; 69 ER 303, 307; *Re Way's Trust* (1864) 2 De G J & Sm 365, 371–373; 46 ER 416, 418–419; *Re Patrick* [1891] 1 Ch 82 (CA), 87; *Walker* v. *The Bradford Old Bank Ltd* (1884) 12 QBD 511; *Ward* v. *Duncombe* [1893] AC 369, 392; *Holt* v. *Heatherfield Trust Ltd* [1942] 2 KB 1, 4. See also *Smith*, [7.76–7.77]; *Marshall*, 103; *Meagher, Gummow & Lehane*, [6.435]. *Cf Tolhurst*, [4.19, 4.20 and 8.06], who takes a rather different view (which is further discussed in Part V(C), *infra*).

57. The need for consideration in an equitable assignment of a *chose* in action is, "a matter of considerable controversy": *Smith*, [7.78], and the references at n 119 therein. Smith, [7.82] takes the view that it is not necessary. The position may, however, be otherwise where the thing assigned is not a presently existing *chose* in action, but a future expectancy (such as future book debts). In such cases, the assignment will take effect in equity *if* the assignment is supported by consideration *when* the book debts arise: *Tailby* v. *Official Receiver* (1888) 13 App Cas 523.

58. As distinct from that point in time when the contract is breached.

59. For a much more detailed analysis of the concept of "ownership" of a *chose* in action, see WW Cook, "The Alienability of *Choses* in Action" (1916) 29 Harv L Rev 816, 819–821, where the terminology of "powers" used by WH Hohfeld, "Some Fundamental Legal Conceptions" (1913) 23 Yale LJ 16, and "privileges" is used in preference to "rights". Professor Cook also highlighted that the "owner" of a *chose* in action should also possess "certain 'legal immunities' from the power of other persons to do acts which will, for example, release or otherwise extinguish the rights above described".

counterparty, and is derived from the fact that B is *privy*[60] to the contract of debt entered with A.[61]

Second, B has "self-help" rights, the most commonly available one being his right to elect to discharge the contract should A either (i) anticipatorily repudiate it; (ii) actually breach a condition of the contract; or (iii) actually breach an innominate term of the contract, thereby causing B to lose substantially the entire benefit of the contract.[62] Like B's right to bring an action against A, B's right of election to discharge the contract for breach is a presently existing right arising upon the formation of the contract of debt.[63]

Third, B may elect *not* to exercise either of the two rights set out above. B's right to bring legal proceedings to bear on A, or to elect to exercise some self-help remedy, denotes that B has a right to elect *not* to take either step at all. This is most obvious in a case where A has committed an anticipatory repudiatory breach of her obligations, since the commission of such a breach does not automatically bring about legal action. B may *elect* to discharge the contract in the face of such anticipatory breach, and then *elect* to bring legal proceedings for that breach. B is not *required* to make either of these elections. Disregarding the assignment to C, B has a free hand in choosing which, if any, election he will make. So, in certain cases, an obligee (for example, a creditor) faced with an anticipatory repudiatory breach by his obligor (the debtor) may well elect not immediately to discharge the contract, but to wait and see what happens when actual performance is due (ie, where the obligee chooses to affirm the contract). Or, the obligee may elect to "accept" the breach so as to discharge the contract, but then to elect not to bring any legal proceedings at all (eg, where the obligee's own counter-promises are entirely executory and where there is no significant loss caused by the obligor's non-performance). This right *not* to bring legal proceedings or to exercise such self-help remedies as might be available to the obligee is important: for, in electing not to exercise them, the obligee is, in effect, *releasing* the obligor from her obligations under the contract.[64]

Therefore, upon the formation of any contract, unless the contract provides otherwise on its true construction, an obligee obtains at least[65] the following "rights":

(i) to sue the obligor;
(ii) to exercise any self-help remedies that may be available; and
(iii) to release the obligor from her contract obligations.

60. For ease of exposition, the varied and numerous "exceptions" to the doctrine of privity of contract are disregarded within this Part.

61. Whether B *succeeds* in such action, though, is another matter.

62. In other contexts, other self-help rights might include the exercise of a lien over the obligee's goods which are in the obligor's possession; though that would not be pertinent in cases like the present, where the subject matter of the assignment is an intangible *chose*.

63. Whether it may have been lawfully exercised, though, depends on the contingency of breach. But that, too, is another matter.

64. Such release may be granted voluntarily (in which case it must be by way of deed), or it may be granted in exchange for valid consideration—in which case we shall have moved into the realm of discharge by accord and satisfaction.

65. Apart from these three, the contract may provide for more—eg, a contractual right to terminate the contract, a contractual right to have any dispute pertaining to the contract submitted for arbitration, and so forth. It is suggested that the three mentioned in the main text are the "core" rights which should be present in most contracts.

Having identified what it is that B *has*, it becomes clear what it is that C *gets*, in principle, when C is equitably assigned[66] B's legal rights in the debt owed by A: these selfsame "rights".[67] But even if C has, in some sense, been transferred B's legal rights, just what it is that C is entitled to insist that A *do* is another question altogether.[68]

Keeping in mind the distinction between the question as *to whom* the debtor is liable, and the question as to *what* the debtor is liable *to do*, and given that the latter question is determined by comparing what A has done or will do (or what she has left undone or will refuse to do), in comparison with what the contract's terms prescribe, it becomes obvious that, if the contract's terms provide that A is to pay the sum owing "to B", the transfer to C of B's legal rights as against A has no effect on the *content* of those rights. The "transfer" only affects the question as *to whom* A is liable. It cannot affect what A is liable *to do* under the terms of her contract with B, unless that contract, on a true construction of its terms, is found to have made provision otherwise. This conclusion is reinforced by considering how an equitable assignment effects such a transfer.

(iii) How does an equitable assignment effect a transfer?

In connection with trusts of land, Hackney observed as follows:[69]

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

Precisely the same thing occurs when a contractual obligee effects an equitable assignment of the legal *chose* in action to an assignee. The first English edition of *Story's Commentaries of Equity Jurisprudence* states:[70]

> "[Courts of equity] give effect to assignments of trusts, and possibilities of trusts, and contingent interests, and expectancies, whether they are in real or in personal estate, as well as to assignments of *choses* in action. Every such assignment is considered in equity, as in its nature amounting to a

66. The position is the same in relation to statutory assignments. See Part VIII(B), *infra*.

67. Whether they do so, or not, will depend on what the parties *intend* to pass by way of the assignment. Eg, given that the right to exercise the self-help remedy of discharge for breach really pertains to the issue of discharge of the outstanding obligations of A and B under their contract, it is suggested that it does not invariably follow that B and C would have intended for B to exercise such right of election to release *itself* from such outstanding obligations under the contract *only* where to do so would be for C's benefit since, given the usual understanding that one may only assign contractual *benefits*, B's contractual obligations to A, if any, may not be assigned to C without A's assent.

68. In a case where B effects an assignment of his legal rights in the debts owed by A to C *after* A has breached the contract, the analysis is similar—the only difference being that A may no longer discharge her obligations by precise performance. C's position in such a case is thus, to some extent, more secure.

69. J Hackney, *Understanding Equity and Trusts* (London, 1987), 21–22. For a rather more lengthy explanation to approximately the same ends, see B McFarlane, *The Structure of Property Law* (Oxford, 2008), 70–71.

70. WE Grigsby, *Story's Commentaries on Equity Jurisprudence—First English Edition* (London, 1884), § 1040 (references omitted).

declaration of trust and to an agreement to permit the assignee to make use of the name of the assignor, in order to recover the debt, or to reduce the property into possession".

Yet, if the equitable assignor is to be treated as the "trustee" of the *chose* in action for the benefit of the assignee, that does not make the assignee the "owner" of the *chose* in action.[71] To borrow Maitland's words, "Equity did not say that the [equitable assignee] was the owner of the [legal rights to the debt], it said that the [equitable assignor] was the owner of the [legal rights to the debt], but added that he was bound to hold the [legal rights to the debt] for the benefit of the [equitable assignee]".[72]

This view as to what equitable proprietary interests entail seems not to have been fully explored by Dr Tolhurst, leading him to suggest that:[73]

"once the obligor receives notice, then, although the obligor can no longer ignore the interest of the assignee, it may not be clear whether the assignee or 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; although that position existed prior to notice (the assignment being complete without notice), the obligor did not have to consider the assignee until notice was given and, once given, the doctrinal result was that the obligation was owed in law and equity to different people".

The better analysis may rather be that the debtor only ever owes a duty (at common law) to the creditor; but, following the equitable assignment, the creditor is no longer in a position to exercise his strict legal rights *vis-à-vis* the debtor for his own benefit.

Just as a trustee who constitutes a trust over Blackacre cannot change the nature of Blackacre by virtue of the trust's constitution, so too the trustee who constitutes a trust over a *chose* in action. If so, it follows that an equitable assignor may not, by virtue of the assignment, change the nature of the *chose* in action assigned either.[74] The true legal position must be that A is discharged from her obligation to pay B once she pays B. B's equitable assignment of the debt to C is neither here nor there. It is a matter between B and C and is none of A's concern, unless she chooses to make it so.[75]

But what of notice?

71. See Part IV, *supra*.

72. Paraphrasing the analysis in the extract at text to n 44, *supra*.

73. *Tolhurst*, [8.06].

74. This was recently acknowledged to be the case by the Court of Appeal in *Crooks* v. *Newdigate Properties Ltd (formerly UPUK Ltd) and Ors* [2009] EWCA Civ 283, albeit in a slightly different context. In that case, an action in tort had been brought against a number of joint tortfeasors, of whom the third defendant was one Grogan. Default judgment in the sum of £253,304.25 was obtained against him. The judgment creditor then agreed, in a settlement agreement, to assign the benefit of this judgment debt to the second defendant upon the receipt of a sum of £293,000 forwarded by the other defendants to the claim, other than Grogan. In deciding that receipt of the settlement sum had the effect of extinguishing Grogan's liability on his judgment debt, in one of two alternative grounds for their decision, the Court of Appeal noted (at [22]) that, "the assignment of a debt does not change the character of the debt. Mr Grogan remained liable after the assignment as he was before, under a judgment in respect of a joint liability in tort. [But p]ayments by the other joint tortfeasors necessarily reduced or extinguished Mr Grogan's liability. The assignee can in this respect be in no better position than the assignor. An assignment of a debt, including a judgment debt, is subject to equities, including the right of the debtor to raise defences to enforcement arising out of the subject matter of the assignment. This includes the right to require credit to be given for any sum paid in or towards satisfaction of the underlying liability. This would be so even if the payments were made not only after the assignment but after notice of the assignment had been given to the debtor."

75. See Part VI, *infra*.

C. Notice and unconscionability

Dr Tolhurst takes a broad view of the effect of notice within the context of equitable assignments:[76]

"Generally, until the obligor receives notice of the assignment, it can obtain a good discharge from the assignor. In the case of a legal [ie, statutory] assignment this must follow because until notice is given there is no assignment. The position is the same with an equitable assignment because, until the obligor receives notice of the assignment, its conscience is not bound by the assignment. It also follows . . . that upon receiving notice of an assignment the obligor is *bound in conscience* to perform the relevant obligation for the benefit of the assignee".

In response, one might make the following observations.

First, it is unclear why it would be unconscionable for a debtor, A, to insist on making payment to her contractually stipulated creditor, B, after having been notified of an equitable assignment to C. A commits no legal wrong in rendering payment to B, but is merely fulfilling her legal obligation which predates the creation of C's equitable interest in that obligation. Indeed, given that it is A's contractual duty to seek out her creditor[77] to effect payment, how is this supposed unilateral change in the identity of her payee not unconscionable *vis-à-vis* A? Where the contract of debt provides that A is to pay B, and where C has agreed to the assignment of B's rights to that debt, how is it not at least equally true to say that it would be "unconscionable" for C to insist that A is to do something quite different, namely, pay C, when C knew very well that A was to pay B? So far as case authority is concerned, there appears to be no English authority directly on point;[78] so, with respect, it would seem that, short of any active collusion between A and B with intent to defraud C,[79] it may be that the scales of unconscionability are evenly balanced.

Second, even if it is right to treat A's fulfilment of her contractual obligation as being somehow "unconscionable", C might not have any equitable remedy to prevent A from carrying out her wish to honour her legal obligations. Where A *has* paid B, it would be too late for C to enjoin A—the deed is done, and the legal *chose* in action is no more as it has already been discharged automatically by A's precise performance of her contractually stipulated obligation.[80] A's position is utterly distinct from that of the purchaser of a legal estate in Blackacre who is seeking to resist the countervailing claims

76. *Tolhurst*, [8.06] (emphasis added).

77. As pointed out at n 51, *supra*.

78. There is some glancing Australian authority: see *Tooth* v. *Brisbane City Council* (1928) 41 CLR 212, 222, *per* Isaacs J (the sole dissenting judge). The point has been cited with approval in a few other Australian decisions since then, eg, *Re Domenick Tony Palumbo and Sharon Rose Palumbo* [1991] FCA 241, [36]; and *Clyne* v. *Deputy Commissioner of Taxation* [1981] HCA 40; (1981) 150 CLR 1, [11]. However, none of these cases involves a debt arising from a *contractual* promise of payment.

79. It may be that, where the debtor effects payment to the assignor-creditor as part of a scheme to defraud the assignee (for example, where the debtor knows that the assignor-creditor will abscond with the funds, once paid), accessory liability might conceivably be imposed on the debtor by way of the equitable doctrine of knowing assistance, given the debtor's "dishonesty" in making payment to the assignor-creditor. This may be the unstated rationale underlying the decision of Eyre CJ in *Legh* v. *Legh* (1799) 1 Bos & P 447; 126 ER 1002.

80. An analogy might be drawn with the unpaid vendor's possessory lien. Such a lien is, undoubtedly, a proprietary interest. But it is extinguished once possession is lost: so, too, an equitable interest in a debt. Once the debt is paid, the equitable interest in that debt is extinguished (although a claim might be made for the traceable substitutes for that debt: see Part X, *infra*).

to Blackacre by a trust beneficiary on the basis that he is Equity's darling, ie, that he had purchased the legal title to Blackacre *bona fide* without notice of the beneficiary's equitable interest in Blackacre. By making payment to B, A purchases *nothing*. She is merely discharging her contractual obligation, and gains no property interest in anything whatsoever, least of all anything to which C, as equitable assignee, has any claim.[81] If there is anything that the assignee has an equitable interest in, it can only be an equitable interest in the traceable substitute of the assignor's legal rights to the debt—ie, the monies received by the assignor from the debtor, in precise performance of her contractual obligation.[82] Indeed, as du Parcq LJ noted in *Re Schebsman*,[83] albeit in a slightly different context as to whether a trust of a *chose* in action had been constituted over a contractual promise by an employer to make payments to the widow and child of one of its employees, there was, "no instance in which equity compels a man to pay money to someone other than the person to whom alone, and for whose sole benefit, he has bound himself to pay it". The position was, therefore, the same in equity as it was in law.[84]

Third, C, as transferee, gains no more than what B, the assignor, had (or could have had). Had there been no assignment, B could never have been contractually entitled to direct A to make payment to anyone else apart from himself such that A would be in *breach* of her obligations were she to refuse to comply with such demand (absent express

81. Even if it is right to say that an obligee to a *chose* in action is entitled to the performance of the obligations in that *chose*, it must be remembered that the *chose* only exists as a thing in action. The *chose* has no independent existence outside of the potentiality of its realisation by way of an action in judicial proceedings.

82. This point was not brought to the attention of the Privy Council in *Colonial Mutual Insurance* v. *ANZ Banking Group* [1995] 1 WLR 1140, or so it seems. Mr and Mrs Whittall owned a house, of which ANZ Banking Group were second mortgagees. Pursuant to the New Zealand Property Law Act, s 78, the mortgage contained an implied covenant that the Whittalls would insure the house in the name of the mortgagees. In breach of the covenant, a policy of insurance was entered into with Colonial Mutual Insurance in Mr Whittall's sole name, although it noted the first mortgagees' interest in "the insurance" as mortgagees of the house. Subsequently, the second mortgagees notified the insurers of their interest, and their interest in "the insurance" was also noted. The house was subsequently destroyed by fire. The first mortgagees exercised their power of sale and managed to recover a sum sufficient to discharge the Whittalls' indebtedness to them, turning over the excess amount recovered to the second mortgagees. Even so, there remained some NZ$73,000 outstanding, and to satisfy this, the second mortgagees looked to the sum payable on the insurance policy. The question was whether, in paying that sum to Mr Whittall, the insurers had discharged their obligations under the policy of insurance; or whether they were to pay that sum again to the second mortgagees. The New Zealand Court of Appeal ordered the latter. In the opinion of the Privy Council, a charge by way of equitable assignment had been created over the proceeds of the policy of which the insurers had received notice, and in consequence the decision of the court below ought to be upheld. This is somewhat odd, at least by English standards. Even accepting that the proceeds of the policy amounted to a debt, a charge over a debt merely confers upon the chargee the right to have the debt enforced, "not by action against the debtor, but by proceedings against the party who created the charge to assign the debt": *Burlinson* v. *Hall* (1884) 12 QBD 347, 350, *per* Day J. This is only logical, since the charge was created over the "proceeds" of the policy, that is, such sums as had been *received* by Mr Whittall. Prior to receipt, there were no "proceeds", only the *chose* in action on the policy. See also the discussion in Part X, *infra*. As to whether a charge operates "by way of assignment" at all, see *Tolhurst*, [3.17].

83. [1944] Ch 83 (CA), 104. Lord Greene MR also made similar observations, at 93. Putting the point beyond doubt, both Lord Greene MR and du Parcq LJ (at 90 and 104 respectively) also proceeded to dismiss any possibility of recovery against the deceased employee's wife and children of monies paid to them by the employer on the basis of money had and received, noting that it had been rightly conceded by counsel for the parties that no such common law action could be brought.

84. Counsel for the trustee-in-bankruptcy had conceded, rightly, as Luxmoore LJ noted (*Re Schebsman*, *ibid*, 99), that at common law the employer in that case was *entitled* to make the payments to the widow and child as it had contracted to do.

or implied terms to that effect). Rather, A would be *entitled* to ignore B's demand. If so, how is it that C, as assignee, is in any different position?[85]

Fourth, this is not a case that involves application of the rule whereby notice inoculates the assignee from equities as between the assignor and the debtor arising post-notice (ie, the rule as to equities). Where A has precisely performed, her plea of such performance is *not*, when closely examined, an equity as against her creditor as amounts to a defence in the same manner as, say, a set-off.[86] Rather, the plea of payment (ie, precise performance) is a refutation of the claimant's cause of action,[87] whether that claimant be the creditor-assignor, or his assignee.

In the slightly different context of mitigation and its (ir)relevance to an innocent party's right to affirm a contract following the other party's breach of a condition, Lord Hodson observed in *White & Carter (Councils) Ltd* v. *McGregor* that:[88]

> "[I]t may be unfortunate that the [garage company] have saddled themselves with an unwanted contract causing an apparent waste of time and money . . . [But] there is no equity which can assist the [garage company]. It is trite that equity will not rewrite an improvident contract where there is no disability on either side. There is no duty laid upon a party to a subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to him by the contract. To hold otherwise would be to introduce a novel equitable doctrine that a party was not to be held to his contract unless the court in a given instance thought it reasonable to do so".

Yet this is precisely what the supposed rule as to notice of equitable assignment of a debt is said to do to the debtor's obligation to make payment to the named creditor. Surely that ought not to be the case?

On the analysis in this paper, being notified of an equitable assignment does not *necessarily* affect the manner in which the debtor is to be discharged from her obligation of payment. Notices of assignment are, essentially, unilateral communications or directives. Without assent and consideration,[89] there is nothing within the common law that gives such unilateral directives any coercive force so as to compel the debtor to act in compliance with them. Nor is there anything within Equity pertaining to equitable assignment or of notices *per se* which give them mandatory effect. In so far as the debt arises out of a contractual *chose* in action, the debtor may choose to *ignore* such notices

85. See text at and following n 50.

86. Notwithstanding that "[t]he distinction between payment and set-off was often a very fine one in old days" (*Hewlett* v. *Allen* [1894] AC 383, 389, *per* Lord Herschell LC), as the Court of Appeal held in *Ribblesdale* v. *Forbes* (1916) 140 LT 483, a set-off is not equivalent to payment or accord and satisfaction. See also *Halsbury* (London, 1999), vol 42, [410].

87. The plea of payment goes beyond a mere traverse of the claimant's claim. It is a plea by way of confession and avoidance. If the defendant successfully proves the new fact pleaded—that she has effected payment in precise conformity with the contractual requirements—she destroys or nullifies the claimant's case. "Where there has been payment, the party against whom the claim is brought pleads payment or accord and satisfaction, which in effect alleges that the claim no longer exists": *Halsbury*, (London, 1999), vol 42, [410]. Parke B noted much the same in the course of counsel's submissions in *Kington* v. *Kington* (1843) 11 M & W 233, 234–235; 152 ER 789 ("In the case of a covenant to pay money on a particular day, payment on that day *is a denial of the breach* . . . "). See also *Chambers* v. *Miller* (1862) 13 CB (NS) 125, 134–135; 143 ER 50, 53–54.

88. [1962] AC 413, 445.

89. Or a consideration substitute.

if it suits her to do so.[90] Conversely, the debtor may choose to give such notices legal effect so as to vary her legal obligation, thereby effecting a discharge of her obligation in an alternative manner by paying the assignee. This is explored in the following Part.

VI. DISCHARGE BY PAYING THE EQUITABLE ASSIGNEE

On the analysis in this paper, where a debtor is notified by her creditor[91] that the debt has been equitably assigned to the assignee, should the debtor choose to act upon such notice and effect payment to the assignee, it might seem that the debtor would be exposed to a different risk of double liability—this time, to her original creditor. To allow a creditor, B, to assert that the debtor, A, had failed to precisely perform her contractual obligation to make payment *to B* when she had made payment to the equitable assignee, C, in reliance on the notice of assignment given to her by either B or C (on the authority of B) is contrary to common sense. But immediately, one can see that B must, at the very least, be estopped from being able to make any such claim against A.[92] Yet the effect of such payment may go beyond estoppel.

A. Cases where the contract provides for unilateral variation

The point has already been made that equitable assignment, notice or no, can have no effect on what is required to permit the debtor to be discharged from her obligation under her contract with her creditor. But it is certainly conceivable that the debtor's contract with her creditor may incorporate more than one mode of performance, and such provisions may well be express *or implied*.

90. The case of a lessor's obligation to pay rent raises different concerns. "[Rent] is a thing not merely in action, because it may be granted over": Co Litt 292b. Consequently, "[a]ll rents were regarded as a species of property, which took them out of the category of mere choses in action, and therefore out of the rule that there could be no assignment of a chose in action. A rent reserved on a freehold estate was part of the reversion on that estate. Naturally it could be assigned with that reversion": Sir William Holdsworth, *A History of English Law*, vol VII, 2nd edn (London, 1937), 264–265 (references omitted). The entitlement to be paid rent has therefore long been "assignable" in the sense that it would "run" with the reversion: *Read* v. *Lawnse* (1562) Dy 212b; 73 ER 469. See also Co Litt 151b. That position has been statutorily preserved by the Landlord and Tenant (Covenants) Act 1995, s 3 (which applies to "new tenancies", as defined in s 1(3) of the 1995 Act being, in general, leases granted on or after 1 January 1996), or the Law of Property Act 1925, s 141 (which applies to tenancies other than "new tenancies"). Furthermore, unless the lease provides otherwise, the lessor is usually free to assign the reversion, following which there will be privity of estate between the "new" landlord and the lessee, as a result of which the lessee is bound to pay rent to the new landlord. The position of a tenant who is notified that the reversion has been assigned to a "new" landlord is, therefore, not the same as the position of a debtor who has promised to pay a certain sum on a certain day to her creditor. "[I]f the lessee grants over all his interest, the lessor may have an action of debt against the assignee, with whom there was no contract by deed. But, forasmuch as the rent issues out of the land, the assignee who hath the land and is privy in estate, is debtor in respect to the land . . . So on the other side if the lessor grants over his reversion, now the contract runneth with the estate, and therefore the grantor shall not have any action for debt for rent due after his assignment, but the grantee shall have it, for the privity of contract follows the estate of the land, and it is not annexed to the person, but in respect of the estate . . . ": *Walker's Case* (1587) 3 Co Rep 22a, 22b; 76 ER 676, 678–679.

91. Where the notice is provided by the equitable assignee, its effectiveness must surely be on the basis that the assignee was issuing the notice on behalf of the creditor-assignor.

92. As Sir William Anson observed in 1901: WR Anson, "Assignment of *Choses* in Action" (1901) 17 LQR 90, 94. Certainly, all the elements of promissory estoppel are to hand.

One example of such a contract with a relevant implied term may be found in *Tolhurst* v. *Associated Portland Cement Manufacturers (1900) Ltd*.[93] Although often cited as an example of equitable assignment, the leading speech, delivered by Lord Macnaghten,[94] is plainly based on something else. In that case, the respondent corporation had taken an equitable assignment of the contractual rights enjoyed by the assignor to the sale and delivery of chalk extracted from a mine owned and operated by the appellant obligor. Yet in holding that the appellant was *not* entitled to claim that his contractual obligation of delivery of chalk at the contractually stipulated price and at the minimum quantities specified therein had not terminated with the winding-up of the named counterparty therein, Lord Macnaghten relied on a legal principle that had nothing to do with the doctrine of equitable assignment *per se*.

Taking into consideration the commercial context leading to the formation of the contract,[95] Lord Macnaghten resolved the difficulty as to whether the obligor mine-owner was liable to honour its contractual obligations to sell the assignees such quantities of chalk at such prices as were specified in his contract with the obligee-assignor in the following manner:[96]

> "Something more is comprehended than the particular company [the obligee-assignor] and the individual Tolhurst [the appellant-obligor]. It seems to me that the contract is to be read and construed as if it contained an interpretation clause saying that the expression 'Tolhurst' should include Tolhurst and his heirs, executors, administrators and assigns, owners and occupiers of the Northfleet quarries. And the expression 'the company' should include the company *and its successors and assigns*, owners and occupiers of the Northfleet Cement Works, and that the words 'his' and 'their' should have a corresponding meaning. That, I think, was the plain intention of the parties".

Therefore, the significance of the equitable assignment of the *chose* in action in *Portland Cement* from the original obligee-assignor to the assignee corporation was only to clothe the assignee with the appropriate characteristics as to fall within the scope of the terms of the contract, construed in the expansive manner put forward by the court. The principle of equitable assignment was not relied upon to explain the ultimate decision arrived at by the House of Lords, at least so far as the majority was concerned.

Given the analysis favoured here, highlighting the common law rule as to invariability of a common law obligation once agreed upon and crystallised in the form of contractual terms, the House could not have come to any other conclusion; and that proposition is reinforced by the analysis below as to how the defence of tender may be seen to operate. To explain how there can be, in effect, a variation of the debtor's obligation (as to the party to whom payment or tender of payment is to be made), a *common law* explanation is

93. [1903] AC 414 (hereafter "*Portland Cement*"). For a different reading, see *Tolhurst*, [6.121].

94. With whom the Earl of Halsbury LC reluctantly agreed: [1903] AC 414, 416). Lord Shand was unable to deliver his own speech. However, Lord Macnaghten was deputised to confirm that Lord Shand concurred with him (at 421). Lord Lindley delivered a short speech which adopted a broadly similar approach to that taken by Lord Macnaghten: see esp 423.

95. [1903] AC 414, 419.

96. *Ibid*, 420.

required. And one common law explanation[97] may lie in the court's willingness either to construe express terms in the contract in an expansive manner (to include parties clothed with the character of "assignees", as in *Portland Cement*, even if there is no express mention of them) or, perhaps, to imply such a term, if the facts of the case merit it, if it is not possible to discern facts consistent with assent to the variation having been sought from and granted by the debtor/obligor.[98]

B. Cases without provision for unilateral variation

What of cases with neither express nor implied provision for such seeming "unilateral variation"? In such cases, notice may be relevant as constituting either a unilateral or a bilateral offer of variation of the contract that becomes binding only upon its acceptance by the debtor/obligor.

Where A is indebted to B, it is plain that, should A make payment to B in full compliance with the terms of her contractual debt to B, her contractual obligation will be discharged without any act of assent by B—there is no question of any "grant" of discharge by B (much less B's assignees). But this is not the only mode by which the obligation may be discharged. In a simple case where A is indebted to B on the basis of a contract of loan, it is perfectly conceivable that A might be "released" or "discharged" from her obligation to pay B simply by B's waiver of the term requiring payment. In such cases, the problem often becomes whether B's waiver is binding so as to preclude him from unilaterally resiling from it and insisting that A revert to honouring her obligations as per the original terms of the contract.

It has been said that:[99]

"[a] concession granted by one party (B) to the contract to the other (A) before breach and supported by consideration or in the form of a deed will, subject to any requirement of writing, constitute an effective variation. A similar concession after breach constitutes an accord and satisfaction or release".

So, if the debt is as yet not due because B has not disbursed the loan monies to A, the obligations of the contract of loan between A and B will still be executory. In such a case, A and B may *vary* the terms of their original contract of loan by mutually agreeing not to insist that the other perform its as-yet-executory obligation. But, where B has already performed his obligation to put A in funds, it is still possible for A and B to agree to bring

97. In other cases, where the contract provides that assignment thereof is conditional upon the obtaining of consent from the obligee, one other common law solution would be to disregard the literal language of assignment and view the mechanism for transfer as being a form of novation, where the consent of the obligee to the "assignment" functions as the obligee's assent to a novation of the contractual benefits *and* its burdens to the "assignee". This was how the Court of Appeal viewed the arrangements in *British Gas Trading Ltd* v. *Eastern Electricity Plc* [1996] EWCA Civ 1239 and is discussed in J Kirby, "Assignments and Transfers of Contractual Duties: Integrating Theory and Practice" (2000) 31 VUWLR 317, 342–343.

98. It appears that this was how Scots law comprehended assignment (or assignation as it is also termed in Scots law): WM Gloag, *The Law of Contract: A treatise on the principles of contract in the law of Scotland*, 2nd edn (Edinburgh, 1929), 257. Indeed, such an agreement by an obligor to perform her obligations to such entity as might eventually be nominated as some future date by the obligee might also be taken to be a form of novation, where the agreement of obligor to such novation is obtained in advance, at the time of the formation of the contract, rather than at the time of the substitution of the counterparty: see Kirby (2000) 31 VUWLR 317, 345–348.

99. *Halsbury* (London, 1998), vol 9(1), [1027].

their loan agreement to an end and to release A from her obligations under that agreement so long as A provides fresh consideration to "purchase" B's release of those—ie, a case of discharge by "accord and satisfaction" if the debt is already due, or a case of discharge by variation if it is not. And, if B executes a deed releasing A from the debt, that release is binding on B even absent any consideration from A.[100] If B had assigned the debt to C, given that the entire purpose of assignment would be to entitle B's assignee, C, to demand payment by A, it is difficult to see how such arrangements entered into by B with A can be anything other than for C's benefit and are therefore within the scope of B's limited autonomy in his dealings with the *chose* in action if B had equitably assigned his legal rights to the debt to C at an earlier point in time.

As to what might amount to good consideration for the purposes of discharge by variation or accord and satisfaction, though there are some special concerns that are applicable in relation to a debt obligation,[101] the usual rules apply.[102] Which is to say, in general, and apart from the case of a promise to pay a lesser sum than is already owed under the contract of debt,[103] most other promises when performed will amount to good executory consideration. If we accept the proposition in this paper, that the identity of the creditor to whom the loaned moneys are to be repaid is as much a term of the contract as the time or place when such debt is due for payment and is therefore similarly invariable, surely payment to someone *other* than that creditor must amount to good consideration? Should *that* be the satisfaction required of an accord or variation between the debtor and the creditor so as to release the debtor from having to pay to the creditor, then such paid-for release is legally effective and binding. None of this should be contentious. Even if it were, there is certainly authority to support the proposition that, where a third party is paid by the debtor at the direction of the creditor, such facts may support a pleading of discharge of the original debt obligation by accord and satisfaction.[104] The analogy between that case and this would seem tolerably close.

Where A communicates her acceptance of a bilateral offer of variation by B, or where A makes payment to C, an equitable assignee from B, A has not been discharged from her obligation to make payment to B by precise performance, since A has performed something other than what the contract specified. Only by interpolating the doctrine of waiver[105] may we conclude that A is relieved from her obligation under the terms of the original contract of debt with B by paying C at B's request. In this, the law of assignment (whether in equity or pursuant to statute) adds nothing. However, notice is significant because it constitutes the *offer* of variation that presents the opportunity for A's obligations to be modified.

Thus, notice to A simply constitutes a fresh offer to discharge A from her obligation to pay B, if she agrees to pay C. A's agreement, signified by performing the very act

100. *Preston* v. *Christmas* (1759) 2 Wils KB 86; 95 ER 700.

101. See *Halsbury*, (London, 1998), vol 9(1), [1045].

102. See *Halsbury* (London, 1998), vol 9(1), [1045] (as to accord & satisfaction) and [1023] (as to variation).

103. Which, from *Pinnel's Case* (1602) 5 Co Rep 117a; 77 ER 237, is not good consideration at all.

104. Eg, *Page* v. *Meek* (1862) 32 LJ QB 4, 4–5.

105. Typically in the context of an equitable assignment, for consideration, so as to amount to an accord and satisfaction or a contractual variation and, absent any express or implied term permitting unilateral changes in the identity of the payee.

requested in B's offer,[106] results in the formation of a contract of variation (or accord and satisfaction) that binds A and B; and, under *that* contract, B is bound to insist no longer that A make payment *to B*. Further, should the offer take a unilateral form, A need not communicate her acceptance of such offer, but may accept by simply performing the act requested of her. Last, as all of this occurs while the debtor's original contractual obligation remains outstanding, releasing A from having to pay B is good consideration for A's new obligation to pay C. So we are in perfect conformity with the common law rule as to invariability of contractual obligations, unless there be assent by the obligor supported by good consideration for such variation. It remains open, though, for the debtor to *reject* such an offer, electing to make payment in precise conformity with the terms set out in the contract with her creditor, instead.

C. Cases where the debtor has paid neither her creditor nor the assignee

One final permutation remains. That is, where the debtor has not made any payment at all, to either statutory assignor or assignee; or, where she has indicated that she will not make any payment to either party—ie, where the debtor is in actual or anticipatory breach. Here, the key concept is that of merger.

Where the debtor is in actual breach, the equitable assignee is entitled to launch legal proceedings against the debtor, albeit in the name of the assignor. As we know, the assignee is entitled to name himself as co-claimant alongside the assignor, if the latter wishes to cooperate, or as sole claimant, naming the assignor as co-defendant alongside the debtor, if not. Should the action succeed, judgment will be ordered in favour of the co-claimants or claimant as the case may be. In either case, once judgment is delivered, should the court find that the debt is due and is unpaid, the assignee becomes a judgment creditor, the debtor becomes a judgment debtor, and the *chose* in action, being the legal right to bring a dispute for resolution before a common law court, will have been *merged* with the judgment. There is no longer any concern as to whether the debtor is still obliged to perform precisely according to the terms of her contract of debt, for, as a result of the doctrine of merger, those obligations will have been superseded by her obligation to comply with the terms of the court's judgment.[107]

So much for principle; what of the cases?

VII. THE CASES: A FRESH LOOK

A. A case of (failed) set-off: *Brice* v. *Bannister*

We start with the case most commonly relied upon in support of the "no discharge after notice" rule: *Brice* v. *Bannister*.[108] There, Gough had been contracted to build a boat for Bannister. He assigned sums as would be due from Bannister to Brice, and Bannister was notified of the assignment. Fearful, however, that Gough would not be able to complete

106. B's offer will, typically, be unilateral. But it is open to B to frame his offer of discharge as being bilateral. If so, A's acceptance will have to be communicated to B, typically in the form of a counter-promise to B to make that payment to C, as requested.

107. *Halsbury* (London, 2001), vol 37, [1225].

108. (1878) 3 QBD 569.

construction of the boat if he was not kept in funds, Bannister made payments to Gough *in advance* of any sums accruing due on the boat-building contract. Brice sued Bannister for the sums that were to have been paid on the contract, and succeeded.

The following passages of the judgments handed down in the Court of Appeal are instructive. First, Cotton LJ noted "the advances were in no way sanctioned by the contract".[109] Second, Bramwell LJ restated Brice's case to be: "You [Bannister] had no right to pay in advance; you were bound to wait till the work was finished; you would then owe Gough money, and would then be bound to pay me [Brice]".[110]

If Bannister had no right to make advances under the boat-building contract, as they were not paid by way of gift, they must have been made by way of loan with the intention that they be set off against the sums to be paid under the boat-building contract as those fell due. However, once Gough's right to receive sums from Bannister as would become due and payable under the boat-building contract was assigned to Brice, there would no longer be any mutuality between Gough's obligation to repay any advances received from Bannister and Bannister's obligation to pay Gough as required under the boat-building contract. By virtue of the assignment of the right to bring a claim on the debt (ie, the staged payment for work done in building Bannister's boat), it was no longer up to Gough to make the decision as to whether to bring proceedings on the debt or not. It would then be up to the assignee, ie Brice, to make that decision.[111] There was thus no mutuality between the two sets of debts (as that principle is defined in cases such as *Re Whitehouse & Co*[112] and *Re Paraguassu Steam Tramroad Co; Black & Co's Case*.)[113] Accordingly, it was not open to the defendant debtor to rely on statutory set-off to discharge his obligation to pay under the boat-building contract, the benefit of which had been assigned to the assignee.

Nor could there be any substantive equitable set-off, since the debt owed by Gough arising from the defendant's advance payment did not "impeach" the title of the claimant's demand.[114] There was no "impeachment" since the defendant's advance payment was distinct and separate from the debts arising due under the boat-building contract—they were insufficiently interconnected.[115]

Brice v. *Bannister* ought, therefore, to be read as a case where neither statutory nor equitable set-off was available to the defendant debtor owing to a lack of mutuality and there being insufficient "interconnectedness" between the debts arising out of the advance payments and the sums due on the boat-building contract.

109. *Ibid*, 578

110. *Ibid*, 581.

111. That is to say, Brice would have the equitable title to Gough's *chose* in action (in respect of Bannister's debt, once it became due).

112. (1878) 9 Ch D 595, 597 (*per* Jessel MR).

113. (1872) LR 8 Ch App 254, 261 (*per* Lord Selborne LC, and with whom Sir WM James and Sir G Mellish LJJ concurred).

114. R Derham, *The Law of Set-off*, 3rd edn (Oxford, 2003), [4.02–4.03], drawing on the authority of *Rawson* v. *Samuel* (1841) Cr & Ph 161, 178–180; 41 ER 451, 458–459.

115. See, in particular, *Brice* v. *Bannister* (1878) 3 QBD 569, 581, *per* Bramwell LJ (who ultimately joined Cotton LJ in holding that the defendant was obliged to pay the sum due on the boat-builder's contract to the assignee).

B. A case of accord and satisfaction: *Jones* v. *Farrell*

In *Jones* v. *Farrell*,[116] the firm of Farrell & Griffiths ("Farrell") was contracted to build Moore a factory. Farrell was also indebted to the firm of Jones, Bland & Co ("Jones"). To obtain further credit, Farrell effected an equitable assignment by way of security to Jones by preparing a written order addressed to Moore on the following terms:[117]

> "We desire you [Moore] to accept this order upon you for the sum of £1,000, and pay Messrs. Jones, Bland & Co that sum or any less amount which may from time to time be owing by you to us. . . . ".

The order was left in the hands of Jones, who subsequently presented it to Moore.[118] On receipt, Moore indorsed upon the order as follows: "I promise to pay to Messrs Jones, Bland & Co whatever balance may be due from me to Messrs Farrell & Griffiths".

Lord Cranworth LC accepted that Farrell's "order" to Moore amounted to an, "assignment . . . to the extent of £1,000 of what should, from time to time, be due to them from Moore in respect of the building they were making for him".[119] And Moore undeniably had notice of such assignment, given his indorsement on the very same order.[120] Despite the order and notice, however, Farrell subsequently sued for the balance due from Moore for the work done on Moore's factory building.[121] Jones sought to enjoin Farrell from prosecuting that action at law but, before that application came on for hearing, Moore paid the sum on the account stated to Farrell. In response, Jones amended its bill and prayed that Moore, Farrell, or such of them as the court saw fit, be ordered to pay the money to it.

The amended bill was allowed by Lord Romilly MR at first instance as against Farrell, but not against Moore. But by that time, the partners in Farrell were not good for the money. Jones successfully appealed against the latter part of the decree and it was varied, making Moore, as well as Farrell, responsible to pay the sum over to Jones. In effect, Moore was to pay the sum over again, but this time to Jones. Although this appears to support the "no discharge after notice" rule, initial appearances are deceiving.

(i) The "voluntary" payment in Jones v. *Farrell*

It is possible to view Farrell's "order" to Moore as amounting to an offer to discharge the original liability on the account stated for the building of Moore's factory on an accord and satisfaction by Moore making payment to Jones instead of to Farrell—an offer which was accepted when Moore promised, at Farrell's request, to pay Jones. Therefore, *Jones*

116. (1857) 1 De G & J 208; 44 ER 703.

117. (1857) 1 De G & J 208, 208–209; 44 ER 703, 704.

118. Admittedly, the capacity in which Jones did so is unclear. But it is not legally implausible that Farrell had left these instructions with Jones for conveyance to Moore as his agent.

119. (1857) 1 De G & J 208, 216; 44 ER 703, 706. Knight Bruce LJ (with whom Turner LJ concurred) seems also to have accepted that there was an equitable assignment from Farrell to Jones (at (1857) 1 De G & J 208, 222; 44 ER 703, 709)—though of what, it remains unclear.

120. (1857) 1 De G & J 208, 216 and 220; 44 ER 703, 707 and 708.

121. Found by the architect employed to settle the account to be £472, 8s.

v. *Farrell* is a case of discharge by accord and satisfaction, wherein the satisfaction provided by Moore took executory form.[122]

In what should be taken to be the leading judgment,[123] Knight Bruce LJ reasoned that Moore's payment of the disputed sum to Farrell stood, "in the particular circumstances of this case, upon no better footing merely voluntary".[124] It will also be recalled that Moore had provided a written undertaking that he would pay Jones.[125] Although Lord Cranworth LC had suggested that this *promise* to pay the sum to Jones might have no significant impact on the outcome of the case,[126] this promise to make payment was critical. For Moore's actual payment to Farrell could only be said to be no better than voluntary if the debt for which it was to have been in satisfaction had been *otherwise discharged*. Which is to say, implicit in its treatment of Moore's payment as being no better than voluntary, the majority must have found that the original obligation to pay had *already* been discharged. Until there is satisfaction, there is no discharge. But as to what counts as satisfaction, that is a matter of construction. And, "where it can be shown that what a creditor accepts in satisfaction is merely his debtor's promise, and not the performance of that promise, the original cause of action is discharged from the date when the promise is made".[127]

Once we recognise this, the point made by Knight-Bruce LJ, that Moore's subsequent payment to Farrell was as good as voluntary, becomes perfectly explicable. In taking that view, Knight-Bruce LJ must have meant that the sum paid by Moore to Farrell was not paid under any form of legal obligation to do so. Yet how could this be, given the account stated by the architect appointed to settle the account in favour of Farrell? The reason must have been that Moore's promise to pay Jones, albeit executory, was good and valid satisfaction so as to immediately make effective the accord reached between Moore and Farrell, and thereby discharged that original obligation of payment on the account stated. Hence, Moore's subsequent payment stood, "on no better footing than merely voluntary". This also explains why Jones was permitted to have the decree against Farrell varied, to make both Farrell *and Moore* responsible to pay the sum in question over to Jones. The

122. Though early authority required that consideration to support an effective accord and satisfaction had to be executed, by the time *Jones* came for decision, that position had been abandoned. In *British Russian Gazette and Trade Outlook Ltd* v. *Associated Newspapers Ltd* [1933] 2 KB 616, 645, Scrutton LJ noted that this was accepted by Parke B. in *Good* v. *Cheesman* (1831) 2 B & Ad 328, 335; 109 ER 1165 and by the Court of King's Bench in *Cartwright* v. *Cooke* (1832) 3 B & Ad 701, 703; 110 ER 256, 703.

123. Arguably, the leading judgment was that of Knight Bruce LJ. We may infer that Turner LJ agreed with Knight-Bruce LJ and not with the much longer judgment of Lord Cranworth LC because the final form of the decree ordered that costs at law be in favour of Moore, as proposed by Knight Bruce LJ ((1857) 1 De G & J 208, 222; 44 ER 703, 709), instead of the order that there be no order of costs as proposed by Lord Cranworth LC (at (1857) 1 De G & J 221, 216; 44 ER 703, 708). The point is made barely more obviously, perhaps, in the report of this decision at (1857) 3 Jur (NS) 751: at p 753, it reports that Knight Bruce LJ's impression was that, "Mr Moore ought to have the costs at law to be set off, subject to what the Lord Chancellor and the Lord Justice may say. My impression is, that Mr Moore should have the costs at law; but that must depend upon their opinion". The report then immediately records as follows: "Sir GJ Turner LJ concurred—*Decree varied accordingly; costs at law agreed at 5l*".

124. (1857) 1 De G & J 208, 219; 44 ER 703, 709.

125. "Mr Moore not only had notice of the assignment, but he had (if that were necessary, which I do not say it was) given a written undertaking that he would act upon that notice": (1857) 1 De G & J 208, 220; 44 ER 703, 708 (*per* Lord Cranworth LC).

126. *Ibid.*

127. *Morris* v. *Baron* [1918] AC 1, 35, *per* Lord Atkinson, citing in support the cases of *Sibree* v. *Tripp* (1846) 15 M & W 23; 153 ER 745; *Hall* v. *Flockton* (1851) 16 QB 1039; 117 ER 1179; and *Evans* v. *Powis* (1847) 1 Ex 601; 154 ER 255.

reason why Moore had to "pay again" was not because he had paid Farrell following notice of the assignment; and this conclusion is reinforced when we take into account the subject matter of the assignment in *Jones* v. *Farrell*.

(ii) The subject matter of the assignment in Jones v. *Farrell*

The Court of Appeal was unanimous in finding that Farrell had effected an equitable assignment to Jones. But of what precisely? Restating the steps in reasoning set out above, we have the following.

First, by promising to pay Jones, Moore had accepted the offer of discharge of the original debt obligation by means of an accord and satisfaction. That accord and satisfaction took immediate effect once Moore communicated his acceptance of Farrell's offer, thereby promising Farrell that he would, indeed, pay Jones. Second, the original debt obligation having been discharged by accord and satisfaction, the subject matter of the assignment to Jones could not have been Farrell's original right to receive payment of the balance of the account stated in relation to Farrell's work done in building Moore's factory. Given that the accord and satisfaction *themselves* constitute an enforceable and binding contract, following discharge of the original obligation of payment, the only subject matter capable of being assigned to Jones would have been Farrell's right to insist that Moore *make payment to Jones*. Third, this right having then been effectively assigned to Jones, Jones was entitled to bring these proceedings against Moore on the basis of his equitable interest over *Farrell's* common law right to give Moore a discharge over his obligation *to make payment to Jones* on the contractual promises forming the accord and satisfaction which discharged the original payment obligation. Given the above, the fact of Moore's having made actual payment to Farrell was immaterial, notice of assignment or no. That actual payment was voluntary and unrelated to any prior legal relationship Moore might have had *vis-à-vis* Farrell.

C. Cases where there was no payment to the creditor at all

The cases of *Durham Brothers* v. *Robertson*,[128] *Walter & Sullivan Ltd* v. *J Murphy & Sons Ltd,*[129] *William Brandt's Sons & Co* v. *Dunlop Rubber Co Ltd*,[130] *Yates* v. *Terry*[131] and *Ex p Nichols*[132] are also often cited as authority for the "no discharge after notice" rule. Yet in none of these cases was the court concerned with the question of the application of the doctrine of discharge by precise performance.

In *Durham Brothers* v. *Robertson*,[133] the Court of Appeal held that an equitable assignee[134] was not entitled to bring legal proceedings against the debtor without joining the assignor where the assignment had been effected by way of security only. Consequently, the assignee's action against the debtor failed, since the amount due from the

128. [1898] 1 QB 765 (CA).
129. [1955] 2 QB 584 (CA).
130. [1905] AC 454.
131. [1902] 1 KB 527 (CA).
132. (1883) 22 Ch D 782 (CA).
133. [1898] 1 QB 527 (CA).
134. Because the assignment was conditional and not absolute: *ibid*, 769, 773 and 774.

equitable assignor to the assignee could not be ascertained.[135] Further, an account taken in an action brought between the assignee and the debtor would not have bound the assignor.[136] The court was *not* asked whether the debtor had been discharged from its obligation to effect payment by precise performance on account of its having paid the assignor, for nothing of the sort was in issue: in fact, the debtor disputed (ultimately unsuccessfully) whether *any* sum was due to the assignor at all. So *Durham Brothers* cannot be taken as authority in support of the "no discharge after notice" rule.

Walter & Sullivan Ltd v. *J Murphy & Sons Ltd*[137] was concerned with the converse. There, the Court of Appeal was asked whether an equitable assignor was entitled to bring an action against the defendants for sums due for services rendered, without having to join the assignees to whom the *chose* in action against the defendants had been equitably assigned in part as security. In the court below, the assignor's action was stayed, pending joinder of the assignees. On appeal to the Court of Appeal, Parker LJ said:[138]

"In the present case . . . it is the assignor who is seeking to recover, and in his own right, and it is strongly urged that he is entitled to do so without joining the assignee. We think that that is an impossible contention. The whole object of the notice to the debtor is to protect the assignee. After receipt of that notice the debtor pays the assignor at his peril".

The assertion of the "no discharge after notice" rule in *Walter & Sullivan* was merely to justify the court's conclusion that the court below had been right to stay the proceedings, pending joinder (a decision which the Court of Appeal upheld). *Walter & Sullivan* does not, therefore, provide independent authority for the "no discharge after notice" rule, and on the analysis in this paper, it rests upon a false premise. The result arrived at by the court is, nevertheless, entirely explicable: since, after effecting the assignment, the assignor is only entitled to *manage* his legal rights to the debt for the benefit of the assignee, the answer to the question whether the assignor was entitled to bring the action in its own name, without joining the assignee, is plainly "no". That, however, is not the same as holding that the assignor had had no entitlement to bring the action at all, as would have been the case had a complete stranger attempted to bring an action on the debt. By upholding the stay of proceedings ordered in the court below, the appellate court must have implicitly accepted that the assignor *was* entitled to bring the action, but could only proceed jointly with the assignee as co-claimant. In consequence, the assignor was not entitled to *judgment* on the matter in its sole name:

"It was further said that once the plaintiffs in the present proceedings recovered judgment the debt would merge in the judgment debt, and that accordingly, the defendants could not thereafter be sued by Hall & Co Ld [the equitable assignees]. The court, however, will not give judgment for the plaintiffs when there is an admitted interest outstanding in Hall & Co Ld, and unless and until the authority to pay Hall & Co Ld is withdrawn, or Hall & Co Ld are joined in the proceedings, judgment cannot be given".[139]

Therefore, *Walter & Sullivan* was concerned with when the court would allow judgment to be entered where a debt obligation had not been performed, and where the equitable

135. *Ibid.*
136. *Ibid.*
137. [1955] 2 QB 584 (CA).
138. *Ibid*, 588.
139. *Ibid*, 589.

assignee had not been joined in the proceedings. It is not sound authority in support of the "no discharge after notice" rule at all.

The same is true of *William Brandt's Sons & Co* v. *Dunlop Rubber Co*.[140] In that case, the House of Lords held that the debt owed by the Dunlop Rubber Company had been equitably assigned, and due notice had been given.[141] Lord Macnaghten observed that nothing more could be required: "Dunlop disregard that notice, and pay the *wrong people*. They must pay the money over again, and pay it to the right person".[142] Because of the error of its employees, the Dunlop Rubber Company had paid not the assignees, William Brandt's Sons & Co, as they had been directed to do via the notice of assignment, but had paid another entity altogether, Kleinwort & Co, being the assignees of a prior, unrelated debt. Obviously, a payment to neither the creditor nor the designated assignee of that debt should be disregarded, therefore requiring the payor to pay again. So the question whether a debtor was entitled to claim that it had discharged its obligation to effect payment by having precisely performed its obligation under the contract never arose.

As for *Yates* v. *Terry*,[143] the issue before the court was one as to competing priorities. As executor of a company in liquidation, the defendant (A) had been found to be liable to pay B the sum of £50 1s 6d, for salary and services. A was then served with a garnishee summons in relation to a judgment for the sum of £37 18s 7d that X had obtained against B in separate proceedings. Next, A was given notice that B had assigned to the claimant (C) the sum of £16 17s 8d due to him from the defendant. Finally, A received a second garnishee summons in relation to a judgment for the sum of £21 4s 7d that Y had obtained against B in yet another set of proceedings. Obviously, A's indebtedness to B was insufficient to satisfy all of these competing claims. The issue was how priority was to be accorded to each of them. A's response had been to pay the entire sum of £50 1s 6d into court. In consequence, the first garnishee summons was satisfied in full while the second garnishee summons was satisfied in part, leaving the assignee with nothing. In effect, A had ignored the fact that he had received notice of the assignment to C prior to his having been served the second garnishee summons.

The Court of Appeal held that A ought only to have paid £37 18s 4d into court, in compliance with the first garnishee order. Having done that, as Romer LJ noted,[144] the right to the balance would still remain "in the person who originally had the right to the whole" (ie, in B); such right was capable of assignment, it was assigned, and notice was given *prior* to the defendant's receipt of the second garnishee summons. It followed that:

> "there was a balance left in the hands of the defendant [A] bound by the assignment, and it was his duty not to let the subsequent garnishee order pass without notice that the fund was not really that of the judgment debtor, so that it could be attached, but that of an assignee. By breach of that obligation the assignee [had] lost his money, and according to well-known principles the defendant [was] liable for that loss".[145]

140. [1905] AC 454.
141. *Ibid*, 460.
142. *Ibid*, 461 (emphasis added).
143. [1902] 1 KB 527 (CA).
144. *Ibid*, 530–531.
145. *Ibid*, 531.

Like *Durham* and *William Brandt's*, the quite distinct issue as to the effect of precise performance by virtue of actual payment to the original creditor never arose. In *Yates*, the defendant debtor, A, never effected any payment to his creditor, B. Instead, *Yates* merely applied the rule that a garnishee summons only attaches such property of the judgment debtor as is beneficially owned by the judgment debtor.

Ex p Nichols[146] was concerned with the competing priorities between the claims of a trustee-in-bankruptcy and an equitable assignee. In *Ex p Nichols*, a partnership became lessees of the Alexandra Palace. The lessees entered into a verbal contract with the Great Northern Railway Company, on whose rail lines patrons of the Palace would travel. The contract provided that the railway company was to collect from such patrons both the railway fare and the price of admission to the Palace, and that it should pay to the lessees a stated proportion of the gross sums so received with an account to be rendered monthly. On 21 March 1882, the lessees executed a deed of assignment in favour of Younger & Co, assigning all sums "now due and owing and hereafter to become due and owing" from the railway company on trust to secure payment of debts owed by the lessors to the assignees. Notice of the assignment was given to the railway company on 22 March 1882. But on 10 August 1882 the lessees submitted a liquidation petition.

On 11 August 1882, Nichols was appointed as receiver and manager of the lessees' property and business. Nichols gave notice of his appointment to the railway company on 12 August 1882 and requested that it forward the lessees' share of the gross receipts of railway fare and admission fees collected by the railway company from 10 August 1882. Nichols continued to operate the Alexandra Palace until 31 August 1882, and the lessees' share of the gross receipts from 10 August until 31 August 1882 came up to £587 3s 8d. Meanwhile, on 8 September 1882, Nichols was appointed by the partnership creditors as trustee in the liquidation of the partnership. The question then arose whether the assignees had a better claim to this sum than did Nichols as trustee. The Court of Appeal held that Nichols had the better claim.

The *ratio* of the case was simply that, "by no assignment or charge can a bankrupt give a good title against his trustee to profits of his business accruing after the commencement of the bankruptcy. The bankrupt cannot as against the trustee assign these profits; they are not his property".[147] Jessel MR was of the view that, on these facts, the business had been carried out by Nichols after the filing of the petition "*ex relatione* by the trustee for the benefit of the bankrupts' estate" and there was, therefore, no analogy to be drawn to "to cases in which the property of a bankrupt has been validly charged by him before his bankruptcy".[148] This is highly significant.

The lessors were made bankrupt pursuant to the Bankruptcy Act 1869.[149] Section 12 of that Act provided:[150]

"Where a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt except in manner directed by this Act. *But this section shall*

146. (1883) 22 Ch D 782, 787. This case is re-examined in Part VII.
147. *Ibid*, 786.
148. *Ibid.*
149. 32 & 33 Vict c 71. The Bankruptcy Act 1883, 46 & 47 Vict c 52, only came into force on 1 January 1884.
150. Emphasis added.

not affect the power of any creditor holding a security upon the property of the bankrupt to realize or otherwise deal with such security in the same manner as he would have been entitled to realize or deal with the same if this section had not been passed".

The issue before the Court of Appeal in *Ex p Nichols* was, therefore, whether the assignees were "creditors holding a security upon the property of the bankrupt" so as to fall within the ambit of the exclusion set out in the italicised portion of s 12 reproduced above. If they were, they would have been entitled to take steps to enforce their security, notwithstanding the vesting of the bankrupt's incorporeal property in the form of *choses* in action in the trustee-in-bankruptcy,[151] which, by the doctrine of relation-back,[152] would presumably have occurred on 10 August 1882 when the lessees filed their liquidation petition.[153]

It was critical in this case that the "gross sums" in issue could have arisen only in so far as Nichols had continued to carry on the business of the Alexandra Palace. Had he not done so, the railway company would have been unable to charge its passengers the gross sum for both transport and admission to the Palace, for there would have been no such passengers (or, at best, precious few). So, within the context of bankruptcy, this was *not* a case of an assignment by way of security of *debts* accruing due *in futuro* (as to which the principle of *Tailby* v. *Official Receiver*[154] would apply) but something else altogether. As Lord Esher MR observed in *Wilmot* v. *Alton*:[155]

"The case of *Ex parte Nichols, In re Jones*, seems to me to shew that the right to payments under a contract which are not debts at the date of the bankruptcy, but will only become due in future if certain conditions are fulfilled, is not a right which can be transferred so as to deprive the trustee in bankruptcy of his claim under the contract".

So *Ex p Nichols* should be understood as setting out a special rule for the purposes of determining whether a bankrupt's incorporeal property such as a contractual *chose* in action had passed to his trustee-in-bankruptcy, or whether that property formed part of the security given to a creditor of the bankrupt which would fall within the proviso to s 12 of the 1869 Act.[156] Reliance on this case as authority for any broader proposition is, perhaps, unwise.

The cases discussed above will hardly exhaust all of the decisions where the principle has received seeming judicial approval. But by this stage of the argument it should be clear that the theoretical underpinnings of the "no discharge after notice" rule appear somewhat weak, and the usual English authorities[157] are, on closer examination, inconclusive. Thus, the way seems open to acknowledge that there may well be no such rule, at least in relation to equitable assignments of debts. But that raises the question: would a debtor faced with notice of a *statutory* assignment be treated any differently?

151. *Ibid*, s 22.
152. *Ibid*, s 11.
153. *Ibid*, s 6(4); the report gives no indication of any other act of bankruptcy.
154. (1888) 13 App Cas 523.
155. [1897] 1 QB 17 (CA), 21. See also Rigby LJ's judgment at 24.
156. See also *In re Davis & Co* (1888) 22 QBD 193 (CA), 199; *In re Collins* [1925] 1 Ch 556, 561–563; *King* v. *Michael Faraday and Partners Ltd* [1939] 2 KB 753, 760; *In re Tout & Finch Ltd* [1954] 1 WLR 178, 186–187; *In re Green* [1979] 1 WLR 1211, 1221.
157. There is also the Privy Council decision of *Colonial Mutual Insurance* v. *ANZ Banking Group* [1995] 1 WLR 1140; but that opinion is not binding, and for the reasons set out at n 82, *supra*, it is hoped it will not be followed.

VIII. "NO DISCHARGE AFTER NOTICE OF A STATUTORY ASSIGNMENT"

As Dr Tolhurst suggests, it seems that most notices to debtors do not specify the precise mode of assignment that has occurred, nor will it occur to many debtors to make such inquiry. He therefore observes that a difference in treatment between equitable assignment and statutory assignment will create an unworkable (or at least unhelpful) distinction between them.[158] It will be argued below that no such distinction ought to be made.

A. An assignor "drops out of the picture" following a statutory assignment—or does he?

The "unworkable distinction" that Dr Tolhurst warns us of arises from the view that, "as there is no [statutory] assignment until notice and upon notice the assignor drops out of the picture as the legal right is assigned. *Thus, only the assignee can provide the obligor with a discharge*".[159] In contrast, commencing from the fifth edition of *Treitel on Contract*,[160] it has been observed that, "Where the assignment is statutory, the debtor ceases, as soon as notice has been given, to be liable to the assignor . . . ".[161]

For Dr Tolhurst, it appears that, unlike the analysis of equitable assignment of a debt outlined above, where the debtor may be discharged if he makes payment to the assignor (as a matter of discharge by performance) *or* to the assignee (typically, absent any express or implied term permitting unilateral variation of the debtor's obligations, as a matter of accord and satisfaction reached on the basis of an agreement between the debtor and her

158. *Tolhurst*, [8.06].

159. *Ibid.*

160. GH Treitel, *The Law of Contract*, 5th edn (London, 1979), 506. Authority for this proposition is found in *Cottage Club Estates Ltd* v. *Woodside Estates (Amersham) Ltd* [1928] QB 463, 467. From the 7th edition onwards, reference is also made to *The Halcyon The Great* [1984] 1 Lloyd's Rep 283, 289. *Quaere* whether *The Halcyon The Great* simply stands for the proposition that the benefit of an arbitration clause is capable of being assigned, as was held to be the case in *Shayler* v. *Woolf* [1946] Ch 320 and *Aspell* v. *Seymour* [1929] WN 152.

161. Accepting that *Cottage Club Estates Ltd* v. *Woodside Estates Co (Amersham) Ltd* [1928] 2 KB 463 involved a statutory assignment (following *Burlinson* v. *Hall* (1884) 12 QBD 347; *Tancred* v. *Delagoa Bay and East Africa Ry Co* (1889) 23 QBD 239; *Hughes* v. *Pump House Hotel Co Ltd* [1902] 2 KB 190 (CA)), the dispute in that case arose over what was due to be paid by a property developer for work done by a firm of builders. The issue was whether the statutory assignment (by way of mortgage) by the builders to their bank of the sums due under the contract precluded them from referring the matter to arbitration to seek an award for such sum. First, Wright J held that the contracting parties' right to refer their dispute to arbitration was "personal" and therefore non-assignable. Therefore, the builders were entitled to refer the matter to arbitration (at 466). However, Wright J was of the view that the arbitral award in favour of the builders was bad on its face in light of the statutory assignment to the builders' bankers and thus refused to uphold it. Instead, Wright J upheld the alternative award by the arbitrator, that the builders were not entitled to recover anything (at 468). The authoritativeness of the decision, at least on the first point, is suspect: *cf Aspell* v. *Seymour* [1929] WN 152 (CA) and *Shayler* v. *Woolf* [1946] 1 Ch 323 (CA). In both cases, it was pointed out that the Arbitration Act 1889, s 4 was predicated on the assignability of an arbitration clause (*Aspel*, 152, *per* Lord Hanworth MR; and *Shayler*, 323 and 324, *per* Lord Greene MR and Morton LJ respectively). In *Shayler*, 324, Somervell LJ also held that an arbitration clause was *not* so "personal" as to be non-assignable. Lastly, there are *dicta* in *The Halcyon The Great* [1984] 1 Lloyd's Rep 283, 289, *per* Staughton J, to the effect that, "the better view is that upon a legal [ie, statutory] assignment the assignor loses the right to arbitrate and the assignee acquires it". In any event, *Cottage Estates* did not require Wright J to consider what might have been the case had the building contractors been paid what was due, and to consider whether such payment in precise performance would have discharged the developers from their contractual payment obligations.

creditor), the same may not be true of a debt which has been statutorily assigned because the "transfer" effected by the statutory assignment causes the assignor to "drop out of the picture". But a closer reading of the provisions of the Act suggests, perhaps, something rather different.

B. What does a statutory assignment "transfer"?

The Law of Property Act 1925, s 136(1) provides:[162]

"Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice —

(a) the *legal right* to such debt or thing in action:

(b) all legal and other *remedies* for the same; and

(c) the power to *give* a good discharge for the same without the concurrence of the assignor:

Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice—

(a) that the assignment is disputed by the assignor or any person claiming under him; or

(b) of any other opposing or conflicting claim to such debt or thing in action;

he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act 1925."

As Lord Esher MR explained[163] in relation to the Judicature Act 1873, s 25(6) (the legislative precursor to s 136(1)), when the assignor's "legal right" to the debt is statutorily assigned to the assignee, the assignor will have taken from him the right to sue for it, which is the very thing the assignee gains. So, where the debt assigned becomes due and owing, the statutory assignee is entitled to sue the debtor on that unpaid debt in his own name. If he succeeds, the court will issue *judgment* against the defaulting *defendant* (the debtor), in favour of the successful *claimant*[164] (who may only be the assignee, this being a statutory assignment).[165] Accordingly, the statutory assignee's cause of action against the debtor would then be merged with the judgment. Just as would have been the case where an equitable assignee obtains judgment against the debtor, where the statutory assignee brings a claim and obtains judgment against the debtor, the statutory assignee/claimant becomes a judgment creditor, the debtor/defendant becomes a judgment debtor, and the cause of action is merged with the judgment of the court.[166] Consequently, the cause of action is extinguished, and in its place we find new rights created by the

162. Emphasis added.

163. *Read* v. *Brown* (1888) 22 QBD 128, 132 (emphasis added), *per* Lord Esher, MR, with whom Fry LJ was in complete agreement. The remaining judge, Lopes LJ, expressed his agreement with Lord Esher's construction of s 25(6). See also *Bovis Lend Lease Ltd* v. *Saillard Fuller & Partners* (2001) 77 Const LR 134, [113].

164. *Supra*, n 6.

165. In the case of an equitable assignment, where the assignor is willing to cooperate in the bringing of an action against the defaulting debtor, the assignor and the assignee would be co-claimants. If the assignor is unwilling to cooperate, then the assignee would be the sole claimant.

166. See Part VI(C), *supra*.

judgment. None of this, however, touches upon the quite distinct question, as to what it is that the debtor must *do* in order to find herself quit of her contractual obligations.

As with equitable assignments of a debt,[167] a distinction remains between having the *right to sue* for payment of the debt, and the question of *what* amounts to "payment of the debt". This distinction is preserved by the statute: that what is "transferred" to the assignee is the assignor's "legal *right* to such debt or thing in action".[168] What the assignor would have been legally entitled to insist that the debtor *do*, however, depends on the construction of the contract which gives rise to that right, and nothing in the statute provides that statutory assignment is to effect any variation of such right.[169]

Read v. *Brown* tells us that in a statutory assignment the assignee is released from the need to join the assignor as a party to the action because he has had transferred to him the *legal right* to bring an action on the debt (or thing in action) that has been assigned: he may bring the action solely in his own name.[170] However, just as with an equitable assignment, a statutory assignee may have transferred to it only what the assignor *has* at the time of assignment. So, where A is indebted to B in the sum of £1,000, such sum to be due to be repaid on 1 June 2009, if B effects a statutory assignment of that debt to C on 15 May 2009, and A is given written notice of that assignment on the same day, all that is "transferred" to C at this point is B's "legal rights" in the debt.

As with "transfers" in equitable assignment,[171] the "transfer" of a statutory assignor's legal rights cannot modify what it is that the debtor has bound herself to do in order to be quit of her contractual obligations. Although the transfer effected by a statutory assignment is seemingly effected without the need to create any fresh equitable interest in C,[172] however it be made, all that is "transferred" to C is B's *legal rights* to the debt. So, in effecting a transfer of those rights, there is no logical necessity that requires any modification to the content of those rights, to what it is that the obligor under those arrangements is legally bound *to do*. Unless, on its true construction, the debt contains terms whereby the debtor is *obliged* to make payment to, not just B, but, in the alternative, other parties such as B's assigns or nominees, all C is *entitled* to, is to insist that A make

167. See Part V(B)(ii), *supra*.

168. This distinction may have been overlooked by the Court of Appeal in *Knill* v. *Prowse* (1884) 33 WR 163. In that case, pursuant to the Judicature Act 1873, s 25(6), Knill was statutorily assigned Benham's right to rents payable on premises that had been leased to Prowse. Notice was duly given to Prowse, and Prowse paid Knill the monthly rent that was due for the next seven months. Benham then asked Prowse to cease such payments. Accordingly, for the months of February and March 1884, Prowse paid the rent for the leased premises to Benham instead. Knill sued Prowse for the rents in arrear for those two months, and succeeded. In coming to its decision, the court merely stated that there was an "absolute assignment by Benham to the plaintiff [Knill]". Had the court been given the opportunity to consider precisely what it was that had been assigned to Knill, given the wording of the statute, it is submitted that the outcome ought to have been quite otherwise. It should be noted, however, that, had Knill been assigned the *reversion* of the lease, Prowse's payment of rent to Benham would certainly *not* have discharged his obligation to pay Knill rent on the lease, as such obligation would have "run with the land": see n 90, *supra.*

169. Given the analysis above as to how equitable assignment and notice thereof may not effect such modification of common law obligations, and on the view that statutory assignment merely provides a more straightforward procedure for assignment but does not affect its substance (see, eg, *Re Westerton* [1919] 2 Ch 104, 133; *Marchant* v. *Morton, Down & Co* [1901] 2 KB 829, 832; *Smith*, [10.06]; *Marshall*, 161 and 166), this must, *a fortiori*, follow.

170. *Read* v. *Brown* (1888) 22 QBD 128.

171. See Parts V(A) and (B), *supra*.

172. There is a long standing debate over this: see WW Cook, "The alienability of *choses* in action" (1916) 29 Harv L Rev 816; S Williston, "Is the right of an assignee of a *chose* in action legal or equitable?" (1916) 30 Harv L Rev 99.

payment of the £1,000 due and owing *to B*. Just as is the case with an equitable assignment, although statutory assignment addresses the question to whom a debtor is liable, it has nothing to say as to what the debtor is liable to do.[173]

C. Is a debtor discharged from her obligation under the contract if she pays the statutory assignor?

Coming back to the *chose* in action in debt, which is the subject matter of this paper, what is striking about the provisions in the 1925 Act is that, although they refer to a statutorily sanctioned "transfer" of the assignor's legal rights (s 136(1)(a)) and remedies (s 136(1)(b)) in relation to the debt so assigned, as well as to the assignor's ability to *give* a good discharge for the debt (s 136(1)(c)), there is nothing in the express words of the provision that bars discharge of the obligation of debt by precise performance of that obligation in accordance with the express terms of the contract of debt as originally agreed between the debtor and creditor. This is unsurprising, given the similarity in phrasing with the words used by Simon Brown LJ in his judgment in *Deposit Protection Board* v. *Dalia*,[174] discussed above.[175]

There, Simon Brown LJ said that the assignor would not be able to *give* a good discharge of the debt following an equitable assignment of that debt. But, just as neither the issue of discharge by performance nor the availability of the defence of tender have anything to do with the question of *giving* a discharge at the discretion of an equitable assignor,[176] so too with a statutory assignment. On reflection, it should also be obvious that neither precise performance nor tender has anything to do with the *transfer* of the assignor's rights and remedies.

Precise performance effects discharge automatically, as a matter of law, whereas tender of payment pertains to a defence available to the debtor, such defence being premised on an obligation on the creditor to cooperate. Thus, although s 136(1) statutorily "transfers" the assignor's legal right to bring an action on the debt, such legal remedies as would have been available to the assignor pursuant to such an action, and the assignor's power to give a good discharge (to the extent that it is now the assignee who may do so) as well as the assignor's rights and remedies *vis-à-vis* the debtor (and therefore it is the assignee *to whom* the debtor is *liable*), it is silent on the question of performance of the contractual obligation of payment to the assignor in precise conformity with the contract's terms where that payment is accepted by the creditor. Just as it is with equitable assignment,

173. One might think that this conclusion is contradicted by the result in *Flower* v. *Lyme Regis Corp* [1921] 1 KB 488 (CA). Close reading of the judgment suggests that the point made above as to the effect of discharge by performance in the face of notice of a statutory assignment was not brought before the court. It seems that the sum paid to the statutory assignor in that case was *not* a payment in precise fulfilment of what was due, but a negotiated sum in settlement of a *dispute* as to what was due under the contract. That is, it was a payment in exchange for the *grant* of a good discharge. So it would seem that *Flower* was simply a case that applied the principle that the power to *give* a good discharge is also transferred to the statutory assignee (see the Judicature Act 1873, s 25(6), or the Law of Property Act 1925, s 136(1), as would now be the case).

174. [1994] 2 AC 367 (CA).

175. At text to n 15, *supra*.

176. The arguments for this being fully set out in Part V, *supra*.

s 136(1) leaves utterly unchanged what *amounts* to precise performance by the debtor.[177] And, even if s 136(1) permits an assignee to bring legal proceedings against the debtor to *demand* that she perform her contractual obligation, the *content* of that obligation remains unchanged (unless the contractual terms provide otherwise). So, if she should have made payment to her creditor *prior* to such demand, although the assignee would be *entitled* to sue the debtor in his own name, his suit must surely fail—the *chose* in action would have been discharged.

D. Is a debtor discharged from her obligation under the contract if she pays the statutory assignee?

As with the case of an equitable assignment, we need to distinguish between two types of case. One, where the debtor has chosen to make payment to the statutory assignee, and has done so. And the other, where the debtor did not make any payment at all when the debt became due, but is then compelled to make payment on account of judgment having been handed down against her.

Where the contract terms provide only that the debtor is to make payment to a particular named creditor and, on a true construction of the contract, *only* to that named entity, payment to the statutory assignee cannot amount to precise performance so as to effect a discharge of the debtor's payment obligation. But, as with the analysis above,[178] apart from the ameliorative effects of estoppel, the problem may be circumvented should the courts be willing to interpret the contract in an expansive manner instead (as occurred in *Portland Cement*).[179] Alternatively, it is possible to construe notices of equitable assignment as constituting either unilateral or bilateral offers of variation. If the debtor is found to have accepted such offers, she would be released from her original obligation to make payment to the original creditor, and will be obliged to make payment to the "assignee" instead. It is suggested that these two forms of analysis are just as applicable to a case where a debtor elects to make payment to a statutory assignee.

The alternative case, though, is where the debtor elects not to make any payment at all, to either statutory assignor or assignee—ie, where the debtor is in breach. Here, as with the analysis above in relation to equitable assignments,[180] the key concept is that of merger. And the analysis there applies with equal force to the case of a statutory assignee who has successfully obtained judgment in its favour.

It therefore seems that the "no discharge after notice" rule is inapplicable to all assignments of contractual debts, whether statutory or equitable. This may seem to be commercially unpalatable. But, were matters otherwise, as the next Part will show, equally

177. The point is even clearer where some other legal thing in action has been statutorily assigned. Revisiting our earlier example (n 33, *supra*) of the painter, J, who has contracted to paint K's house white: assuming for the sake of argument that such an obligation is not "too personal" to be capable of being assigned, if K were to "statutorily assign" the benefit of that contract to L, the owner of a house down the road, what would that entail? It could not mean that L would be entitled, as statutory assignee, to insist that J paint *his* house instead of K's. Such an assignment could only ever entail an assignment of K's right to bring legal proceedings against J, in so far as J's performance had fallen short of what he had agreed to do—which was to paint K's house. This appears to be consistent with the decision in *Offer-Hoar* v. *Larkstore Ltd* [2006] EWCA Civ 1079; [2006] 1 WLR 2926, [41], *per* Mummery LJ, with whom Rix LJ and Peter Smith J agreed.

178. Part VI(A) and (B).

179. [1903] AC 414; *supra*, text to and following n 91.

180. Part VI(C).

unpalatable conclusions will have to be drawn regarding who should receive tender of payment. Awkward distinctions might then be required as to when contractual *burdens* might be assigned.

IX. TENDER OF PERFORMANCE AND THE ASSIGNMENT OF BURDENS

If it is right to say that notice of assignment has the effect of precluding the operation of the doctrine of discharge by performance despite the debtor's actual payment of the debt to her creditor, what if payment could only have been effected with the cooperation of the creditor, as is the usual case where payment is to be made in cash? There does not appear to be any reported English authority on the point,[181] but it would seem to follow that, in such cases, tender of payment to the creditor, following notice of the assignment, ought not to operate as a good defence; tender ought to be made to the assignee instead. This, if correct, creates some difficulties of its own.

Anson's Law of Contract states:[182]

"Tender is attempted performance; and the word is applied to attempted performance of two kinds, dissimilar in their results. It is applied to a performance of a promise to do something, and of a promise to pay something. In each case the performance is prevented by the act of the party for whose benefit it is to take place".

The difference in treatment relates to the effect of non-acceptance of a tender of payment, as opposed to a tender of acts. In the latter, the defence operates to excuse further performance of the tendered act. In the former, however, the payor must remain ready to pay the tendered sum, and must pay that sum into court to take advantage of the defence. But that need not detain us. For present purposes, the important point is that the underlying principle for the defence of tender of an act or of payment is the same.

As Rolfe B observed in *Startup* v. *MacDonald*:[183]

"[I]n every contract by which a party binds himself to deliver goods, or pay money, to another, he in fact engages to do an act which he cannot completely perform without the concurrence of the party to whom the delivery or the payment is to be made. Without acceptance on the part of him who is to receive, the act of him who is to deliver or to pay, can amount only to a tender. But the law considers a party who has entered into a contract to deliver goods or pay money to another, *as having substantially, performed it,* if he has tendered the goods or money to the party to whom the delivery or payment was to be made, provided only that the tender has been made under such circumstances that the party to whom it has been made, has had a reasonable opportunity of examining the goods, or the money, tendered, in order to ascertain that the thing tendered really was what it purported to be".

There is more. In the same case, Parke B observed that:[184]

181. At [6.120], *Tolhurst* cites the case of *Bay of Plenty Electricity Ltd* v. *Natural Gas Corporation Energy Ltd* [2002] 1 NZLR 173, 181 as authority for the point that the assignee must be subject to the same obligation to accept tender of performance as the assignor would have done, had there been no assignment.

182. J Beatson, *Anson's Law of Contract*, 28th edn (Oxford, 2002), 508.

183. (1843) 6 M & G 593, 610; 134 ER 1029, 1036 (emphasis added), *per* Rolfe B, with whom Gurney B concurred.

184. (1843) 6 M & G 593, 624; 134 ER 1029, 1042 (emphasis added).

"[I]f he [the debtor or obligor] is to pay a sum of money, he must tender it a sufficient time before midnight for the party to whom the tender is made, to receive and count; or if he is to deliver goods, he must tender them so as to allow sufficient time for examination and receipt. This done, he has, so far as he could, paid or delivered within the time; and *it is by the fault of the other* only, that the payment or delivery is not complete".

So the creditor/obligee is at *fault* for wrongfully refusing to accept a conforming tender. But how may this be, unless we accept that the creditor/obligee is under an *obligation* to cooperate with the debtor/obligor in so far as such cooperation is required to enable the debtor/obligor to complete the performance of her obligations?

Indeed, the principle of *Mackay* v. *Dick*[185] would seem to mandate the implication of such a duty to cooperate. As Lord Uthwatt noted in *McCarrick* v. *Liverpool Corp*:[186]

"in any contract whatever its nature, it is a general rule that, if the thing agreed to be done cannot effectually be done unless both parties concur in it, the proper construction of the contract requires the implication of a term that each agrees to do all that is necessary to be done on his part for the carrying out of that thing".

That being so, would the proposition that a debtor may only *tender* to the assignee, following notice of an assignment, not also involve the proposition that there had been an assignment of the creditor/obligee's obligation to cooperate with the debtor?

To say that the combined effect of assignment and notice gives rise to a rule of "no discharge after notice" would be also to deny the possibility that a debtor might *tender* such performance to the creditor.[187] But this seems to sit awkwardly with the proposition that the defence of tender is premised on the *obligation* of the creditor/obligee to accept a tender of performance which is in conformity with the terms of the contract. And few matters about the doctrine of assignment are as clear as the rule that only *benefits* associated with personalty but not *burdens* may be assigned.[188] That *burden* to co-operate with the debtor, in so far as the debtor's precise performance requires such cooperation, cannot be "assigned" to the assignee, at least in the sense that the assignor is to be

185. (1881) 6 App Cas 251 (HL, on appeal from a judgment of the First Division of the Court of Session, Scotland). See *ibid*, 263, *per* Lord Blackburn: "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect". The principle is not limited to written contracts but is of general application: *MacCarrick* v. *Liverpool Corp* [1947] 1 AC 219, 231.

186. *Ibid*, 231. Admittedly, such implication arises in fact and not in law. Eg, in *Luxor (Eastbourne) Ltd* v. *Cooper* [1941] AC 108, 148–149, although Lord Wright recognised the principle in *Mackay* v. *Dick*, he was not prepared to make such an implication on the facts of that case.

187. Dr Tolhurst has also recognised that there is a problem with the assignment analysis if it does not also permit the transfer of the "burden" that an assignee "must accept a tender of conforming goods or services": *Tolhurst*, [6.120]. To resolve this difficulty, Dr Tolhurst relies and expands on the maxim that an assignee must "take the burdens with the benefits", and builds on both the conditional and the pure principle of benefit and burden set out by Megarry V-C in *Tito* v. *Waddell* [1977] Ch 106, 289–311; *Tolhurst*, [6.103–6.135]. But saying that in some cases the burden of a contract might pass by assignment explains nothing: Anon, "Obligations of the Assignee of a Bilateral Contract" (1929) 42 Harv L Rev 941, 943. In any event, the proposition in this paper is that such elaboration is unnecessary because the problem arises only if it is true that assignment has the effect of preventing discharge by precise performance to the original obligee, in disregard of prior notice of assignment to an assignee.

188. *Linden Gardens Trust Ltd* v. *Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 103; *Nokes* v. *Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, 1019–1020. The point was also accepted by Lord Templeman in *Rhone* v. *Stephens (Executrix)* [1994] 2 AC 310, 316.

released from his obligations to the debtor (for that would require novation or, at the very least, assent by the debtor to release the creditor from his obligation to accept a conforming tender of payment), or for the assignee to become contractually obliged to the debtor (for that would require privity of contract). So continued adherence to the perceived status quo carries within it a significant risk that may be just as commercially repugnant, if not more so. Nor does there appear to be much judicial appetite for such an extension.[189]

On the analysis in this paper, if the debtor elects to pay her original creditor despite having been notified of the notice, an assignee may lose the advantage of the *chose* in action the benefit of which has been assigned. This seems commercially shocking. But, if matters were otherwise, logic dictates that the obligation of cooperation which underlies the doctrine of tender must also have passed from the creditor-assignor to the assignee. That represents a weakening of the rule that the burdens of a contract may not be assigned. And, if this rule is weakened in relation to the obligation of cooperation, where do we stop?

X. THE ASSIGNEE'S POSITION FOLLOWING PAYMENT TO THE ASSIGNOR

If it were true that payment by A to B discharges A's debt once that payment is accepted by B, regardless of A's having been notified of the equitable assignment to C, there would not be room for C to bring any direct action against A on that *chose* in action, since the right to bring legal proceedings against A for *non-payment* of the debt would have been extinguished by force of the common law.[190] But can C bring proceedings against B? Certainly he may.

On the one hand, there is some judicial authority supporting the proposition that in such circumstances, B is *personally liable* to account to C for the sums received. This is plainly set out by Lindley LJ, delivering the judgment of the Court of Appeal in *Re Patrick, Bills*

189. Leaving aside the position as between landlords and tenants (as to which see n 90, *supra*), at common law, when realty is transferred, no covenant may run with the land so as to bind the covenantor's successors in title. And even in Equity, the rule in *Tulk* v. *Moxhay* (1848) 3 Ph 774; 41 ER 1143, read in light of *Haywood* v. *Brunswick Permanent Benefit Building Soc* (1881) 8 QBD 403, only applies to permit *restrictive* covenants to run with the land. When given the opportunity to extend that rule to permit positive covenants to run with the land, the House of Lords refused to do so: *Rhone* v. *Stephens (Executrix)* [1994] 2 AC 310, 318, *per* Lord Templeman. Mindful of the dramatic upheaval in settled practice were it to up-end the settled understanding of the limits of the *Tulk* v. *Moxhay* doctrine (as to which, see J Snape, "The Burden of Positive Covenants—*Rhone* v. *Stephens (Executrix)*" [1994] Conv 477, 481), the House of Lords desisted, preferring to leave the matter to Parliament (see *Rhone* v. *Stephens* [1994] 2 AC 310, 321). Further, Parliament may have already filled the gap *vis-à-vis* the "assignment" of burdens with the enactment of the Contracts (Rights of Third Parties) Act 1999.

190. In his judgment in *Tolhurst* v. *Associated Portland Cement Manufacturers* [1902] 2 KB 660 (CA), 668, Lord Collins MR said, "The right [to assign the benefit of a contract in equity] seems . . . to be based on the equitable principle that it would be against conscience on the part of the person on whom the obligation lay to discharge it to the original contractee [*sic*] after he had notice that the latter had assigned the benefit of it to another person". The point was not taken by the House of Lords; but, accepting that there is such an equitable principle so as to entitle the assignee to seek an injunction to *enjoin* the debtor from tendering payment to the creditor-assignor, wherein lies the jurisdiction of the court to disregard the operation of the common law rules as to discharge by performance in circumstances where no such injunction has been granted prior to payment?

v. *Tatham*.[191] In that case, a settlor created a trust in favour of certain beneficiaries over certain specialty debts secured by bills of sale that were owed to him. The voluntary deed of settlement provided *inter alia* that the principal sums owed, all interest due or to become due thereon, and all the estate and interest of the settlor therein was to vest in the trustees for the benefit of the settlor's wife, her sisters, as well as the settlor's own sister. This was, in the circumstances, an equitable assignment of the debts to the trustees by way of trust and not absolutely. The settlor died intestate without delivering any of the bills of sale to the trustees and before any of these debts were repaid: the sums due were ultimately paid to the settlor's legal personal representative.

The questions before the Court of Appeal were: (i) whether the debts had been completely assigned by the settlement such that the trustees, as assignees, would have been able to recover those debts from the various debtors without any further assistance from the settlor; and (ii) whether the settlor (in the form of his personal representative) having himself received payment of the sums owed (no notice of the assignment ever having been given to the debtors) was liable to make good to the trustees of the settlement the amount received by him.[192]

Having found that there had been a complete assignment of the debts within the principle of *Kekewich* v. *Manning*,[193] as to (ii), Lindley LJ said:[194]

"If once the conclusion is arrived at that the assignment of the debts was complete, and not incomplete, it follows that the settlor, having got in the debts himself, is accountable to the trustees of the settlement for the amount he so got in. This was decided in *Fortescue* v. *Barnett*[195]".

This would be a perfectly adequate remedy so long as the settlor's estate was solvent. But what if it was not? Could the trustees assert a proprietary remedy in the alternative? Lindley LJ seems to have thought not:[196]

"There is no question here of following trust money, and the right of the plaintiffs is only to rank as creditors against the estate of the deceased for the amount of the debts he got in . . . ".

Despite this, it is submitted that a reasonable case may be made in support of the proposition that the assignees in such a case may also have a proprietary remedy. First, Lindley LJ's refusal to recognise the possibility of a proprietary remedy in *Re Patrick* is clearly *obiter*: since the estate was solvent (there is no indication that it was not), the issue did not really arise. Second, although the receipt of the monies owed by the settlor's personal representative would, on the analysis in this paper, discharge the *chose* in action, it is difficult to see how those moneys in the personal representative's hands would ever not amount to the traceable substitute of the *chose* in action (the specialty debts) that had been subject to the trustees' equitable interest arising from the assignment. It follows, therefore, that the trustees in *Re Patrick* would have been entitled to assert an equitable interest to such traceable substitute, had it been necessary to do so. Last, if it were

191. [1890] 1 Ch 82.
192. *Ibid*, 86.
193. (1851) 1 De G M & G 176; 42 ER 519.
194. [1890] 1 Ch 82, 87.
195. (1834) 3 My & K 36, 40.
196. [1890] 1 Ch 82, 87.

necessary to provide authority for the proposition, one might consider the order made by the Court of Appeal in *Gorringe* v. *Irwell India Rubber and Gutta Percha Works*.[197]

In that case, Heilbut, Symons & Co ("Heilbut") supplied goods on account to the Irwell India Rubber and Gutta Percha Works Ltd ("Irwell"). £660 14s 11d was due on the account but Irwell was unable to make payment in full. To meet the balance, Irwell equitably assigned to Heilbut £425 which was due to Irwell from M/s Cayzer, Irvine & Co ("Cayzer") for goods supplied to them by Irwell. Cayzer was notified of the equitable assignment to Heilbut on 5 February 1885. However, prior to receipt of that notice, a petition to wind Irwell up was presented on 2 February 1885. Cayzer paid the £425 into a bank account held jointly by Irwell's official liquidator and Heilbut. The issue therefore arose whether the £425 due from Cayzer formed part of the assets of Irwell so as to be distributed by the official liquidator, or whether the equitable assignment to Heilbut was effective in ring-fencing the sum payable by Cayzer despite Cayzer's having been notified of the equitable assignment only after the petition had been filed. Although notice of the assignment was given after the commencement of Irwell's winding-up, the Court of Appeal granted a declaration that Heilbut was entitled to the sum paid into the joint account.

Leaving aside the point for which *Gorringe* is usually cited,[198] it is plain that the order, as made, accepted that Heilbut, as equitable assignee, *did* have a beneficial interest in the traceable substitute of the *chose* in action that had been assigned to it. Thus, Heilbut was entitled to the sum represented by the bank account in the names of the official liquidator and the equitable assignee in *Gorringe.* Even though payment in *Gorringe* was not made *to* the original creditor, the point remains—the equitable assignee retains an equitable right so as to entitle it to some form of judicial assistance to recover the traceable substitute for the *chose* in action discharged by the debtor's payment in precise conformity with the terms of her contract.[199]

XI. CONCLUSION

Most commentators seem to accept that, although all contractual obligations may be automatically discharged by precise performance and such obligations are invariable at common law unless the contract provides otherwise,[200] the contractual performance promised by an obligor may nevertheless be "varied" through assignment, and notice thereof, such that discharge of such contractual performance might occur only by performance "to" the assignee as opposed to performance in accordance with the original terms of the contract. With regard to employment contracts, the courts have taken a sceptical view of unilaterally imposed variations to contractual obligations, requiring that

197. (1887) LR 34 Ch D 128 (CA).

198. As to the immateriality of notice to the debtor where one is only concerned with "completeness" of an equitable assignment as between assignor and assignee.

199. Nor was *Gorringe* an isolated instance; see, eg, *Bence* v. *Shearman* [1898] 2 Ch 582, 587 and 588; *Re Patrick* [1891] 1 Ch 82, 87; and *Barclays Bank Plc* v. *Willowbrook International Ltd and Anor* [1987] 1 FTLR 386 (CA), 391. See also the discussion of *L'Estrange* v. *L'Estrange* (1850) 13 Beav 281; 51 ER 108, at n 32 *supra*.

200. Following *Re Schebsman* [1944] Ch 83, Equity made no rule otherwise.

the power to do so must be expressed clearly and unequivocally.[201] Yet outside that context, and particularly in relation to debt obligations, the shoe seems to be on the other foot. Hitherto, this has been "explained" by saying simply that notice of an equitable assignment will have such an effect. But by what principled reason might that be so?

Reverting to our earlier example of a creditor, L Ltd, English-incorporated and domiciled, who assigns to an assignee X, with operations only in Baghdad, a debt owed to it by D:[202] as noted previously, it is plain that if D is expected to seek X out and to make payment to X, D's obligations will have become much more onerous than they had been at the time of contract. So, to the extent that the identity of the payee in a contract of debt functions as shorthand to indicate part of the parameters of what is required to be done to discharge the debt, such delimitation *is* of benefit to the debtor and is not to be cast away without some *quid pro quo*.[203]

The need to re-examine the source of the supposed rule that warns against D's paying C, *despite* the notice of equitable assignment to X, for fear of its not discharging the debt obligation, is not merely an exercise in intellectual tidying-up.[204] It goes to the root of what it means to have a contractual obligation, to the certainty that, once one binds oneself to a certain level of performance, there is no fear of any unilateral imposition of any additional burden.[205] Further, the status quo introduces instabilities of its own as it may require the dismantling of the rule that burdens are not to be assigned.[206] If so, we open yet another can of worms.

Equitable or statutory[207] assignees of debt[208] ought to be more conscious as to the fragility of their interest in that debt: that, where the contract of debt fails to make express provision for unilateral variation of the identity of the party to whom the debtor is to effect payment, the ability of assignees to insist unilaterally that the debtor make such payment to them instead of to the creditor will depend on the willingness of the court to imply the requisite terms. It may well be that in general the courts will be willing to do so, as may be observed most obviously in *Portland Cement*.[209] But there is no authority for the proposition that such a term is to be implied in law in *all* contracts of debt. Any such implication, if it occurs, appears to be an implication of fact. Much will therefore depend on the individual facts of the case, and there *will* be cases where the facts go against such implication. Indeed, the inclusion of an express anti-assignment clause within the contract

201. See, eg, *Wandsworth London Borough Council* v. *Da Silva* [1998] IRLR 193 (CA), [31]; *Newbold* v. *Leicester City Council* [1999] ICR 1182, 1189; [1999] EWCA Civ 3115, [26].

202. *Supra*, at text to n 51.

203. This example also explains how it is that payment *to* the assignee effects a discharge of the original debt obligation. Even if notional, the additional trouble involved in making payment to the assignee may be seen to amount to a *detriment* incurred by the debtor *at the creditor's request*.

204. Worthy as that, in itself, is.

205. Certainly, if a debtor expressly agrees to the possibility of an assignment of that debt, it might plausibly be argued that such agreement impliedly encapsulates agreement to such potential enhancement of the burdens of payment. But that is not the sort of case we are concerned with here. Our concern is with those cases where the possibility of assignment has *not* been expressly addressed at the time of contract between debtor and creditor.

206. See Part IX, *supra*.

207. That is, assignees who take pursuant to the Law of Property Act 1925, s 136(1).

208. Or, for that matter, any legal *chose* in action arising out of contract, for the arguments in this paper apply equally, in large part, to them.

209. [1903] AC 414.

might well amount to a matter that would have such an effect.[210] Other examples might be found in the cases where the courts have construed the *choses* in action in question to be "personal" to the assignor, and therefore "incapable" of assignment.[211] Alternatively, assignees will have to rely on the willingness of the courts to construe the notice of assignment as constituting some form of offer of variation which, upon its acceptance by the debtor, binds her to perform in accordance with the terms of the "new" contract.[212] On the other side of the transaction, a debtor who has been "notified" that her debt has been assigned to a stranger no longer bears the risk of investigating the veracity of such communications,[213] so long as she performs precisely in accordance with her contractual obligations by making payment to her contractually stipulated creditor.[214]

Accordingly, assignees of debts may be exposed to more legal risk than they might have reckoned. Future acquisitions of such debt may need to be re-priced to reflect such heightened risk. But the risk is not, perhaps, so large as to derail the wheels of commerce. The system has worked thus far, and one might reasonably assume that courts will be minded to take as broad a view of the matter as they have done in *Portland Cement*, if given the opportunity. Further, the creditor-assignor is not just personally liable to account for such receipts to his assignee:[215] there is a strong case for the proposition that the assignee also has a proprietary remedy as against him, so long as the creditor-assignor retains some traceable substitute for the *chose* in action of sufficient value.[216] Assignees thus have some protection against insolvency risk.[217] Exceptionally, where the debtor and the creditor-assignor have actively colluded to effect payment to the creditor-assignor to defraud the assignee, accessory liability might be imposed on the debtor on the basis of knowing assistance.[218]

Whether equitable or statutory, we should pay much closer attention to what the cases and the statutes say (and to what they do not say). Although both forms of assignment may be said to involve a "transfer" of the creditor-assignor's legal rights to the debt, the legal logic of transfer precludes modification of the debtor's obligation. In the case of equitable assignment, the impossibility of such modification is reinforced by the limitations of the equitable mechanisms that underlie it. It should thus be clear that to conclude that the

210. *Cf Linden Gardens Trust Ltd* v. *Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 103. But see CH Tham, "The Nature of Equitable Assignment and Anti-Assignment Clauses", ch 12 of J Neyers, R Bronaugh and SAG Pitel (eds), *Exploring Contract Law* (Oxford, 2009).

211. On the analysis in this paper, a more transparent description of the reasoning underlying such labels would be that these are cases where, absent any assent by the obligor as to the variation, the court is unable to find any express term permitting unilateral variation of the contract and where it is not satisfied as to the merits of implying such a term.

212. No doubt, unless such offer is taken to emanate from the creditor-assignor *and* the assignees (either through some form of agency or through the joint-promisee doctrine), prior to the enactment of the Contracts (Rights of Third Parties) Act 1999, it would have been difficult for the assignee to bring proceedings against the debtor directly. Nowadays, it may also be possible to view such an assignee as being a third party who is "purported" to have been benefited by such promises, and who may therefore rely on the 1999 Act to bring a direct action against the debtor.

213. The dilemma faced by a debtor who is given notice of an assignment at the eleventh hour before the debt is due to be paid is therefore defused.

214. It is a different matter if she fails to do even that and breaches the contract.

215. *Supra*, at text to nn 191–195.

216. *Supra*, at text to nn 195–198.

217. Though not the risk of the assignor-creditor's absconding after receipt of payment from the debtor.

218. *Supra*, at n 77.

debtor, following assignment, is now *obliged* to make payment to the assignee, more is required: perhaps, either an express or implied term providing for such unilateral variation of the debtor's contractual obligation, or a finding of some form of assent by the debtor to such modification to her contractual obligation. The rule of "no discharge after notice" ought, therefore, be consigned to history.