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Equitable fraud and double liability of a debtor following notice of equitable assignment of the debt

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

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CH Tham[*]

'Equitable fraud' is broader in its conception than fraud at common law. Notwithstanding ambiguities as to its precise boundaries, equitable fraud can help explain why a debtor who tenders payment to his or her creditor, despite having received notice that the money debt had been equitably assigned to an assignee, may be ordered to make payment to the assignee if the creditor-assignor were to abscond with the sums tendered, leaving the assignee out of pocket. Such liability can be explained on grounds of the debtor having committed a form of equitable fraud by dishonestly assisting in the creditor-assignor's breach of his or her duties (as an equitable assignee) to the assignee. Equitable fraud can also result in liability in the debtor at common law, given the court's power to bar a defendant to an action at law from pleading common law defences which would otherwise shield the defendant from liability at law. This article will sketch out how equitable fraud may be employed in these ways to render a debtor to be liable to pay a second time, and point out some of the implications of such reasoning.

I Introduction

Chancery's jurisdiction as a court of conscience[1] extended to matters of 'fraud, accident and trust',[2] and its conception of 'equitable fraud' is a flexible one. Although fraud was also cognisable in courts of common law,[3] equitable fraud was (and remains) a broader category than fraud at common law, not least because equitable fraud encompasses 'actual', and 'constructive' fraud.[4]

* Professor of Law, School of Law, Singapore Management University.

1 'The Office of the Chancellor is to correct Men's Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be': *The Earl of Oxford's Case in Chancery* (1615) 1 Rep Ch 1, 6–7; 21 ER 485, 486 (Lord Ellesmere LC).

2 3 Bl Comm 431, following 4 Co Inst 84.

3 Justice Story and AE Randall, *Commentaries on Equity Jurisprudence* (3rd English edn, Sweet and Maxwell 1920) § 60. See also 3 Bl Comm 431–32.

4 Actionable fraud at common law (by way of the tort of deceit) required the plaintiff to prove fraud on the part of the defendant. As Lord Herschell explained in Derry v Peek (1889) 14 App Cas 337 (HL) 374:

> [I]n order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. ... Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial.

Liability for fraud at common law under the tort of deceit would therefore require findings of fact as to the tortfeasor's knowledge of the falsity of his representation, his lack of belief in their truth, or as to his reckless indifference in their truth or falsity. There is, accordingly, no room for the equitable conception of 'constructive' knowledge in connection with the tort of deceit.

In *Earl of Chesterfield v Janssen*, Lord Hardwicke LC identified five categories of forms of 'fraud', the last of which is plainly very broad:

> There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting: weakness on one side, usury on the other, or extortion or advantage taken of that weakness.[5]

Notwithstanding later developments,[6] the position today would appear to be fairly similar. Thus, the editors of *Snell's Equity* tell us that where an equitable remedy is sought against a respondent ('A'),

> [i]n equity ... the term 'fraud' has seemingly been extended beyond actual fraud to include, by a fiction, conduct that involves no deceit or dishonesty on A's part. The equitable concept of fraud does not stop at 'moral fraud in the ordinary sense' but also takes account of 'any breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience.' The term 'constructive fraud' is used to differentiate conduct falling within that broader definition from 'actual fraud' that also amounts to deceit at common law. The adverb 'constructive' is a euphemism and it reveals the fiction inherent in extending a concept such as fraud, which has a well-settled meaning, to situations that are clearly beyond the reach of that well-settled meaning.[7]

Given the wide range of cases which make up the category 'equitable fraud', the precise boundaries of equitable fraud remain unclear. This may be a necessary consequence of its function as a court of conscience.[8] In correspondence with Lord Kames, Lord Hardwicke LC[9] observed as follows:

> Fraud is infinite, and were a court of equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive.[10]

Similar sentiments were expressed by Lord Redesdale, Lord High Chancellor of Ireland, in *Webb v Rorke*:

> Cases cannot always be found to serve as direct authority for subsequent cases; but if a case arises of fraud, or presumption of fraud, to which even no principle already established can be applied, a new principle must be established to meet the fraud, as

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5 (1750) 2 Ves Sen 125, 157; 28 ER 82, 101, with whom the other members of the court agreed. For discussion of the various limbs of 'equitable fraud' identified by Lord Hardwicke LC, see Warren Swain, 'Reshaping Contractual Unfairness in England 1670–1900' (2014) 35 JLH 120, 126–31.

6 These developments are traced in Swain (n 5).

7 John McGhee and others, *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) para 8-002 (references omitted). See also *Nocton v Lord Ashburton* [1914] AC 932 (HL) 954 (Viscount Haldane LC).

8 For accounts of the historical development of the notion of conscience in the Court of Chancery, see Mike Macnair, 'Equity and Conscience' (2007) 27 OJLS 659; and, at greater length and detail, Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate 2010).

9 Lord Hardwicke was Lord Chancellor between 1737–56.

10 The letter is dated 30 June 1759 and is reproduced in full in Lord Alexander Fraser Tytler Woodhouselee, *Memoirs of the Life and Writings of the Honourable Henry Home of Kames* (2nd edn, T Cadell and W Davies 1814) vol I, 329–45. The portion reproduced above is found at 341. The letter is also reproduced in Joseph Parkes, *A History of the Court of Chancery* (Longman 1828) 508.

> the principles on which former cases have been decided, have been from time from time established [sic], as fraud contrived new devices; for the possibility will always exist, that human ingenuity, in contriving fraud, will go beyond any cases which have before occurred.[11]

Human ingenuity not having become any less, these views remain relevant, even today. Although it may be that 'what the conscience of equity became was simply the sum of all the individual cases which the Chancellor decided',[12] as Hudson reminds us, reasoning by reference to decided caselaw is part and parcel of the common law legal method:

> the term 'conscience' ... does not need an *a priori* definition from the courts any more than the word 'reasonable' requires such a dictionary-style definition from the common law courts. Rather, its meaning is to be derived from an analysis of the cases in which it has been used and by juristic discussion about what it should mean in the future.[13]

Thus, as Millett J observed in *Lonrho plc v Fayed (No 2)*:

> Equity must retain what has been called its 'inherent flexibility and capacity to adjust to new situations by reference to mainsprings of the equitable jurisdiction' ... All courts of justice proceed by analogy, but a court of equity must never be deterred by the absence of a precise analogy, provided that the principle invoked is sound.[14]

But even so, it seems that to be held liable for 'equitable fraud', one must be shown to *know* (or at least be deemed to know), of the circumstances that relate to the said fraud. To put the point in another way, if the court's equitable jurisdiction is founded on its origins as a court to 'correct Men's Consciences for Frauds',[15] how might one's conscience be so affected as to bring one within the court's equitable jurisdiction absent knowledge of facts pertaining to the fraud in question?

The requirement of knowledge runs as an undercurrent to Lord Hardwicke LC's five classes of fraud in *Earl of Chesterfield*; indeed, it is explicitly set out in respect of the third that

> [a] 3[r]d kind of fraud is, which may be presumed from the circumstances and conditions of the parties contracting: and this goes farther than the rule of law; which is that it must be proved, not presumed; but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another: which knowingly to do is equally against the conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as the other.[16]

To modern eyes, this would seem to be a reference to the equitable doctrine of constructive notice.

In this article, it will be suggested that the broad conception of 'equitable fraud' outlined above, a conception which encompasses the doctrine of

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11 (1806) 2 Sch & Lef 661 (Ch) 666.
12 Klinck (n 8) 273 (and see also Macnair, 'Equity and Conscience' (n 8) 680, who concludes similarly).
13 Alastair Hudson, 'Conscience as the Organising Concept of Equity' (2016) 2 CJCCL 261, 264.
14 [1989] 1 WLR 1, 9; [1992] 4 All ER 961 (Ch) 969.
15 *The Earl of Oxford's Case in Chancery* (n 1).
16 *Earl of Chesterfield* (n 5) Ves Sen 155–56; ER 100.

constructive notice, may usefully be employed to explain a conundrum that bedevils understanding of the law of equitable assignment. The conundrum arises on facts like these:

> Suppose B buys goods on credit from A for a price of £8,000. In a separate transaction, B also borrows £10,000 from A. They agree that the loan shall be repayable once A gives B a written demand. A then equitably assigns the benefit of the loan to C, and B receives notice of the assignment, orally.
>
> Some time later, although C had not authorized her to do so, A serves a written demand of payment to B, and B tenders payment to A forthwith. A accepts the tender of payment. But A is subsequently made a bankrupt, and A's trustee-in-bankruptcy brings proceedings against B to recover the £8,000 for the goods purchased by B.

On these facts, as equitable assignee of the debt arising from the loan, C may rely on the *Vandepitte* procedure[17] and commence proceedings against A and B as codefendants to recover the £10,000.[18] In such proceedings, given the authority of cases like *Jones v Farrell*,[19] or *Brice v Bannister*,[20] it is very likely that B will be ordered to pay £10,000 to C. In effect, B will have to 'pay again'.[21] But why should a debtor like B be liable to be ordered to pay the assignee, C, a second time?

This article provides two possible answers, both resting on Lord Hardwicke LC's characterisation of equitable fraud sketched out in *Earl of Chesterfield*. First, it is arguable that a debtor such as B, above, would have committed an 'equitable fraud' on the assignee, C, in having dishonestly assisted the creditor-assignor, A, in breaching her equitable duties to C as assignor. Alternatively, it is arguable that B will have perpetrated an 'equitable fraud' on C by tendering payment to A, despite knowing of the assignment to C: consequently, B might be barred from pleading the defence of payment were he or she to be sued at law on the debt. As the discussion below will show, such bars can arise within the court's equitable or common law

17 The procedure is named after *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70 (PC). In *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148, [2007] 1 Lloyd's Rep 495 [99], Rix LJ explicitly accepted that this procedure may also be applied in cases of equitable assignment. Recourse to the *Vandepitte* procedure would not be required, however, if A had also previously granted C a duly-executed power of attorney to bring proceedings at law in her name against B.

18 As Waller LJ explained in *Barbados Trust Co Ltd* (n 17) [45]: 'The [*Vandepitte*] procedure is "procedure" and it simply provides a short cut to prevent litigation under which [the assignor] could be forced to sue followed by an action under which [the assignor] sues.' Thus, the *Vandepitte* procedure (n 17) effects a joinder of proceedings and not of parties. In essence, where a common law chose in action (such as a contractual debt) has been equitably assigned, and where the assignor is not willing to reduce the chose in action into possession by commencing an action at law against the obligor without order of court, the assignee may join their suit in equity against the assignor to compel the assignor to commence the action at law against the obligor, with that action at law, naming the assignor and the obligor as codefendants in the conjoined proceedings. Such joinder of proceedings in equity to proceedings at common law in order that both may be heard in a single court would have been impossible in the period immediately prior to the administrative fusion fashioned by the Supreme Court of Judicature Act 1873 (UK) (Judicature Act 1873).

19 (1857) 1 De G & J 208, 44 ER 703.

20 (1878) 3 QBD 569 (CA).

21 The question whether B might rely on his or her payment to A if A's trustee-in-bankruptcy were to bring an action for the £8,000 will be discussed in Section VIII.

jurisdiction, even as a matter of present-day English law.[22] This article will then conclude by identifying some of the implications if these alternative explanations for a debtor's 'double-liability' are accepted.

II Equitable fraud and equitable liability for dishonest assistance

Chitty on Contracts tells us that when a debt has been equitably assigned and the debtor has received notice of the assignment, 'from the debtor's perspective it seems that, if the debtor ignores [the] notice and pays the assignor, he is not discharged'.[23] This statement does not distinguish between equitable assignments and statutory assignments which are compliant with section 136(1) of the Law of Property Act 1925 (UK) (although all three of the cases cited in support are cases of equitable assignments).[24] Consequently, the language in *Chitty on Contracts* could be taken to suggest that, when the debtor receives notice that his or her debt to his or her lender of an equitable assignment[25] of a debt[26] the obligation undertaken by the debtor changes: prior to receiving notice, the debtor, B, is duty-bound to tender payment to his or her creditor, A; but after receiving notice, B is duty-bound to tender payment to A's assignee, C, in place of A.

That would presuppose that A has the power to unilaterally modify the terms of the contractual debt owed by B, even absent any express provision to such effect, a view which, I believe, is problematic.[27] In essence, it violates a basic principle of liberty[28] — that the terms of an obligation, once voluntarily

22 Though this article will trace the historical antecedents of the present law, it is not a legal history: as explained in the main text, its goal is the more limited one, to explain how the law (as it currently stands) gives rise to the seeming 'double-liability' of the debtor, B, in cases like the example set out above. To achieve this end, it will concentrate on primary sources of English law, namely, the decided cases and statutes. It will not, therefore, delve in any detail into secondary sources such as academic treatises and commentaries, although references will be made to them by way of illustration.

23 Joseph Chitty, *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) para 19-021. No distinction is made in the text between equitable and statutory assignments. However, all of the cases which are cited in support of the proposition are equitable, and not statutory, assignments.

24 Namely, *Jones* (n 19); *Brice* (n 20); and *Deposit Protection Board v Barclays Bank plc* [1994] 2 AC 367 (HL).

25 This article will leave aside discussion of statutory assignments which comply with the requirements set out in Law of Property Act 1925 (UK), s 136(1). That section provides for additional statutorily mandated effects whenever an absolute equitable assignment not made by way of charge is made in written form, duly signed by the assignor, and where written notice of the same is given to the obligor, and requires slightly different treatment which I have set out elsewhere: see CH Tham, *Understanding the Law of Assignment* (CUP 2019) ch 13.

26 That is, a 'chose' or thing in action: being personalty which can only be claimed or enforced — ie, reduced into possession — by action, 'and not by taking physical possession': *Torkington v Magee* [1902] 2 KB 427 (KB) 430, revd [1903] 1 KB 644 (CA), but not on this point.

27 Chee Ho Tham, 'Notice of Assignment and Discharge by Performance' [2010] LMCLQ 38, especially 41–42. Much of the discussion in that paper has been expanded, reworked, and updated in Tham, *Understanding the Law of Assignment* (n 25) ch 11.

28 See John Stuart Mill, 'On Liberty' in John Gray and GW Smith (eds), *JS Mill: On Liberty*

assumed, may not be unilaterally changed by the obligee without the assent of the obligor.

The concern as to liberty underpins an important principle of contract law:[29] the terms of a contract following its formation may not be varied without the assent of all contracting parties.[30] This is why assent of all obligors with outstanding obligations under a contract must be obtained before that contract may be novated.[31] Hence, if the debt contract between A and B were to be novated to C, B would have to assent to A being substituted by C as the creditor to whom B would thereafter be indebted.

And yet, 'the conventional view is that an equitable assignment, like a statutory assignment, involves a transfer of rights from the assignor to the assignee'.[32] Such 'transfer' would seemingly also entail a substitution of the assignee (C) in place of the assignor (A) as obligee to whom the obligor/debtor (B) is duty-bound. But, notwithstanding the obvious commercial convenience of allowing intangible personalty such as debts to be 'transferred' by the creditor without necessarily having to obtain the debtor's assent,[33] why should the common law on novation be subverted by 'equitable assignment'? For that matter, is it subverted by this equitable doctrine, at all? Is this a case where, 'whenever there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity shall prevail'?[34] But how can that be, if both common law and equity

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in Focus (Routledge 1991) 23, especially 30–31, 116; and Isaiah Berlin, 'John Stuart Mill and the Ends of Life' in John Gray and GW Smith (eds), *JS Mill: On Liberty in Focus* (Routledge 1991) 131, especially 135.

29 The same concern as to invariability also exists in equity in the law of trusts. Although it is open to the beneficiaries of an express trust to bring the trust to an end by virtue of the doctrine in *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282, that is a power to bring the trust to an end, not a power to vary the trust such that it continues in operation, albeit on changed terms; and in respect of such trusts,

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

Chapman v Chapman [1954] AC 429 (HL) 446 (Lord Simonds LC).

There is, accordingly, no general power to allow for variations of the terms of an express trust save where the settlor had previously made provision for it, and independent of statute: see Variation of Trusts Act 1958 (UK), granting the courts a limited power to vary the terms of an express trust in specified circumstances, and which was enacted in response to *Chapman*.

30 See, eg, *Cowey v Liberian Operations Ltd* [1966] 2 Lloyd's Rep 45 (Mayor's and City of London Court) 50 (Block J): 'I do not think it is necessary to say more than this, that it is not competent for a party to a contract to vary the terms of that existing contract by passing a notice.' If matters were otherwise, the common law doctrine of novation would be redundant.

31 *The 'Tychy' (No 2)* [2001] 1 Lloyd's Rep 10 (QB) [65], affd *MSC Mediterranean Shipping Co SA v Owners of the Ship 'Tychy'* [2001] EWCA Civ 1198, [2001] 2 Lloyd's Rep 403.

32 Chitty (n 23) para 19-006.

33 To avoid, say, a run on confidence in the continued credit-worthiness of the creditor: a debtor who knew of such assignment might hesitate before extending credit to his or her creditor in subsequent cross-dealings. The business of non-notification debt factoring is predicated on the ability to deal with debts as if they were transferable assets without need for debtor assent.

34 Senior Courts Act 1981 (UK), s 49(1).

respect the invariability of voluntarily assumed obligations?[35]

Elsewhere, I have suggested that equitable assignment only makes it *seem* as if common law doctrine has been subverted by equity's *simulation* of a 'transfer'.[36] Equitable assignment and notice thereof does not preclude discharge of the debt as a matter of common law principle. Their effect is more subtle, as was recognised in *Stocks v Dobson*:

> The debtor is liable, at law, to the assignor[37] of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid?
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> If a Court of Equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment, it would be impossible for a debtor safely to pay a debt to his creditor. The law of the Court has therefore required notice to be given to the debtor of the assignment, in order to perfect the title of the assignee.[38]

These passages refute the proposition that a debtor who makes payment to his or her creditor despite having received notice that the debt had been equitably assigned to an assignee would not discharge the debt. What is more, this is still the law in England.[39]

Respecting the principle as to invariability of voluntarily assumed obligations without prior assent of the obligor, one possible reason why B has to pay again could lie in B's having committed a form of equitable fraud — namely, in having committed the equitable wrong of what in England and Wales is now understood as 'dishonest assistance'.[40]

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35 See n 29, and main text thereto. The obligations of an express trustee are voluntarily assumed since he or she 'may choose whether he will accept the trust, or not': *Robinson v Pett* (1734) 3 P Wms 249, 251; 24 ER 1049, 1050.

36 Tham, *Understanding the Law of Assignment* (n 25): the argument is set out in miniature in ch 2.

37 Since *Stocks v Dobson* (1853) 4 De GM & G 11, 43 ER 411 predates the introduction of statutory assignment under the Judicature Act 1873, the assignment in that case could only have been an equitable assignment.

38 ibid De GM & G 15–16; ER 413.

39 See *Deposit Protection Board* (n 24) 382 (Simon Brown LJ). Although Simon Brown LJ was in the minority, the majority (comprising of Russell LJ and Sir Michael Fox) did not appear to disagree on the point. The majority (comprising of Russell LJ and Sir Michael Fox) took the view that the deposit protection legislation providing for statutory compensation for 'depositors' in the Banking Act 1987 (UK), s 58, was sufficiently broadly worded to include equitable assignees, since equitable assignees of the benefit of bank deposits would have been entitled to bring actions at law if the banks in question were to decline to make payment. Neither Russell LJ nor Sir Michael Fox addressed Simon Brown LJ's observation that even after having received notice that a bank deposit had been equitably assigned, the bank in question would still be liable to the original customer who had effected the assignment. Nor was Simon Brown LJ's discussion of this point addressed by the House of Lords on appeal. Finally, although the editors of *Chitty on Contracts* respectfully suggest that Simon Brown LJ's analysis is wrong (Chitty (n 23) para 19-021 n 86), no further reference is made to *Stocks* (n 37).

40 Being derived from the Privy Council's reformulation of the 'knowing assistance' liability derived from *Barnes v Addy* (1874) LR 9 Ch App 244 (Court of Appeal in Chancery) in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) (*Royal Brunei Airlines*). This is now accepted to be law in England and Wales: *Ivey v Genting Casinos (UK) Ltd* [2017]

The possibility of grounding the liability of a debtor such as B as a type of accessory equitable liability has been raised before.[41] What follows is an attempt to illustrate how such equitable liability will arise in light of facts like those in the example set out at the beginning of this article.

By equitably assigning the benefit of the debt (a legal chose in action) to C, A would have come under an equitable duty to C to preserve that chose in action, until such time as C required it to be reduced into possession. In our example, A had demanded payment, and accepted tender thereof. However, C had not requested reduction of the debt (the chose in action) into possession. By acting independently of C's request, A would have breached her equitable duty to C not to reduce the debt into possession without C's say-so.

Next, had B not tendered the payment to A, A could not have reduced the debt into possession in breach of her duty to C: A could only have breached these duties with B's assistance. And crucially, B would have assisted A in the breach of her duty to C, despite having actual knowledge of C's equitable interest in the debt (B having received notice of the assignment).

Given that actual knowledge, it is arguable that B should have made reasonable inquiries before tendering payment to A — eg, by checking with C if he or she was at one with A's actions. Had such inquiry been made, B would have discovered that A's actions had not been requested by C. Hence, B would be fixed with constructive notice of the fact that A's actions were, in reality, unauthorised.

Under the terms of the debt contract which had formed between A and B at the outset, B's tender of payment to A following the written demand for payment would have been precisely what B had agreed he or she would do. As a matter of common law principle, A's acceptance of such conforming tender of payment would lead to the discharge of the debt obligation by reason of precise performance. But this would have destroyed C's equitable interest in the common law debt as a chose in action. Having been transmuted into the cash notes in A's possession, that chose in action would no longer exist — it would have been 'reduced into possession'.

Such injury to C's equitable interest on B's part would not go unremedied.

On the facts of our example involving A, B and C, when B tendered £10,000 in cash to A despite knowing that A had previously equitably assigned the benefit of the debt to C, if A had not been authorised by C to issue the written demand and to accept such tender of payment from B, A would be duty-bound to C to preserve the cash tendered by B. That cash being the traceable substitute for the chose in action (ie, the debt) in respect of which A was duty-bound to C by reason of the equitable assignment, a constructive trust would arise over its traceable substitute. If A depleted the £10,000 in cash in breach of her duty to C to preserve and to account for it, C could falsify such depletion of the account by A. A would then be subject to a personal

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UKSC 67, [2018] AC 391. However, not all common law jurisdictions have accepted this reformulation: see n 121 below, and main text thereto.

41 See, eg, Harlan F Stone, 'The Nature of the Rights of the *Cestui Que Trust*' (1917) 17 Colum L Rev 467, 485; Tham, 'Notice of Assignment and Discharge by Performance' (n 27) 52 n 79. The application of this head of liability in equity to the problem of debtors who are made to 'pay again' is explored at greater length in Tham, *Understanding the Law of Assignment* (n 25) ch 11.

liability to reinstate the shortfall in the account. Since the shortfall could not have arisen but-for B's tender of payment to A (which enabled A to breach her duty to C to preserve the chose in action), so far as B had *dishonestly assisted* A in breaching that duty to C, B would be liable to C in the same extent as A.[42]

On this analysis, the basis for the respondent in *Jones* being ordered to pay again would have rested on equitable principles — unsurprisingly so, since that was a decision of the Court of Appeal in Chancery. As for *Brice*, that was an appeal to the Court of Appeal from a decision of the Queen's Bench Division, a decision which had been handed down following the administrative fusion when the Supreme Court of Judicature Act 1873 (hereafter, the Judicature Act 1873) came into force in 1875.[43]

By that Act, the High Court and the Court of Appeal of the Supreme Court of Judicature were vested with the jurisdiction of, inter alia, the Court of Chancery[44] and its predecessor 'common law' courts such as the Courts of Queen's Bench, Common Pleas, and Exchequer:[45] it empowered the High Court to grant the various remedies that each predecessor court could have granted, though in such manner as would avoid multiplicity of proceedings.[46] It is possible, therefore, to take *Brice* to have been a decision of the High Court applying equitable principles within its *equitable* jurisdiction, compelling the debtor in that case to make further payment in light of his equitable wrongdoing by reason of what we would understand, today, as 'dishonest assistance'.[47] So one reason why a debtor (such as B) might be ordered to 'pay again', is because of the commission of an equitable wrong

42 As to whether A (and therefore B, as a dishonest accessory) might be held liable to compensate C for consequential losses sustained as a result of A's breach of duty, such liability to make equitable compensation for consequential loss goes beyond the scope of this article. The question whether consequential losses arising from a breach of trust may be recovered by way of equitable compensation has been considered in Jamie Glister, 'Breach of Trust and Consequential Loss' (2014) 8 J Eq 235.

43 Pursuant to the Supreme Court of Judicature Act 1875 (hereafter, the Judicature Act 1875).

44 Judicature Act 1873, s 24(1).

45 ibid s 24(6).

46 ibid s 24(7).

47 The proceedings in *Brice* (n 20) were brought by the assignee in his own name, without joining the assignor. In the court below, judgment had been handed down in the assignee's favour on grounds that that there had been a valid statutory assignment in accordance with Judicature Act 1873, s 25(6) (the predecessor to the Law of Property Act, s 136(1)). Consequently, joinder of the assignor would have been obviated by the statute. But the Court of Appeal held that the assignment did not fall within the ambit of s 25(6), although it still held in favour of the assignee on grounds that there had been a perfectly valid equitable assignment. If so, as a matter of substantive principle, it would not have been open to an equitable assignee to bring an action at law in his or her own name and joinder of the assignor would have been necessary. The fact that this was not done, and that the Court of Appeal did not take issue with the assignor's non-joinder, provides glancing support for the proposition that the remedy granted in *Brice* (n 20) by the Court of Appeal was, in essence, in exercise of its equitable jurisdiction: where proceedings are brought by an equitable assignee within the court's equitable jurisdiction, joinder of the assignor is more readily dispensed with as joinder is not required for substantive reasons. The different reasons for joinder of an equitable assignor of a common law chose in action to proceedings at law, as compared with proceedings in equity, are discussed in Tham, *Understanding the Law of Assignment* (n 25) chs 7–9. See also discussion in Section VI, below, as to the operation of Judicature Act 1873, ss 24(1), (7).

giving rise to a liability remediable by an order of the court in exercise of its equitable jurisdiction.

But that may not exhaust the possibilities.

In the following Sections, I propose a further string to the court's remedial armoury, a procedural one by which reliance on common law principles by way of defence may be precluded.

In brief: B's tender of payment to A, despite his or her knowledge of the equitable assignment to C, amounts to a form of equitable fraud on C, such that B may be barred from *pleading* the facts pertaining to his or her tender of payment to A by way of defence, were B to be sued on the debt. A distinction may thus be drawn between cases where a common law defence is held to be unavailable because it could not be made out for substantive reasons, and cases where no defence is pleaded because its pleading had been barred.

In the remainder of this article, the grounds for denying a defence in the former instances will be termed 'substantive', whereas the grounds for barring a defence in the latter instances will be termed 'procedural.[48] So defined, this article will show that notice of equitable assignment of a debt can have a 'procedural' effect, by precluding the pleading of a substantive common law defence *on equitable grounds*.

III Injunctive relief from the Court of Chancery for equitable fraud

Prior to the administrative reforms brought about in 1875 in England and Wales by the Judicature Act 1873, if 'equitable fraud' by the respondent were made out, a common injunction[49] might be issued on application by bill to the Court of Chancery (ie, 'a suit in equity'), to enjoin the respondent from commencing or continuing[50] with proceedings before a common law court[51]

48 This article is not, therefore, concerned with questions as to 'civil procedure', ie, those procedural rules arising in connection with the conduct of a trial as are now found in the Supreme Court Practice.

49 ICF Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (9th edn, Sweet & Maxwell 2014) 393:

> So on the one hand there came to be developed the common injunction, by which the defendant could be restrained from taking steps in a court of law that were unconscionable in the eyes of a court of equity, whilst on the other hand injunctions that restrained the performance of any particular act or acts, other than the taking of a step in proceedings, were known as special injunctions.

50 The power to enjoin the continuation of proceedings which had already been commenced in a common law court was removed by Judicature Act 1873, s 24(5), with the command that the effect which would otherwise be achieved by such injunction should henceforth be achieved by way of a defence. The power to enjoin the commencement of proceedings, however, was not legislatively removed. Such power provides the basis for the grant of antisuit injunctions.

51 Such injunctions were issued by the Court of Chancery to restrain not just proceedings before the common law courts, but also proceedings before the Ecclesiastical Courts, the Admiralty Court, other courts of equity (such as the Court of Exchequer, which had equity jurisdiction until 1841), and even other proceedings before the Court of Chancery itself, as well as proceedings in foreign courts: see Charles Stewart Drewry, *A Treatise on the Law and Practice of Injunctions* (S Sweet 1841) 96–108, and the cases cited therein.

(ie, 'an action at law') against the petitioner.[52] But the common injunction could also be turned to bar the respondent from pleading *defences* were he or she to be sued in a court of law.

In the period leading up to administrative reforms under the Judicature Acts 1873 and 1875,[53] examples of bills seeking injunctions to bar defendants from pleading certain defences 'fraudulently or improperly' may be found in cases like *Stewart v The Great Western Railway Co*,[54] and *Lee v Lancashire and Yorkshire Railway Co*,[55] both cases involving pleas of payment; *Aspinall v The London and North-Western Railway Co*,[56] a case involving the plea of release; and *Re Northern Assam Tea Co, ex p Universal Life Assurance Co*,[57] a case involving a plea of statutory set-off pursuant to the Statutes of Set-off 1729 (UK).

Injunction issued, the respondent to the bill in equity would be faced with contempt proceedings if he or she were to plead the defence in question in the action at law in defiance of the injunction. But if complied with, no defence would be filed in the action. Unless some other defence were pleaded, judgment in the action at law would then be handed down in default of such

52 For accounts of grants of injunctions for such purposes, see William Williamson Kerr, *The Law and Practice of Injunctions in Equity* (William Maxwell & Son 1867). The technicalities of the grant of common injunctions to enjoin the commencement or to stay proceedings in other courts was also extensively discussed in a subsequent edition of Drewry (ibid): Charles Stewart Drewry, *The Law and Practice of Injunctions* (S Sweet 1849). In William Williamson Kerr, *A Treatise on the Law and Practice of Injunctions* (2nd edn, W Maxwell & Son 1878), published after the Judicature Act 1873 reforms had come into force, the chapters on the filing of bills for common injunctions to enjoin or stay proceedings in other courts in the previous edition were excised because, given Judicature Act 1873, s 24(5), no action before the courts of the Supreme Court of Judicature could be enjoined by common injunction. For an illustration of the effect of s 24(5), see *Garbutt v Fawcus* (1875) 1 Ch D 155 (CA). Such injunctions could and were granted to stay proceedings not only in other courts of law, but also against other courts of equity (such as the Court of Exchequer prior to 1841 before its equity jurisdiction was merged with that of the Court of Chancery pursuant to the 1841 statute of 5 Vict, c 5 (Administration of Justice Act 1841 (UK)). For an account of such injunctions, see ibid 103–05.

53 It may be that cases like these were already known to the profession by the late 1700s. Writing in 1787, Mitford (who later became Lord Redesdale, Lord High Chancellor of Ireland), wrote (without providing authorities in support): 'The courts of equity will interfere upon the same grounds to relieve against instruments which destroy as well as against instruments which create rights; and therefore will prevent a release which has been fraudulently or improperly obtained from being made a defence in an action at law': John Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill* (2nd edn, W Owen 1787) 118.

54 (1865) 3 De GJ & Sm 319, 46 ER 399 where the Lord Westbury LC affirmed the decision of Sir Richard Torin Kindersley V-C: *Stewart v Great Western Railway Co* (1865) 2 Drew & Sm 438, 62 ER 687. As a result, the defendants were enjoined from pleading in the action at law that the plaintiff had been paid a liquidated sum in full and final settlement as compensation for the injuries he had sustained as a passenger on a train operated by the defendants which had collided with another train owing to the negligence of the defendants' servants or agents.

55 (1871) LR 6 Ch 527 (Court of Appeal in Chancery), where the bill seeking to enjoin the defendant railway company from pleading payment of a liquidated sum in full and final settlement of the plaintiff's action at law was dismissed on grounds that the plaintiff had not pleaded any particulars pertaining to fraud on the part of the defendant.

56 (1853) 11 Hare 325, 68 ER 1299.

57 (1870) LR 10 Eq 458 (Ch) 464.

defence (assuming no other defences were pleaded), leading to a common law judgment debt between the parties.

Without touching on the substantive merits of the defence at law, by barring the pleading of such defence on *equitable* grounds raised before the Court of Chancery in his bill, the plaintiff to the action at law would have obtained final judgment at law through 'procedural' means. Yet this would not be an instance where 'equity prevails over the common law'.[58] Here, equity would merely forestall application by the court of law of its common law principles by threatening the person of the defendant in the action at law.

IV The 'equitable jurisdiction of the common law courts'[59]

The practice of issuance of injunctions by the Court of Chancery to bar pleadings at law did not pass unnoticed by the courts of common law. But the common law courts did not just take note of these developments. They went further and seized an 'equitable jurisdiction' for themselves. These developments in common law practice were summarised in 1843 by Lord Abinger CB in the Court of Exchequer:

> It has been the practice of Courts of law (especially in modern times), where they see that justice demands the interference of a Court of equity, and that a Court of equity would interfere — in every such case to save parties the expense of proceeding to a Court of equity, by giving them the aid of the equitable jurisdiction of a Court of common law, to enable them to effect the same purpose.[60]

By this 'equitable jurisdiction of a Court of common law', Lord Abinger CB explained that a common law court could give 'aid' in the following way:

> From that principle has arisen where they [the courts of common law] have prevented a plea of release, or any other matter of the same sort, from being pleaded; and where they have seen clearly and distinctly that a Court of equity would declare the release to be void, they set the release aside, in order to save the parties the necessity of having recourse to a tedious, and certainly sometimes an expensive, litigation.[61]

Further,

> [i]n the cases cited, where the release has been given by one party in fraud of another and in collusion, or whether by a mere nominal plaintiff having no interest whatever in the subject-matter of the action, or under other circumstances of the same character, which perhaps may be found in other cases, the ruling principle which has governed the Courts has been, that it has appeared manifest that Court of equity could do nothing else but set the release aside.[62]

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58 Senior Courts Act 1981, s 49(1).

59 See also authorities cited in William Tidd, *The Practice of the Courts of King's Bench and Common Pleas in Personal Actions and Ejectment* (9th edn, Joseph Butterworth and Son 1828) vol I, 677–78.

60 *Phillips v Clagett* (1843) 11 M & W 84, 91; 152 ER 725, 728 (Lord Abinger CB). Although the Court of Exchequer formerly had both common law and equity jurisdiction, the Administration of Justice Act took away the latter in 1841.

61 ibid.

62 ibid.

Hence, in the period prior to the Judicature Act reforms, instead of applying to the Court of Chancery for injunctive relief, a plaintiff could apply directly to the court of law to 'set aside'[63] the defendant's defences by barring the defendant from pleading defences which would otherwise be enjoined by the Court of Chancery, thereby saving the time and expense of bringing parallel proceedings.[64]

That said, it remained open to a plaintiff at law to bring parallel proceedings in equity against that same defendant to enjoin such pleas of defence by injunction: the development of the 'equitable jurisdiction of the common law courts' did not diminish Chancery's jurisdiction to grant injunctions to enjoin the bringing or continuation of proceedings in other courts — Chancery's jurisdiction to enjoin the pleading of common law defences in an action at law persisted.[65]

Still, why might a plaintiff elect to forego the savings in time and legal costs by mounting parallel proceedings in the Court of Chancery? One reason[66] for the continued relevance of the traditional recourse to Chancery appears to be this: the 'equitable jurisdiction of the common law courts' to bar the pleading of defences which might otherwise have been available on the merits remained a creature of the common law. To reflect this, the common law courts would only invoke this 'equitable jurisdiction' of theirs if it was proved to their satisfaction that the defendant had actual knowledge[67] of the 'fraud' in question so as to be made 'party' to it. This additional constraint is set out

63 In cases before the King's Bench like *Mountstephen v Brooke* (1819) 1 Chit 390 (KB); and *Johnson v Holdsworth* (1835) 4 Dowl 63 (KB), the deed of release itself was ordered to be set aside *and cancelled*. But the basis for cancellation of these deeds is unclear. In *Phillips* (ibid), Parke B doubted whether the courts of law might not have gone too far in setting aside the release itself (at M & W 93; ER 729). See also *Aspinall* (n 56) Hare 335; ER 1303–04 (Sir William Page Wood V-C).

64 The otherwise difficult case of *Legh v Legh* (1799) 1 Bos & P 447, 126 ER 1002 may be an example of the 'equitable jurisdiction of the common law courts' as applied by the Court of Common Pleas.

65 See, eg, *Codd v Wooden* (1790) 3 Bro CC 73, 29 ER 415; *Evans v Bicknell* (1801) 6 Ves 174, 182; 31 ER 998, 1002. To extinguish such jurisdiction, once it had been asserted by the court, statutory language to that effect would be necessary: *Slim v Croucher* (1860) 1 De GF & J 518, 528; 45 ER 462, 466.

66 It would seem that another would have been where other, exclusively equitable, remedies were also to be sought — eg, if reformation or rectification of a contractual document or deed were also sought, that being a remedy which was not available in the common law courts, recourse to a court of chancery would still be necessary. It was also uncontroversial that the Court of Chancery had the power to make orders for delivery up and cancellation of deeds or other written instruments — unlike the position in the common law courts: see n 61, above.

67 So far as the common law courts were concerned, knowledge such 'fraud' had to be 'imputed by direct evidence': *Furnival v Weston* (1822) 7 Moore CP 356, 357; 24 RR 687, 688. And in *Arton v Booth* (1820) 4 Moore CP 192, 21 RR 740, where a debtor paid 1 of 2 partners before receiving a release, while ignorant that arrangements had been made between the partners in their deed of dissolution that the other partner was to receive payment, the Court of Common Pleas declined to set aside the debtor's plea of release on grounds that 'fraud' had to be clearly established, 'and such fraud cannot be inferred, but must be manifestly apparent': at Moore CP 195; RR 743 (Park J). That said, it appears the courts of common law would set aside a plea of release if the affidavits in support showed that the release had been granted without consideration having been given in exchange: see, eg, *Mountstephen* (n 63); and also *Johnson* (n 63).

in the judgments handed down by Parke B and Alderson B in *Phillips v Clagett*.[68]

First, Parke B noted as follows:

> In order to call upon the Court to exercise its equitable jurisdiction, it must be made out manifestly and clearly that there has been a fraud by some person upon the plaintiff seeking to enforce the demand, *and that the defendant was a party to that fraud. Unless that can be made out manifestly and clearly, this Court ought not to interfere*.[69]

In agreement, Alderson B observed:

> Where the party is an interested party, and where by the law all persons having a joint interest have a right to release and to dispose of the debt, how is his acting on that right which the law gives him as arising out of his interest, a fraud? Then what other ground exists in this case except that? It seems to me that there is none, and that even if there were, — if fraud were made out, — it is not traced to the defendant. *It is not only necessary that it should be a fraud on the party injured, but it also should be shewn that the defendant is cognizant of it, so as not to be in the situation of an innocent party*.[70]

Thus, although the Court of Chancery might have been prepared to issue the relevant injunction against the defendant at law in light of some form of 'equitable fraud'[71] on the defendant's part (including cases where the relevant knowledge might well have been imputed to the defendant by reason of constructive notice), a court of common law hearing the action at law would only exercise the 'equitable jurisdiction of the common law courts' if it was manifestly and clearly proved[72] that there was such fraud *and* that the defendant actually knew of it to enable the defendant to be taken to have been party to it.

V Legislative supplementation of the powers of the courts of common law to bar or avoid pleadings[73]

In 1854, the UK Parliament enacted the Common Law Procedure Act 1854 (UK) (CLPA 1854), section 85 of which provided as follows:

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68 *Phillips* (n 60).

69 ibid M & W 93, ER 729.

70 ibid M & W 96, ER 730. The remaining judge, Gurney B, concurred with Alderson B.

71 Encompassing both 'actual' and 'constructive' fraud — which would also encompass fraud imputed to the defendant by reason of the equitable doctrine of constructive notice.

72 That said, such findings were a jury question, and the readiness of juries of the time to find the presence (or absence) of such actual knowledge is unknown. I am indebted to one of the anonymous referees for pointing this out.

73 The legislative tactics outlined in this Section were not novel. For an account of some legislative interventions from earlier periods by which common law courts were enabled to exercise what had hitherto been exclusively equitable remedies in other contexts, see Mike Macnair, 'Common Law and Statutory Imitations of Equitable Relief under the Later Stuarts' in Christopher W Brooks and Michael Lobban (eds), *Communities and Courts in Britain: 1150-1900* (Hambledon Press 1997) 115. And, although the account below concentrates on how these developments applied to the context of equitable assignments of debts, their application was not limited to that context. For an account of their application to the context of contractual mistake, see Catharine MacMillan, *Mistakes in Contract Law* (Hart Publishing 2010) 82–86.

> The Plaintiff may reply, in answer to any Plea of the Defendant, Facts which avoid such Plea upon equitable Grounds; provided that such Replication shall begin with the Words 'For Replication on equitable Grounds,' or Words to the like Effect.

As explained in *Vorley v Barrett*:

> [t]he very object of the Common Law Procedure Act in these clauses [providing for replications on equitable grounds] was, to enable courts of law to administer equitable relief, without driving the parties to the useless and vexatious expense of proceedings in a court of equity.[74]

By statute, judges sitting in the common law courts were empowered to grant such relief as their brethren in the Court of Chancery would have done by way of injunction. Since the Court of Chancery could grant injunctions to relieve against accident, mistake[75] or fraud, a court of common law could do something similar under the 1854 Act, albeit by way of a pleading 'on equitable grounds'.[76]

In *Hunter v Gibbons*, Bramwell B explained:

> The statute [CLPA 1854] does not give to the plaintiff an absolute right to reply equitably. The Court must see that there is some chance that the facts sought to be replied would avoid the plea [ie, the defendant's defence] on equitable grounds.[77]

So long as there was some prospect that equitable relief would have been granted by the Court in Chancery, section 85 of the CLPA 1854 would permit a judge in the common law courts to grant such relief. Then, since the Court of Chancery might grant equitable relief in respect of 'equitable fraud' (including instances where knowledge of the 'fraud' had been imputed by reason of constructive notice), section 85 of the statute would enable a court of common law to do likewise: under section 85, the common law court was not constrained as to proof of 'actual fraud' as it would have been had the 'equitable jurisdiction of the common law courts' been resorted to, instead.

The case of *De Pothonier v De Mattos*[78] illustrates this perfectly. This case involved a charter party where the defendant chartered the plaintiff's ship, the Bella Donna, to load coals at Birkenhead for discharge at Constantinople for an agreed freight. Before the freight had been earned, the plaintiff sold the Bella Donna, and equitably assigned the benefit of the defendant's charter party, to Salveson. Queen's Bench proceedings were then initiated against the

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74 (1856) 1 CBNS 225, 240; 140 ER 94, 100 (Crowder J). Creswell J made similar observations at CBNS 240; ER 100. In this case, a defence of release was met by the plaintiff's 'replication on equitable grounds' pursuant to Common Law Procedure Act 1854 (UK) (CLPA 1854), s 85 on the equitable ground that the release had only included a reference to the claim on which the present action was brought by reason of mistake.

75 This point will be highlighted in the discussion of *De Pothonier v De Mattos* (1858) EB & E 461, 120 ER 581 below.

76 For discussion of the operation of the CLPA 1854 in connection with mistake, see MacMillan (n 73) 84–85.

77 (1856) 1 H & N 459, 466; 156 ER 1281, 1284. In this case, Bramwell B qualified the plaintiff's position as follows: 'The statute [CLPA 1854] does not give to the plaintiff an absolute right to reply equitably. The Court must see that there is some chance that the facts sought to be replied would avoid the plea [ie, the defendant's defence] on equitable grounds.'

78 *De Pothonier* (n 75).

defendant for non-payment of freight by Salveson, albeit in the plaintiff's name.

In his defence, the defendant made three pleas:

- Plea I: that the plaintiff had discharged the defendant from performance of the agreement for good and sufficient consideration before the goods had been loaded on board the plaintiff's ship. Alternatively,
- Plea II: that the defendant had discharged the plaintiff's claim by payment, prior to action being brought. Further in the alternative,
- Plea III: that the plaintiff had released and discharged the defendant from the said causes of action and all damages in respect thereof for good and sufficient consideration, albeit not by deed under seal, after the said causes of action had accrued.[79]

Salveson, suing in the plaintiff's name, set out a replication on equitable grounds under section 85 of the CLPA 1854. It set out the assignment to Salveson, and also pointed out that the discharge in Plea I, the acceptance of payment in Plea II, and the release granted in Plea III, had all been carried out without Salveson's authorisation. The replication also set out that the defendant had had notice of the equitable assignment to Salveson before the plaintiff's discharge, acceptance, or release.

Judgment was entered in the plaintiff's favour, with the court[80] holding that these replications on equitable grounds were good. Lord Campbell CJ explained his reasoning, as follows:

> I am of opinion that these equitable replications are good. The object of sect 85 of The Common Law Procedure Act, 1854, was to allow an equitable replication to a plea which sets out facts that can be answered upon equitable grounds: such a plea, in fact, as the Court [of King's Bench] would, before the statute, have set aside in the exercise of what was called its equitable jurisdiction. Ever since *Winch v Keeley* (1 TR 619), Courts of law have allowed the assignee to sue in the name of an assignor, and where any defence to the assignees claim is founded on fraud by the nominal plaintiff, will set such defence aside.[81] By the statute [ie, the CLPA 1854] it was intended that the assignee should be allowed to put his own answer to such a defence upon the record [ie, on the pleadings], instead of bringing it forward, as he was obliged to do so before, by affidavit. ... Here the replications [of the nominal plaintiff] are clearly within the statute: *they deny that the nominal plaintiff had any right to release, inasmuch as, at that time, he had no [beneficial] interest, and is, in consequence, not the real plaintiff when the action was brought*. The replications, therefore, 'avoid' the 'plea on equitable grounds.'[82]

Coleridge and Erle JJ arrived at the same conclusion as Lord Campbell CJ, and for similar reasons.[83]

Under section 85 of the 1854 Act, litigants were empowered to raise points in answer to defences which might previously have been barred through a parallel application to a court of equity for an injunction. Without having to

79 ibid EB & E 462–63; ER 582.

80 Consisting of Lord Campbell CJ, Coleridge, Erle and Crompton JJ.

81 Ie, by way of the 'equitable jurisdiction of the common law courts'.

82 *De Pothonier* (n 75) EB & E 466–68; ER 583–84 (emphasis added).

83 ibid EB & E 467–68 (Coleridge J), 468 (Erle J); ER 584 (Coleridge J and Erle J). Crompton J was absent and did not hand down any judgment.

file a separate bill in the Court of Chancery, litigants at law could plead a 'replication on equitable grounds' in response to the defence. In addition, not only would litigants save the cost and complications of mounting parallel proceedings in equity, the statutory 'replication on equitable grounds' under section 85 was broader than the so-called 'equitable jurisdiction of the common law courts' since the requirement of strict proof of actual knowledge of the 'fraud' so as to render the defendant to be 'party' to the 'fraud' did not apply to the statutory procedure.

An equitable assignment of a legal chose in action entails a trust over the benefit of the chose in action.[84] Given such trust, the plaintiff[85] in *De Pothonier* would have been obligated to Salveson[86] to preserve the common law debt which had been equitably assigned, and not reduce it into possession, without Salveson's prior approval.[87]

Having received notice of the assignment, the defendant would have had actual knowledge of it, and would also be deemed to know of its implications as to the plaintiff's obligations to Salveson. Then, given the doctrine of constructive notice, the defendant would be expected to make reasonable inquiries of Salveson in light of such actual knowledge when dealing with that debt in the manner particularised in the defendant's three pleas. In particular, had those inquiries been made, the defendant would have discovered that Salveson had not authorised the plaintiff to act in the manner set out in those pleas, and realised that such acts by the plaintiff without Salveson's authorisation would have been in breach of his duties as assignor to Salveson.

Given such deemed knowledge, an injunction would have issued, had parallel proceedings in equity been brought. If so, a section 85 'replication on equitable grounds' would be allowed by the court in the proceedings brought at law by Salveson in the plaintiff's name. (In contrast, unless satisfactory proof of actual fraud on the part of the defendant had been tendered, the court would not have invoked its 'equitable jurisdiction of the common law courts'.)[88]

Notwithstanding the changes introduced by section 85, the need for recourse to the Court of Chancery was still not entirely extinguished. As with the equitable jurisdiction of the common law courts, the statutory jurisdiction which was vested in the common law courts by the 1854 Act was not so extensive as to allow them to grant every form of equitable remedy. For example, rectification was still the exclusive preserve of the Court of

84 For English authority that an equitable assignment of a legal chose in action operates by means of a trust, see *The Wasp* (1867) LR 1 A&E 367 (Admlty) 369; *Re Steel Wing Co Ltd* [1921] 1 Ch 349 (Ch) 356; *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430 (CA) 443–44; *Bexhill UK Ltd v Razzaq* [2012] EWCA Civ 1376 [58]; and *Roberts v Gill & Co* [2010] UKSC 22, [2011] 1 AC 240 [68]. More generally, pointing out that an equitable assignment does not *only* operate by means of such trust, see CH Tham, 'The Mechanics of Equitable Assignments: One Engine or Two?' in Simone Degeling, James Edelman and James Goudkamp (eds), *Contract in Commercial Law* (Lawbook 2016) 381; Tham, *Understanding the Law of Assignment* (n 25).

85 As equitable assignor.

86 As equitable assignee.

87 As Lord Campbell CJ recognised: see text emphasised in the extract from his judgment in n 82, above.

88 Following *Phillips* (n 60).

Chancery: if the grounds on which the equitable plea were based were such that a court of equity would have reformed (ie, rectified) the contract instead of refusing to allow it to be enforced in toto, the common law courts would not allow the equitable plea pursuant to the statute to be made.[89]

Furthermore, as caselaw on the 1854 Act developed, judges of the common law courts construed the Act narrowly with the result that the plea of a 'defence on equitable grounds' envisaged in section 83 of the CLPA 1854 was taken to be permitted where equitable relief in a court of chancery would have been granted unconditionally.[90] Given the similarity in wording between sections 83 and 85, it was accepted that the same would apply to pleas of a 'replication on equitable grounds'.[91] Consequently, the 'defence on equitable grounds' pursuant to section 83 or the 'replication on equitable grounds' pursuant to section 85 would be available only where an injunction might have been granted unconditionally.[92]

As for the equitable jurisdiction of the common law courts which had been developed by those courts independently of the statute, *Bartlett v Wells*[93] tells us that the statutory 'replication on equitable grounds' relied on in *De*

89 See, eg, *Perez v Oleaga* (1856) 11 Exch 506, 156 ER 930; *Official Manager of Solvency Mutual Guarantee Co v Freeman* (1861) 7 H & N 17, 158 ER 374. Thus, '[a] mistake in a transaction [sic] which would be rectified in equity, cannot in general be relied on as a ground for an equitable pleading; because a court of law cannot apply the same complete remedy': Edward Bullen and Stephen Martin Leake, *Precedents of Pleadings in Personal Actions in the Superior Courts of Common Law* (3rd edn, Stevens and Sons 1868) 569.

90 *Mines Royal Societies v Magnay* (1854) 10 Exch 489, 156 ER 531, where a 'defence on equitable grounds' was not permitted because the Court of Exchequer concluded that had injunctive relief in Chancery been sought, such relief would only have been granted on terms. This result duly led to the commencement of proceedings in Chancery, in which further prosecution of the action at law was indeed enjoined on terms: *Magnay v Mines Royal Co* (1855) 3 Drew 130, 61 ER 852. Lord Campbell CJ explained the rationale for this constraint in *Wodehouse v Farebrother* (1855) 5 El & Bl 277, 289–90; 119 ER 485, 489–90. Consequently, such equitable plea would be struck out, as provided for in CLPA 1854, s 86.

91 Both counsel in *Vorley* (n 74) accepted that the constraint as was applied to CLPA 1854, s 83, also applied to s 85: CBNS 235–36; ER 98–99. It may be noted that Lord Campbell CJ's explanation of the rationale for the restriction as applied to s 83 in *Wodehouse* (n 90) would apply equally well to an equitable plea by way of a replication on equitable grounds. Also, in *Hunter* (n 77), having held that the replication on equitable grounds in that case in answer to a defence of limitation to an action for trespass on the plaintiff's land to excavate coal ought not to be allowed, Bramwell B pointed out that '[i]n equity, the plaintiff would be entitled to the value of the coal, less the cost of getting it; at law he would be entitled to its value at the mouth of the pit, without deduction. If then this replication was allowed, it would alter the rights of the parties': H & N 466; ER 1284. That is, since equitable relief to enjoin the plea of limitation would only have been granted on terms, it was not open to the court to exercise such power as it had been granted under CLPA 1854, s 85 to allow the replication on equitable grounds to stand against the defendant's plea of limitation. See also cases cited in MacMillan (n 73) 84–88.

92 The Common Law Commissioners had recommended that courts of law be permitted to receive pleas on equitable grounds, even in circumstances where an injunction might only have been granted in the Court of Chancery on terms: 1852–53 [1626]: *Royal Commission to Inquire into Process, Practice and System of Pleading in Superior Courts of Common Law, Second Report* (1853) 45. However, the common law courts took Parliament to have rejected this recommendation, given the wording in CLPA 1854, s 86, which gave the common law courts the power to strike out such 'equitable' pleas or replications 'so as to do justice between the Parties'.

93 *Bartlett v Wells* (1862) 1 B & S 836, 840; 121 ER 924, 925–26 (Crompton J, in argument):

Pothonier supplemented and did not abolish this predecessor. But like the equitable jurisdiction of the common law courts, the statutory 'replication on equitable grounds' did not operate as a substantive rule of law. Given its purpose (to duplicate the injunctive relief which would otherwise have required a duplicate bill to be filed in the Court of Chancery), its operation remained entirely within the procedural realm by barring the pleading of certain defences within the context of a particular action, thereby leading to the possibility of judgment being handed down in that action in lieu of those defences. It was not that the substantive basis for such defences was negated: rather, the defendant was just not permitted to plead the facts as would substantiate them.

The case of *De Pothonier* demonstrates how section 85 of the CLPA 1854 freed the common law courts from the need to require proof of actual fraud, and therefore allowed greater scope for the notion of equitable fraud and constructive knowledge to be applied within the common law courts — albeit at a 'procedural' level, and without directly modifying the substantive principles of the common law. Though it did not eliminate the 'equitable jurisdiction of the common law courts', recourse to that jurisdiction was no longer necessary since the statutory 'replication on equitable grounds' could be resorted to without the need to prove actual fraud, first. But even so, the statutory 'replication on equitable grounds' still operated to invalidate defences at law, not because of any substantive defects, but simply because their pleading would have been enjoined.

VI Reform under the Judicature Acts 1873 and 1875,[94] and the present-day position in England and Wales

The three 'procedural' techniques to bar a defendant at law from pleading certain defences discussed in Sections III, IV and V, above, were preserved by the Judicature Act 1873. In this connection, sections 16, 24(1), (6)–(7) of the 1873 Act repay close reading.

First, section 16 of the Judicature Act 1873 provided for the establishment of the High Court of Justice ('the High Court') to be a 'Superior Court of Record'. But section 16 also transferred and vested the equity jurisdiction of the Court of Chancery to the High Court. In this way, the power of the Court of Chancery to adjudicate matters in accordance with *equitable* principles, and to grant *equitable* remedies in light thereof, was vested in the High Court.

Section 16 did the same in respect of the jurisdiction of the Courts of Queen's Bench, Common Pleas, and Exchequer. Thus, so far as the Court of Queen's Bench had the power to adjudicate matters in accordance with the

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'Wherever there is want of good faith in pleading a plea, we have jurisdiction to set it aside independently of the Common Law Procedure Act, 1854.'

94 The discussion in this Section merely outlines the operation and effects of the Judicature Act. For a legal history of their passage, reference may be made to Patrick Polden's account of 'The Judicature Acts' in William Cornish and others, *The Oxford History of the Laws of England: Vol XI 1820-1914 English Legal System* (OUP 2010) 757. For an account of the preparatory steps leading to the Judicature Act reforms, please see Michael Lobban, 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I' (2004) 22 *Law and History Review* 389; and Michael Lobban, 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II' (2004) 22 *Law and History Review* 565.

principles which had been developed by and were applied within the common law courts (ie, 'common law' principles), and to grant common law remedies in light of its conclusions in connection with such principles, that power would also be vested in the High Court.

Second, the provisions in section 24(1) of the Judicature Act 1873 meant that, if a defendant to an action at law brought before the High Court were to assert, 'any right, title, or claim whatsoever' by way of defence, if the plaintiff could have claimed relief 'upon any equitable ground ... which heretofore could only have been given by a Court of Equity' against such 'right, title or claim whatsoever' of the defendant's, the High Court was to 'give to such plaintiff or petitioner such and the same relief ... [had] a suit or proceeding for the same or the like purpose [been] properly instituted before the passing of [the Judicature Act 1873]'. Hence, if an injunction could have been sought in a court of equity to enjoin a defendant at law from pleading a defence in an action at common law prior to the transfer of that court's equitable jurisdiction to the High Court, such injunction could still be sought in any proceeding commenced in the High Court within the equitable jurisdiction as had been transferred to it by the 1873 Act *and*, it seems, such relief could henceforth be given without the need to commence separate proceedings by filing further originating process for such 'equitable relief'.[95]

Third, as explained in Section IV, the courts of common law had acquired for themselves the so-called 'equitable jurisdiction of the common law courts' independently of statute. Then, as explained in Section V, this extension of the common law courts' jurisdiction had been statutorily supplemented with the enactment of the section 85 of the CLPA 1854 which granted plaintiffs in an action at law the right to plead a 'replication on equitable grounds' in a court of common law so as to avoid pleas of defence before those courts. Having been transferred its predecessor common law courts' jurisdictions by section 16 of the Judicature Act 1873, the High Court would, by virtue of section 24(6), be empowered to 'recognize and give effect to ... all ... rights, duties, obligations, and liabilities existing by the Common Law or ... by any Statute, *in the same manner as the same would have been recognized and given effect to, if this Act had not passed*' by any of the courts whose jurisdiction had been transferred to the High Court. Hence, when acting within such common law jurisdiction as had been transferred to it, the High Court would also be empowered to give effect to the entitlements of plaintiffs as would formerly have arisen within the 'equitable jurisdiction of the common law courts', as well as the slightly more widely available entitlements arising from section 85 of the CLPA 1854.

Fourth, section 24(7) empowered the High Court to exercise the powers which had been transferred from its predecessor courts in a manner which

95 In *Eyre v Hughes* (1876) 2 Ch D 148 (Ch), Bacon V-C held that pursuant to Judicature Act 1873, s 24(2), the court had the power to give effect to an equitable defence relied on by a defendant to a foreclosure suit without the need for a cross bill or counterclaim to be filed. By parity of reasoning, it would seem that the same should be true for a plaintiff relying on an equitable entitlement pursuant to s 24(1). As pointed out in n 46, above, *Brice* (n 20) may be another illustration of this procedural innovation, a possibility supported by the operation of s 24(7) which empowered the courts to deal with the matters before them with a view to reducing multiplicity of proceedings.

would avoid multiplicity of legal proceedings. By this provision, Parliament empowered the High Court to grant common law and equitable remedies in respect of causes of action over which the Chancery courts would previously have had concurrent jurisdiction without the need for separate proceedings or originating process to be filed.

Section 24(7) covered much of the ground which had previously been provided for by provisions such as section 79 of the CLPA 1854 (empowering courts of common law to grant injunctions), as well as section 2 of the Chancery Amendment Act 1858 (UK) (Lord Cairns' Act) (empowering the Court of Chancery to award damages). When the Judicature Act 1873 became law, the High Court retained its power to issue injunctions to restrain the pleading of defences to an action at law. In addition, by section 24(7), it was also empowered by Parliament to exercise such power without requiring separate proceedings to be brought, thereby eliminating the multiplicity of proceedings that might otherwise have resulted.

Given these legislative developments, recourse to the 'equitable jurisdiction of the common law courts', or the statutory 'replication on equitable grounds' would henceforth be largely academic, since the High Court would be in a position to enjoin the pleading of a defence in an action at law by way of common injunction (preserved by section 24(1)), without the need for any separate originating process to be filed (given the operation of section 24(7)). Thus, though all three procedural modes to bar the pleading of a defence were preserved, it would seem that the preservation of the 'equitable' route to bar such pleading vide section 24(1), coupled with the effect of section 24(7), rendered the other two modes of 'procedural' relief to be otiose, even though they had also been preserved (by section 24(6)).

This position has been preserved to the present day.

In the decades which followed, sections 16, 24(1), 24(6) and 24(7) were re-enacted, *in pari materia*, in the Supreme Court of Judicature (Consolidation) Act 1925 as sections 18, 37, 42 and 43, respectively. Then, when the 1925 Act was repealed by the Senior Courts Act 1981 (UK), section 18 of the 1925 Act was re-enacted, *in pari materia*, as section 19 in the 1981 Act, whereas sections 37, 42 and 43 of the 1925 Act were re-enacted in slightly more compressed form in section 49(2) of the 1981 Act.

Given sections 19 and 49(2) of the 1981 Act, a plaintiff who brings an action in debt before the High Court today may still seek equitable relief within the High Court's equitable jurisdiction to bar the defendant to that action at law from pleading a defence, without needing to bring separate proceedings in equity for the same. Alternatively, such plaintiff may seek relief within the High Court's common law jurisdiction to bar the defendant from pleading a defence by reason of either the common law-derived 'equitable jurisdiction of the common law courts', or the statutorily-derived 'replication on equitable grounds' rooted in the CLPA 1854.[96]

The complexity set out above should not, however, overshadow the

96 However, as mentioned above, these avenues to procedural relief by reference to the 'equitable jurisdiction of the common law courts', or the statutory 'replication on equitable grounds' may have been rendered otiose given the availability of 'equitable' relief without the need for separate proceedings in equity to be commenced, first.

commonalities running through all three routes by which the pleading of a particular defence to proceedings at law may be barred. First, these routes do not touch on or affect any aspect pertaining to the substantive merits of the defence, leaving the ingredients of such defence untouched: they only preclude assertion of that defence in pleadings before the court such that adjudication on their merits is forestalled.

Second, notwithstanding that only one of these three routes entailed recourse to the court's equitable jurisdiction, with the 'equitable jurisdiction of the common law courts' and the statutory 'replication on equitable grounds' falling within the court's common law jurisdiction, the latter two procedural routes to barring the pleading of a defence still required determining whether a common injunction would have been issued by the Court of Chancery. Thus, all three routes to barring the pleading of a defence at law were still subject to the general bars to equitable remedies such as a lack of 'clean hands' on the part of the plaintiff seeking such relief, or laches.

Third, all three routes are 'procedural' in their operation. In our example involving A, B and C, B's having received notice of A's equitable assignment of the benefit of the debt to C would provide grounds to bar B from pleading the defence of payment *if and when* an action were brought against B on the debt. Hence, although B might be ordered to 'pay again' if an action at law were brought against B, it would be due to B's being barred from pleading the facts of the tender of payment to A, and A's acceptance thereof, as a defence to the common law action: it is not the case that B's tender of payment to A, and A's acceptance thereof, would be a nullity such that B would be entitled to demand a return of the sums paid on grounds of a total failure of consideration. As a matter of substantive principle, tender and acceptance of such sum by A would still have discharged the debt at law.[97]

VII The position in Singapore — Then, and now

The analysis in this article has concentrated on the law of England and Wales. Detailed examination as to the extent to which that law continues to be relevant within the wider Commonwealth is beyond the scope of this article. But, given the occasion of the Journal of Equity Conference 2019 in Singapore, and 2019 being the bicentenary of the founding of modern Singapore, some comments about the relevance of the analysis in this article to Singapore law and lawyers seems timely.

It is suggested that the position in Singapore today is similar to the English position outlined above, given Singapore's reception of English law pursuant to the Letters Patent granted by the Crown in 1826[98] (the Second Charter of Justice), and modern-day provisions such as the Civil Law Act,[99] sections 3(a), (g) and (h) (which are broadly *in pari materia* with and duplicate the effects of Judicature Act 1873, sections 24(1), (6) and (7), respectively).

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97 The further consequences of this in light of A's bankruptcy are explained in Section VIII, below.

98 Letters Patent Establishing the Court of Judicature at Prince of Wales' Island, Singapore and Malacca, in the East Indies (27 November 1826).

99 (Singapore, cap 43, 1999 rev ed), see <https://sso.agc.gov.sg/Act/CLA1909> accessed 2 September 2019.

For the purposes of the procedural devices discussed in this article, the effect of these provisions seems to be this: *if* all three of the procedural mechanisms which have been outlined in the preceding sections were available to the Singapore High Court prior to the enactment of the Civil Law Act, then those mechanisms would continue to be available, today. But were any of these mechanisms ever applicable in Singapore prior to her acquisition of independence as a sovereign state?

Modern-day Singapore was founded in 1819. But reception of English law occurred in 1826 when the Crown, exercising the Royal prerogative, granted the Second Charter of Justice[100] to the Straits Settlements (comprising Prince of Wales' Island (present-day Penang), Singapore, and Malacca). That exercise of the Crown's prerogative power created a court of record, the Court of Judicature of Prince of Wales' Island, Singapore, and Malacca (the 'Court of Judicature'), to administer the law in the Straits Settlements. In particular, the Court of Judicature was vested with:

> such Jurisdiction and Authority as [the] Court of King's Bench and [the] Justices thereof, and also as [the] High Court of Chancery and [the] Courts of Common Pleas and Exchequer, respectively, and the several Judges, Justices, and Barons thereof, respectively, have *and may lawfully exercise* within that Part of [the] United Kingdom called *England*, in all civil and criminal Actions and Suits & as far as Circumstances will admit.[101]

Given this, a judge of the Court of Judicature would have been vested with the power to issue common injunctions to bar pleadings of defences at law (within the Court's equity jurisdiction), just as a judge of the Court of Chancery in England could have done in 1826. At the same time, since a judge of, say, the King's Bench would have had access to the 'equitable jurisdiction of the common law courts' in 1826, so, too, would a judge of the Court of Judicature.

In 1855, the Crown granted a further set of Letters Patent which reconstituted the Court of Judicature (the Third Charter of Justice).[102] The Third Charter of Justice of 1855 was worded in much the same language as the Second, whilst making certain structural changes. Inter alia, while affirming that there should continue to be a 'Court of Judicature of Prince of Wales' Island, Singapore and Malacca', the grant also divided that Court into two divisions.[103]

Importantly, just as the Second Charter had done for the judges of the Court of Judicature, the Third Charter decreed that each judge of the Court of Judicature (now split into two divisions) was to have the same power and

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100 Or, to give its proper name, the Letters Patent Establishing the Court of Judicature at Prince of Wales' Island, Singapore, and Malacca, in the East Indies (Mission Press 1827). This supplanted a prior grant of letters patent in 1807, but which only extended to Prince of Wales' Island. The first and second grants of letters patent were commonly referred to as the First and Second Charters of Justice, respectively.

101 Emphasis added.

102 Or, in full, the Letters Patent Reconstituting the Court of Judicature of Prince of Wales' Island, Singapore, and Malacca, in the East Indies, Bearing Date the Tenth Day of August, in the Nineteenth Year of the Reign of Victoria, in the Year of our Lord One Thousand Eight Hundred and Fifty-Five, reproduced in *The Acts and Ordinances of the Legislative Council of the Straits Settlements from the 1st April 1867 to the 1st June 1886* (Eyre and Spottiswoode 1886) vol I, 1.

103 ibid 3–4.

authority as might be exercised by the judges of the Court of Chancery, or the common law courts enumerated in the Charter, as far as circumstances in the Straits Settlements would admit.[104] But the Third Charter was granted and took effect from 10 August 1855. Consequently, a plain reading of the Third Charter would suggest that the judges of each division of the Court of Judicature would have been granted the same powers and authority as judges in the English courts, mutatis mutandis, as at the date of its grant. This would *include* the extended powers of a judge sitting in the common law courts in England pursuant to the CLPA 1854. Thus, as at 1855, a judge sitting in the Singapore and Malacca Division of the Court of Judicature of the Straits and Settlements would have had available to him all three of the procedural devices outlined in this article to bar the pleading of defences to a cause of action at law.

These developments were preserved by subsequent ordinances enacted by the Legislative Council of the Straits Settlements. Chief among these were the Supreme Court Ordinance 1868 (Straits Settlements),[105] the Court's [sic] Ordinance 1873 (Straits Settlements),[106] as well as three notable ordinances which were enacted by the Legislative Council in 1878 (following the administrative fusion effected by the Judicature Acts 1873 and 1875 in England and Wales). These were, on the one hand, the Courts Ordinance 1878 (Straits Settlements) and the Civil Law Ordinance 1878 (Straits Settlements);[107] and on the other, the Civil Procedure Ordinance 1878 (Straits Settlements).[108]

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104 ibid 10–11.

105 No V of 1868, s 4. This Ordinance was published in the Straits Settlements Government Gazette, No 25, 13 June 1868. The effect of this Ordinance was explained in *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381 (PC) 397.

106 Published in the Straits Settlements Government Gazette, No 28, 11 July 1873. Section 103 read with the Schedule of Repeals of the Court's Ordinance 1873 (No V of 1873) repealed Supreme Court Ordinance 1868, ss 5–28 (inclusive), ss 37–43 (inclusive). Apart from s 36, the remaining provisions of the Supreme Court Ordinance 1868 were only repealed with effect from 1 January 1879 pursuant to Ordinance VI of 1878; and s 36 was itself repealed pursuant to Civil Procedure Ordinance 1880 (No VIII of 1880).

107 Courts Ordinance 1878 (No III of 1878) and Civil Law Ordinance 1878 (No IV of 1878) (both enacted 7 May 1878 and published in the Straits Settlements Government Gazette, No 24, 14 June 1878).

108 Civil Procedure Ordinance 1878 (No V of 1878) (Legislative Council of the Straits Settlements), enacted 7 May 1878, and published in the Straits Settlements Government Gazette, No 24, 14 June 1878. This Ordinance broadly duplicated the procedural rules which had been adopted by the High Court in England and Wales pursuant to the Judicature Act 1875 and applied them to the Supreme Court of the Straits Settlements. While the Civil Procedure Ordinance 1878 was repealed by Ordinance No 33 of 1907, its provisions were largely re-enacted as the Civil Procedure Code 1907 (Ordinance No 30 of 1907) (Straits Settlements). When the Civil Procedure Code 1907 was itself repealed by the Courts Ordinance 1934 (Ordinance No 17 of 1934) (Singapore), s 87 of the 1934 Ordinance introduced the Civil Procedure Rules of the Supreme Court 1934 (Singapore) in its place. Still bearing a strong resemblance to their 19th century antecedents, the present-day version of these rules may be found in the Rules of Court (GN No S 71/1996, 2014 rev ed). For an account of the history of the development of these Rules in Singapore (albeit focusing on the rules pertaining to discovery), see Jeffrey D Pinsler, 'Origins of Singapore's Discovery Process' [1997] Sing JLS 396, 402–03.

It should be noted that although the Government of India Act 1833 (3 & 4 Will 4, c 85) vested power in the Governor General in Council in India to legislate for the Straits

Sections 4–10 of the Supreme Court Ordinance 1868 and the Court's Ordinance 1873 were repealed by Courts Ordinance 1878 (No VI of 1878) (Straits Settlements)[109] upon the coming into operation of the Courts Ordinance 1878 on 1 January 1879.[110] However, the Attorney-General made it clear in his statement of the Objects and Reasons in support of the bill which was eventually enacted as the Courts Ordinance 1878 that the provisions in parts IV and XVI of the Courts Ordinance 1878 to preserve the pre-existing position.[111] In particular, within part IV of the Courts Ordinance 1878, section 10 provided that '[t]he Supreme Court shall have such jurisdiction and authority as Her Majesty's High Court of Justice in England'. Hence, the jurisdiction of the Supreme Court of the Straits Settlements as at 1878 pursuant to the Courts Ordinance 1878 remained the same as that under the Third Charter.[112] But, at this point, we must turn our attention to sections 1(1), (6) and (7) of the Civil Law Ordinance 1878 which replicated for the Straits Settlements, sections 24(1), (6) and (7) of the Judicature Act 1873.

By section 1(1) of the Civil Law Ordinance 1878, the Supreme Court was *also* empowered to grant such relief as the Court might have given on its 'Equity side' prior to the enactment of the Courts Ordinance 1878. Similarly, section 1(6) also empowered the Supreme Court to recognise and give effect to *all* legal claims and demands, as well as all entitlements arising by way of the common law, custom, or by statute, as if the Civil Law Ordinance 1878 had not been passed. This meant that the Supreme Court of the Straits Settlements would also have been vested with the same power and authority of the courts enumerated in the Third Charter as at 1855 by section 1 of the Civil Law Ordinance 1878, *independently* of the operation of the provisions of the Courts Ordinance 1878. Lastly, the provisions of section 24(7) of the Judicature Act 1873 were re-enacted in the Straits Settlements *in pari materia*

Settlements (a power which only ceased from 1 April 1867 when the Straits Settlements were separated from the Government of India following the passing of the Government of the Straits Settlements Act 1866 (29 & 30 Vic, c 115)), the Indian Code of Civil Procedure 1859 (No 8 of 1859) seems never to have been made to apply to the Straits Settlements: Geoffrey Wilson Bartholomew, Elizabeth Srinivasagam and Pascal Baylon Netto, *Sesquicentennial Chronological Tables of the Written Laws of the Republic of Singapore: 1834–1984* (Malaya Law Review 1987) 52.

109 An Ordinance to Repeal Certain Enactments, enacted on 10 December 1878. It repealed such parts of the Supreme Court Ordinance 1868 as had not previously been repealed (save for s 36), such parts of the Court's [sic] Ordinance 1873, and the whole of the Courts Amendment Ordinance 1876 (save for s 3), upon the coming into operation of the Courts Ordinance 1873, ie, with effect from 1 January 1879: Government Gazette of the Straits Settlements, No 50, 13 December 1878, 1320.

110 On 7 December 1878, an Order of the Governor in Council was passed, providing that the Courts Ordinance 1878, the Civil Law Ordinance 1878, and the Civil Procedure Ordinance 1878 were to come into operation on 1 January 1879.

111 The Attorney-General's Objects and Reasons in support of the Bill to amend the Law relating to the Constitution of the Courts of Justice which was which was read for the first time on 15 March 1878 before eventually being enacted as the Courts Ordinance 1878 were appended to the Bill. The Bill was published in the *Straits Settlements Government Gazette*, No 12 of 1878 (22 March 1878), and the Objects and Reasons are set out at 298–302. The Attorney-General's remarks on pts IV and XVI of the Bill (which correspond to pts IV and XVI of the Courts Ordinance 1878) may be found at 300 and 302, respectively.

112 See *M v G* [1904] 8 SSLR 82 (CA) 84 (Law J), 88 (Hyndman-Jones J); and *Re Sinyak Rayoon* (1887) 4 Ky 329 (SC) 332 (Pellereau J), 334 (Wood J).

in the form of section 1(7) of the Civil Law Ordinance 1878. These re-enactments of sections 24(1), (6) and (7) of the Judicature Act 1873 within the Straits Settlements are significant, as subsequent events meant that section 10 of the Courts Ordinance 1878 has no contemporary equivalent in the statute books of the Republic of Singapore.[113]

From 1878 to the present day, Singapore's status evolved. From a constituent part of the Straits Settlements, she became a Crown colony, then a state within the Federation of Malaysia, before becoming an independent republic. As Singapore evolved, section 1 of the Civil Law Ordinance 1878 was successively re-enacted by the legislative bodies vested with the requisite power to make written law at the relevant time, and each iteration of this provision as it was successively re-enacted was *in pari materia* with its predecessor. Thus, each successive iteration would have preserved the state of affairs as pre-dated its own enactment; and this remains the case with sections 3(a), (g) and (h) of the Civil Law Act,[114] the most current legislative equivalents to sections 1(1), (6) and (7) of the Civil Law Ordinance 1878.

Section 3(a) provides that a judge of the High Court in Singapore, today, would still be empowered to grant 'such and the same relief' which could only have been given by the court on its 'equity side' before 1 January 1879 — being the date when the Civil Law Ordinance 1878 came into force.

Next, section 3(g) empowers a judge of the High Court in Singapore to recognise and give effect to the claims and entitlements specified therein ('all legal claims and demands, and all estates, titles, rights, duties, obligations and liabilities by the common law or by any custom, or created by any law having force in Singapore') in such manner as it would have done if the Civil Law Act had not been enacted. But since each prior iteration of section 3(g) in its predecessor legislation had similar provision, the jurisdiction granted to the High Court of the Republic of Singapore pursuant to section 3(g) of the Civil Law Act today is the same as that which had been granted to the Supreme Court of the Straits Settlements under section 1(6) of the Civil Law Ordinance 1878. Since section 1(6) of the 1878 Ordinance provided that the position of a judge of the Supreme Court of the Straits Settlements would have been the same as if *that* Ordinance of 1878 had never been enacted, we must then look to the position of a judge of the Supreme Court prior to

113 Section 10 of the Courts Ordinance 1878 was re-enacted as ss 9(1) and (8), Courts Ordinance 1907 (No 30 of 1907, Legislative Council of the Straits Settlements). In turn, they were later re-enacted as ss 17(a) and (p) of the Courts Ordinance 1955 (Legislative Council of the Crown Colony of Singapore). But, as Thean J noted in *Shiffon Creations (S) Pte Ltd v Tong Lee Co Pte Ltd* [1987] SLR(R) 730 (HC) [30] (*Shiffon Creations*), the Courts Ordinance 1955 was repealed following Singapore's merger with the Federation of Malaya to form the Federation of Malaysia in 1964. This, Thean J suggested in dicta, had the effect of taking away the power to award Chancery Amendment Act 1858 (UK) (21 & 22 Vict, c 27) (Lord Cairns' Act) damages in lieu of or in addition to an order of specific performance or injunction which the High Court would formerly have been vested with pursuant to the Courts Ordinance 1955, s 10 (*Shiffon Creations* (n 113) [30]). The interesting question whether this is truly the case is beyond the scope of the present article.

114 Civil Law Act (Singapore, cap 43, 1999 rev ed), the legislative history of which is appended at the end of the text of the Act. This, and the entirety of text of the Civil Law Act as presently amended, may be downloaded from Singapore Statutes Online <https://sso.agc.gov.sg/Act/CLA1909> accessed 2 September 2019.

1 January 1879 when the Civil Law Ordinance came into force: and the jurisdiction of such a judge would be that set out by section 4 of the Supreme Court Ordinance 1868, read with the Court's Ordinance 1873 — which brings us back to the jurisdiction as would have been vested pursuant to the Third Charter of 1855.

Finally, section 3(h) replicates the power to avoid multiplicity of proceedings that had been provided for in section 24(7) of the Judicature Act 1873.

Given these provisions in the Civil Law Act, in a case like that of A, B and C set out at the beginning of this article, it would still seem that the effect of the notice of assignment would be to bar B from pleading the defence in proceedings before the Singapore High Court, whether for reasons rooted in the grant of an injunction in equity to enjoin such plea, by the former exercise of the 'equitable jurisdiction of the common law courts', or by reason of the statutory 'replication on equitable grounds' derived from the operation of the Common Law Procedure Act 1854. Each of these jurisdictions would have been extended to Singapore courts, pursuant to the provisions of the Third Charter of Justice of 1855. That was then made part of the statute law of the then Straits Settlements by section 4 of the Supreme Court Ordinance 1868. That position was then preserved down to the present day by sections 1(1) and (6) of the Civil Law Ordinance 1878, read with sections 3(a) and (g) of the present-day Civil Law Act.[115] Supplemented by the operation of section 3(h) of the Civil Law Act, it seems the position under Singapore law is not dissimilar to the English position, post-Judicature Act 1873, set out in Section VI.

VIII Conclusion

Taking Lord Hardwicke LC's conception of equitable fraud as still being relevant today, this article has attempted to show how that conception can be harnessed to explain why a debtor of a debt which had been equitably assigned by his or her creditor may be liable to be ordered to pay the assignee a second time, if the debtor had received notice of assignment prior to his or her tender of payment to the creditor-assignor. Apart from the possibility of such liability arising within the court's equitable jurisdiction by reason of such debtor's dishonest assistance in the assignor's equitable obligations to her assignee, as explained in this article, equitable fraud may also play a significant role even in a seemingly straightforward common law action, by barring the pleading of a common law defence which would otherwise be made out in substance.

In the latter case, this article has sought to highlight how the essentially 'procedural' operation of such bars should alert us as to their limited scope of operation. Where this procedural mechanism is utilised, since it is rooted in and draws upon equitable principles, the power of the court to bar the pleading of substantive defences (such as acceptance of a precisely conforming tender

115 Although the Application of English Law Act (Singapore, cap 7a, 1994 rev ed) purports to dis-apply English enactments as might apply to Singapore, s 4(1) of the 1994 Act provides that any English enactment which applies to or is in force in Singapore by virtue of any written law shall continue to apply in Singapore. Hence, the 1994 Act does not affect the analysis in the main text.

of payment) should be subject to the general equitable bars (eg, the requirement that he or she who comes to equity must come with 'clean hands', and must not be guilty of laches, as equity favours the diligent and not the tardy). It is also, in principle, subject to the weak discretion which all equitable remedies are subjected to.

Secondly, the procedural bar to pleading the defence of payment will not obviate the substantive effects of payment. The situation here is approximately analogous to what happens when a debtor repays a time-barred debt: although no action could be brought against him because of the time-bar, a debtor who repays a time-barred debt has no cause of action against the creditor-payee to recover the sum paid on grounds of a total failure of consideration because time-barred debts are still due and owing.[116] If notice of an equitable assignment has a similarly 'procedural' effect to bar the pleading of a *defence*, then such payment would still discharge the debt, outside of the litigation context.

The 'procedural' analysis which has been highlighted also has other significant real-world implications. Reverting to the example which was set out at the beginning of this article, if B's tender of payment to A did not discharge the debt at law, B would be entitled to recover the payment to A on grounds of a total failure of consideration. In light of A's bankruptcy, B could submit a proof of debt in respect of his or her claim seeking restitution of the £10,000, which could then be set off against the trustee-in-bankruptcy's claim to recover the £8,000 from B.

On the analysis in this article, if B's tender of payment to A did discharge the debt as a matter of substantive common law principle, and B was merely precluded from pleading the facts to substantiate such discharge, then no cause of action to recover the payment to A on grounds of total failure of consideration would arise. Consequently, if B were sued by A's trustee-in-bankruptcy, B would not be able to set off the £10,000 he or she had paid A, against the £8,000 owed for the goods he or she had purchased from A. Since B would have no viable cause of action against A to recover the £10,000, no insolvency set-off could be raised by B in light of A's bankruptcy.[117]

That said, one might wonder why a plaintiff might prefer to use any of these 'procedural' routes for relief, so as to ensure a successful claim at common law, as opposed to making a substantive claim within the court's equitable jurisdiction, perhaps by relying on the 'dishonest assistance' reasoning that was mentioned in Section II of this article. Given that each route would lead to different remedies, the choice as to whether to adopt one or the other approach could well be determined by tactical choices as to which set of remedies might be more advantageous. But the choice may well be unavailable to jurisdictions which have yet to recognise 'dishonest assistance' liability.

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116 *Curwen v Milburn* (1889) 42 Ch D 424 (CA) 434–35 (Cotton LJ): 'Statute-barred debts are due, though payment of them cannot be enforced by action.'

117 Insolvency Act 1986 (UK) s 322(1), read with s 382(1). In Singapore, see Bankruptcy Act (Singapore, cap 20, 2009 rev ed), s 87, read with s 88. The position is similar for corporate insolvencies.

The dishonest assistance liability discussed in Section II rests on English law on the question of accessory liability for breaches of equitable obligations following the re-formulation of *Barnes v Addy*[118] in *Royal Brunei Airlines Sdn Bhd v Tan*.[119] In *Royal Brunei Airlines*, Lord Nicholls made it clear that 'dishonest assistance' liability could be made out even where the primary wrongdoer to whom assistance had been given had not acted fraudulently or dishonestly. The law in Singapore on the point appears to mirror the English position.[120] However, in jurisdictions such as Australia that have rejected this re-formulation, dishonest assistance liability might not be so readily made out.[121] If so, the problem of the double-liability of debtors in, say, Australia, may have to be explained by reference to the procedural routes to relief outlined in Sections III–V, unless the primary wrongdoer (A, in our example) could be shown to have accepted the accessory's assistance (in our example, B's tender of payment) 'fraudulently or dishonestly'.

Be that as it may, the procedural string to Equity's armoury expanded on in this article reveals the important role which Equity plays in moderating how holders of common law entitlements may invoke and exercise those entitlements. Referring to the fifth class of 'fraud' in Lord Hardwicke LC's judgment in *Earl of Chesterfield*, Lord Ellesmere LC observed that 'fraud' within the equitable jurisdiction may include unconscientious uses of one's entitlements.[122] Without challenging the policy choices which underpin the existence of those entitlements, Equity may be called upon to scrutinise the particular circumstances in which those common law entitlements are to be exercised, such that where 'equitable fraud' is present, the enjoyment of certain common law entitlements, including access to common law defences, may be barred. This has broader implications beyond the confines of this article and may provide grist for the development of further techniques to regulate invocation and exercises of other kinds of common law entitlements.

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118 *Barnes* (n 40).

119 *Royal Brunei Airlines* (n 40).

120 See *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd (in liq)* [2002] SGCA 28, [2002] 2 SLR(R) 94 [33]; *George Raymond Zage III v Ho Chi Kwong* [2010] SGCA 4 [20]; *MKC Associates Co Ltd v Kabushiki Kaisha Honjin* [2017] SGHC 317 [182].

121 See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89 [161]–[163], [179]–[184], rejecting Lord Nicholls' analysis in *Royal Brunei Airlines* (n 40), and adhering to the 'traditional' understanding of *Barnes* (n 40). The 'traditional' position also appears to have been retained in Canada: see *Air Canada v M & L Travel Ltd* [1993] SCR 787 (SC) 813–28 (Iacobucci J, with whom the other members of the Court, apart from McLachlin J, concurred). Although McLachlin J concurred in the result arrived at by Iacobucci J, she did not think it was necessary to rule on this particular point to dispose of the matter.

122 *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484 (Court of Appeal in Chancery) 491, cited with approval by Lord Blackburn in *O'Rorke v Bolingbroke* (1877) LR 2 App Cas 814 (HL) 833 (hearing an appeal from the Court of Appeal in Ireland).