Published in Equity today: 150 years after the Judicature Reforms (2023).
DOI: 10.5040/9781509960101.ch-003

Section 25(6) of the Judicature Act 1873: A 'Procedural' Approach

C.H. THAM*

I. INTRODUCTION

The Court of Chancery has facilitated assignments of legal choses in action from at least the seventeenth century,[1] although the common law was more reluctant.[2] Even so, *Snell's Equity* tells us that:[3]

> The old common law rule against the assignment of chose[s] in action was gradually relaxed. … Ultimately, by the Judicature Act 1873 [, section 25(6)[4]], and now by the Law of Property Act 1925[, section 136(1)[5]], 'any debt or other legal thing in action' was made assignable at law.

Section 25(6) was re-enacted[6] as section 136(1), replacing the law French 'chose in action' with the more Anglo-Saxon 'thing in action',[7] together with other minor differences, but to no substantial effect.[8] Largely unchanged, the construct now found in section 136(1) has been part of English law for 150 years. However, understanding what section 136(1) does, and how it does it, remains muddled.

* Professor of Law, Yong Pung How School of Law, Singapore Management University.

[1] See, eg, *Meechett v Bradshaw* (1633) Nels 22, 21 ER 779; *Hurst v Goddard* (1670) 1 Ch Cas 169, 22 ER 746; *Corderoy's Case* (1675) 1 Freem 312, 22 ER 1233.

[2] *Lampet's Case* (1613) 10 Co Rep 46b, 48a; 77 ER 994, 997.

[3] J McGhee (ed), *Snell's Equity*, 34th edn (London, Sweet & Maxwell, 2021) para [3-003].

[4] Hereafter, 'section 25(6)'.

[5] Hereafter, 'section 136(1)'. For ease of reference, both provisions have been set out in the Appendix at the end of this chapter.

[6] *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, [2001] 1 QB 825 [59].

[7] The Bankruptcy Act 1914, ss 38(c) and 167, had also replaced 'chose in action' with 'thing in action'.

[8] An assignment falling within section 136(1) is, 'effectual in law (subject to equities having priority over the right of the assignee)', whereas under section 25(6), it would have been 'effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed)'. The proposition that these changes meant they operated differently was rejected in *Glencore Grain Ltd v Agros Trading Co Ltd* [1999] 2 All ER (Comm) 288 (CA) [30].

The High Court of Australia takes the view that Australian equivalents[9] to sections 25(6) and 136(1) set out substantive formality requirements which *must* be complied with, else the non-conforming assignment becomes invalid (unless value had been given in exchange). However, the position in England is less clear.

On the one hand, given Lord Macnaghten's pointed observation in *William Brandt's Sons v Dunlop Rubber* that, '[section 25(6)] does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree',[10] *Smith & Leslie* takes the view that English law does *not* follow the Australian position, suggesting that *Olsson v Dyson*, the leading Australian decision, was wrongly decided.[11] On the other, *Guest on Assignment* suggests that '[t]he position to be adopted in English law awaits resolution by the courts'.[12] *Snell's Equity* is also equivocal.[13]

This chapter agrees with *Smith & Leslie* that English law justifiably takes a different view of sections 25(6) and 136(1) from their Australian equivalents. This chapter explains how section 136(1), like section 25(6), operates at what may be termed a 'non-substantive' or 'procedural' level to effect a slightly non-obvious manner of 'transfer' whereby:

(i) the assignee is invested with *copies* of the assignor's entitlements arising from the chose in action assigned that the assignee can effectively invoke *as though* it were the creditor/obligee of the chose assigned, *even though it is not*; and
(ii) the assignor is thereafter *barred* from effectively invoking these replicated entitlements for her own benefit such that it will seem *as though* the assignor was no longer the creditor/obligee, *even though it remains so*.

These provisions make it seem as though the assignee had replaced the assignor as creditor/obligee, without that being so as a matter of substantive principle.

II. 'TO TRANSFER' AND 'TO PASS': MULTIPLE MODES

A. Ordinary Language Usage

The verb 'to transfer' operates differently in different contexts. For example: in the sentence, 'Cristiano Ronaldo has been transferred from Juventus to Manchester United', the word 'transferred' connotes that Juventus has no call on the services of Ronaldo on the football pitch post-transfer, whereas only Manchester United will be

[9] Currently, these comprise the Conveyancing Act 1919 (NSW), s 12 (which is *in pari materia* with s 25(6)) on the one hand, and on the other: Civil Law (Property) Act 2006) (ACT), s 205; Law of Property At 2000 (NT), s 182; Property Law Act 1974 (Qld), s 199(1)–(2); Law of Property Act 1936 (SA), s 15; Conveyancing and Law of Property Act 1884 (Tas), s 86(1)–(2); Property Law Act 1958 (Vic), s 135; Property Law Act 1979 (WA), s 20 (which are largely *in pari materia* with s 136(1)).

[10] *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 (HL) 462.

[11] M Smith and N Leslie, *The Law of Assignment*, 3rd edn (Oxford, OUP, 2018) para [11.179]. See also CH Tham, *Understanding the Law of Assignment* (Cambridge, CUP, 2019) 434–36.

[12] YK Liew, *Guest on the Law of Assignment*, 4th edn (London, Sweet & Maxwell, 2021) para [3-65].

[13] McGhee (n 3) para [3-019].

so entitled. By contrast, in the sentence, '[t]he data in the hard disk in John's laptop has been transferred to Mary's USB drive', 'transferred' does not entail extinction or erasure of the transferred data post-transfer. Such transfer entails *copying* the data in the hard disk to the USB drive. But erasure from the source hard disk does not necessarily follow.[14] To an extent, this is because data is information. 'Transfers' of information do not extinguish that information; nor do they entail the transferor deleting such information from its memory. But they do entail the transferor having increased the number of entities who know it. So 'transfers' of information are *replicative* without necessarily being *extinctive* (though additional steps may certainly be taken to achieve that).

The verb 'to pass' is similar. Where the subject matter that has been passed is 'rivalrous',[15] for example, A's possession of a particular soccer ball, the 'passing' of possession by A to B entails A losing it to B. But where the subject matter is *not* rivalrous, this 'extinctive' entailment does not arise. Suppose a professor asked a student of hers to 'pass' the message to the other members of the tutorial group that the following week's tutorial will be postponed, and the student does so. As the message is information, the 'passing' of the message does not extinguish it. Nor does its 'passing' entail that it be forgotten by the professor and the student who had passed it along.

B. Technical Legal Usage

As Holmes observed:[16]

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

The 'transfer' or 'passing' of legal title in an estate in land is similar. Transfers of legal title of this kind extinguish the transferor's entitlements arising from its status as 'title-holder' because legal titles to estates in land are transferred via substitutions of *status*. As the entitlements (and obligations) of title-holding are specified by reference to an individual's status – whether one is/is not the title-holder at the relevant point in time – when the status of title-holder is 'transferred' from one holder to a successor,

[14] Technically, the source data will not be 'erased' until it is overwritten by other data. For example, where the MS-DOS operating system is used: 'In MS-DOS, one can use the undelete command. In MS-DOS the "deleted" files are not really deleted, but only marked as deleted – so they could be undeleted during [sic] some time, until the disk blocks they used are eventually taken up by other files.': Wikipedia entry, 'File deletion' https://en.wikipedia.org/wiki/File_deletion.

[15] *Lloyd v Google LLC* [2019] EWCA Civ 1599, [2020] QB 747 [68]; *Thaler v Comptroller General of Patents Trade Marks and Designs* [2021] EWCA Civ 1374, [2022] Bus LR 375 [133].

[16] OW Holmes, *The Common Law*, M De Wolfe Howe's edn (London, Macmillan, 1968) 265.

so, too, the associated entitlements and obligations.[17] However, not all transfers work like this.

Section 2 of the Carriage of Goods by Sea Act 1992 effects a 'transfer' differently:

> **2.** (1) Subject to the following provisions of this section, a person who becomes—
>
> (a) the lawful holder of a bill of lading;
>
> (b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or
>
> (c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order,
>
> shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage *as if he had been a party to that contract*. (emphasis added)

Unlike the Bills of Lading Act 1855 which it replaced, the subject matter of the 'transfer' in section 2(1) of the 1992 Act comprises the 'rights of suit' of the 'contract of carriage'[18] to which the shipping documents in question relate. However, like the 1855 Act, the technique used to 'transfer' these entitlements from the original shipper to indorsees or consignees is similar: section 2(1) renders it '*as if* he [the indorsee or consignee] had been party to the contract of carriage.'

The indorsee/consignee's entitlement-acquisition via section 2(1) cannot entail status-substitution: if the indorsee/consignee acquired the shipper's status as a contract-party, the indorsee/consignee would *have* that status, and it would not be *as if* it had been a party. To make it *as if* the indorsee/consignee were a party, section 2(1) has to operate by duplicating or copying the shipper's entitlement to sue the carrier (given its status as a contract-party), before enabling the indorsee/consignee to invoke the copied entitlement *even though* it remains a non-contract-party.

Like the 1855 Act, the 1992 Act effects a 'transfer' through *copying* or *replication*. But it goes further: section 2(5) provides that the entitlements of the shipper arising from its contract of carriage with the carrier as might pre-date the creation of the bill of lading setting out distinct entitlements are extinguished when section 2(1) is triggered for subsequent holders of bills of lading, though not sea waybills or ship's delivery orders. So, the 'transfer' effected by section 2(1) operates 'extinctively' in some cases, but not all. Still, how are such 'extinctive' effects, where present, achieved?

As with entitlement-acquisition, entitlement-extinction through status-substitution is inapplicable: if section 2(1) substituted the indorsee/consignee for the shipper as party to the contract of carriage, it would not be *as if* the indorsee/consignee were a party: the indorsee/consignee *would* be a party. Therefore, the 'extinctive' effect of these section 2(1) 'transfers' as modified by section 2(5) must arise otherwise. Perhaps, if the consignees/indorsees are to be treated *as if* they were party to those

[17] Tham (n 11) 51–52.

[18] And not the '[c]ontract contained in the Bill of Lading' as had been provided in the Bills of Lading Act 1855, s 1.

contracts, even though they are not, by parity of reasoning, the original shipper should be treated *as if* it was no longer party to those contracts, *even though it still is*?

Treating it 'as if' the shipper was no longer party to those contracts leaves intact the substantive legal rules by which the shipper is recognised by the substantive law as having the status of being a contract party. Since it leaves substantive rules unchanged, this mode of operation can be termed 'non-substantive', or 'procedural'. In other words, although the shipper still *has* those entitlements, it is *disabled* from effectively invoking them. As the following shows, such techniques are no stranger to English law.

III. THE 'PROCEDURAL BAR' ARISING FROM ENGLISH STATUTES OF LIMITATION

In *Ketteman v Hansel Properties Ltd*, in a dispute which came within the Limitation Act 1939 (which the Limitation Act 1980 repealed and replaced),[19] Lord Griffiths held that:[20]

> A defence of limitation raises a procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the [substantive] merits of the claim which may all lie with the plaintiff, but as a matter of public policy Parliament has provided that a defendant should have the opportunity to meet a stale claim. The choice lies with the defendant and if he wishes to avail himself of the statutory defence it must be pleaded.

The Limitation Act 1939 was repealed and re-enacted by the Limitation Act 1980. However, the latter still operates by way of a 'procedural bar': generally, unless that limitation period be extended or excluded in accordance with the provisions in Part II of the Act, where the limitation period for a cause of action set out in Part I of the Act has elapsed, no action may be brought in respect of it.[21] Read together with section 38(1),[22] this means that no proceeding in a court of law may be brought by a claimant on a cause of action whose limitation period has fully elapsed. Since the 1980 Act leaves intact the substantive law which generates the substantive *rights* whose (alleged) breach gives rise to the claimant's cause of action, as the Law Commission observed, 'as a general rule the expiry of the limitation period under the 1980 Act operates to bar the claimant's remedy,[23] rather than extinguish his or her rights'.[24] Hence, section 2 of the 1980 Act does not result in extinction of the claimant's entitlement to sue arising from the substantive law – it is just that although the claimant still *has* it, its effective *use* is barred. Consequently, it is *as though* the claimant no longer has those entitlements so far as access to judicial remedies is concerned.

[19] Although there are significant differences in the operation of the 1980 as opposed to the 1939 Act, those differences do not impact the manner of operation of the time-bar in either Act.

[20] *Ketteman v Hansel Properties Ltd* [1987] AC 189 (HL) 219.

[21] Limitation Act 1980, s 5.

[22] Limitation Act 1980, s 38(1) provides: 'In this Act, unless the context otherwise requires – "action" includes any proceeding in a court of law, including an ecclesiastical court.'

[23] But see text following n 25.

[24] Law Commission, *Limitation of Actions* (Law Com No 270, 2001) para [5.20]. See also *Royal Norwegian Government v Constant & Constant* [1960] 2 Lloyd's Rep 431 (QB) 442.

IV. CONSTRUING SECTIONS 25(6) AND 136(1): THE POWER OF 'AS THOUGH'

Like the Limitation Act 1980, sections 25(6) and 136(1) also cover a wide range of entitlements arising from different areas of substantive law. The matters which are passed and transferred by sections 25(6) or 136(1) may arise from any form of debt or other legal chose/thing in action. Hence, sections 25(6) and 136(1) may be applied to assignments of entitlements arising from contractual choses in action, choses in action arising in equity,[25] or choses in action generated from *causes* of action say, from a breach of contractual or statutory duties, or even a 'tortious duty' (ie, a duty not to commit a tort). And when they *are* applied, sections 25(6) and 136(1) 'pass and transfer' certain entitlements from assignor to assignee, namely:

(a) the legal to the subject-matter as had been assigned;
(b) all legal and other remedies for the same; and
(c) the power to give a good discharge for the same without the concurrence of the assignor.

But the *manner* by which these particular entitlements 'pass' and 'transfer' by reason of the statutory provisions is not immediately obvious. Fortunately, the manner of their operation was explained in connection with the assignment of a contract debt, in *Read v Brown*.[26]

As Lord Esher MR held in *Read v Brown*:[27]

> In construing s 25, sub-s 6, we must adopt the ordinary rule as to the construction of Acts of Parliament, that of giving, if possible, a meaning to each word. … Now the defendant's argument comes to this, that the 'legal right' to a debt is the same thing as the 'legal and other remedies' for it … That is a wrong rule of construction; the words mean what they say; they transfer the legal right to the debt as well as the legal remedies for its recovery. The debt is transferred to the assignee and becomes *as though it had been his from the* beginning; it is *no longer to be the debt of the assignor at all*, who cannot sue for it, the right to sue being taken from him … (emphasis added)

These observations have two aspects: a positive *enabling* aspect; and a less obvious, negative *disabling* aspect. Both will be explored below.

[25] More properly, a 'chose in equity'. Although some academic doubts persist as to whether choses in equity can come within s 25(6), the case law accepts that they do: *Harding v Harding* (1886) 17 QBD 442 (QB); *Manchester Brewery Co v Coombs* [1901] 2 Ch 608 (Ch) 619; *Re Pain* [1919] 1 Ch 38 (Ch) 44; *Torkington v Magee* [1902] 2 KB 427 (KBD) 430–31. Since s 136(1) and s 25(6) are *in pari materia*, it seems likely that the same holds for s 136(1). McGhee (n 3) paras [3-003] and [3-009] accepts this. However, Smith and Leslie (n 11) paras [16.11]–[16.16] suggest that these cases have been incorrectly decided or are at least doubtful. Liew (n 12) para [2-09] takes a more ambivalent position. None of these works addresses the point that ss 25(6) and 136(1) have disabling effects which are also relevant where equitable choses have been assigned: see Tham (n 11) 380–83, and also section IV.B below.

[26] *Read v Brown* (1888) 22 QBD 128 (CA).

[27] ibid 132; Lopes LJ agreed (at 133).

A. The Enabling Aspect of Sections 25(6) and 136(1)

i. '[T]he Right to the Debt or Other Legal Chose[/Thing] in Action'

In *Read v Brown*, Brown & Co contracted to sell and deliver goods for just under £17 to the defendant, Brown. The contract was formed, and the goods delivered, in Sussex. At Read's premises in Fleet Street, Brown & Co equitably assigned to Read the benefit of Brown's contract debt absolutely, 'in writing under the hand of the assignor', and Brown received written notice. Hence, the assignment to Read 'became' statutory pursuant to section 25(6). When Brown failed to pay, Read sued him in the Mayor's Court of the City of London, relying on section 25(6).

Brown applied to the Divisional Court for a writ of prohibition directing the cessation of Read's Mayor's Court proceedings for want of jurisdiction. The Mayor's Court had common law and equity jurisdiction where the entirety of the claimant's cause of action arose within the City's geographical limits. However, its common law jurisdiction was extended by Mayor's Court Procedure Act 1857, section 12. In particular, where the plaintiff's action in debt did not exceed £50, and if the plaintiff's cause of action arose within the City or the liberties thereof, 'either wholly or in part', no plea to the Court's jurisdiction would be allowed.

The Divisional Court declined to issue the writ of prohibition, holding that Read had showed cause.[28] On appeal, it was held that part of Read's 'cause of action' against Brown *had* arisen within the City of London since Read's cause of action had to include pleadings setting out the written assignment in the assignee's premises in Fleet Street. As less than £50 was claimed, section 12 applied.

Anticipating the two 'classic definitions'[29] of a cause of action in *Letang v Cooper*[30] and *Cooke v Gill*,[31] Lord Esher MR,[32] Lopes and Fry LJJ[33] explained that a 'cause of action' is that set of facts which a claimant before a court must plead and prove successfully to obtain judgment in his/her favour.[34] To commence an action at law in the High Court in his own name against Brown as 'statutory assignee' of a debt owed by Brown to the assignor (Brown & Co), Read had to plead as part of *his* cause of action against Brown:

(i) facts concerning the cause of action arising between the assignor-vendor, Brown & Co, and the debtor-purchaser, Brown (meaning, facts about the formation of the contract of sale between Brown & Co, and Brown (in Sussex);

[28] It is for the party resisting the writ of prohibition to show cause why it should not be issued: *The Mayor & Aldermen of the City of London v Cox* (1867) LR 2 HL 239, 280 (Willes J, in argument).

[29] *Roberts v Gill & Co* [2011] UKSC 22, [2011] 1 AC 240 [41] (Lord Collins); [107] (Lord Walker).

[30] [1965] 1 QB 232 (CA) 242–43.

[31] (1872–73) LR 8 CP 107 (Court of Common Pleas) 116.

[32] *Read v Brown* (n 26) 131.

[33] ibid 133.

[34] One often encounters statements like, 'the claimant's *cause of action* is time-barred'. So used, 'cause of action' seems to refer to the claimant's legal standing to bring a claim. Such usage is endemic: see, eg, *Berezovsky v Abrambovich* [2011] EWCA Civ 153, [2011] 1 WLR 290 [56]; *Ballinger v Mercer Ltd* [2014] EWCA Civ 996, [2014] 1 WLR 3597 [9]. Though confusing, such usage is not improper, since one's

(ii) the due performance by Brown & Co of its obligation to deliver the said goods to Brown (also in Sussex)); *as well as*
(iii) facts concerning execution of the equitable assignment of the debt owed by Brown to the assignor-vendor at Read's premises in Fleet Street, the assignment being absolute, under the hand of the assignor, and written notice having been given to the debtor, so making the equitable assignment statutory.

Obviously, if Brown & Co had commenced an action on the contract between it and Brown, it would have been prolix to plead the facts in (iii) pertaining to the assignment to Read. Hence, Read's cause of action as 'statutory assignee' of Brown & Co was not the same as Brown & Co's cause of action in its own right. Accordingly, section 25(6) did not 'transfer' Brown & Co's cause of action to Read. What, then, did it do?

Read v Brown tells us that the 'passing' and 'transferring' of the entitlements specified in section 25(6) did not substitute Read in place of Brown & Co as a contract-party. Rather, section 25(6) *replicated* Brown & Co's 'right to the debt or legal chose in action', 'legal and other remedies for the same', and 'power to give a good discharge, without concurrence of the assignor', and impressed them in Read. Through such replication, matters became, in Lord Esher MR's judgment,[35] *as though* the debt arising from the contract between Brown and Brown & Co had been owed to Read 'all along' – meaning, this would be so, *even though* Read remained a stranger to that contract. Consequently, by employing the power of 'as though', Read was enabled by section 25(6) to sue Brown in a way analogous to the technique of 'as if' employed in the Bills of Lading Act 1855, and which has been retained in the Carriage of Goods by Sea Act 1992.[36]

Confirmation that section 25(6) does not work by status-substitution may be found in *Bennett v White*,[37] where the Court of Appeal concluded that the defendant in an action in debt was entitled to rely on the Statutes of Set-off as statutory assignee of the benefit of a debt which had been owed by the plaintiff to the assignor. Echoing Lord Esher's analysis, Cozens-Hardy MR concluded in *Bennett v White* that section 25(6) made it such that '… [t]he debt [was] for all purposes [including the purposes of the Statutes of Set-off] in the same position *as if* it had been the original debt of the assignee' (emphasis added).[38] And the same would be true of section 136(1) today.

legal standing to sue depends on the facts which make up a 'cause of action'. In the present analysis, it is suggested that the usage set out in the main text (focussing on the root sense of 'cause of action' as being 'a set of facts' upon which one's standing to sue depends) is more appropriate within the context of ss 25(6) and 136(1).

[35] See text accompanying n 27.

[36] See section II above.

[37] [1910] 2 KB 643 (CA).

[38] ibid 646. Farwell and Kennedy LJJ agreed.

ii. '[A]ll Legal and Other Remedies'

In *Read v Brown*, Lord Esher MR also said:[39]

> Sect 25, sub-s 6, of the Judicature Act, 1873, gives to the assignee of a debt … more than the mere right to sue for it; it gives him the debt and *the legal right to the debt*, and it follows from that that he would have a legal right to sue for and recover it, *even had the section not contained the words, 'and all legal and other remedies for the same.'* (emphasis added)

Fry LJ, whose judgment immediately followed Lord Esher's, was 'of the same opinion',[40] and Lopes LJ concurred with Lord Esher MR's interpretation.[41] The Court of Appeal in *Read v Brown* thus located the assignor's power to sue (ie, to bring an action) within the words, 'the legal right to the debt' in section 25(6) (and now, in section 136(1)(a)).

Certain observations set out in *Camdex International v Bank of Zambia (No 1)* suggest a different construction:[42]

> By section 25 of the Supreme Court of Judicature Act 1873, now section 136 Law of Property Act 1925, debts were made assignable at law. If the statutory conditions are satisfied, such an assignment passes to the assignee 'all legal and other remedies for the same.' It is thus apparent from the wording of the statute that Parliament sanctioned not only the assignment of a debt, an item of property, but also the transfer of the concomitant right to sue for it.

Peter Gibson LJ seems to have located the 'transfer' of a statutory assignor's right to sue for a debt as had been assigned in the language of section 136(1)(b), ('all legal and other remedies for the same'), instead of section 136(1)(a) ('the right to the debt or other legal thing in action'). But having accepted that sections 25(6) and 136(1) were equivalents to each other, it is regrettable that the interpretation of section 25(6) in *Read v Brown* was not drawn to his attention.[43] Had it been, Peter Gibson LJ might well have followed suit, instead of charting a different course. Nor would the outcome in *Camdex International* have been altered had he followed *Read v Brown*.

As Lord Esher noted, where possible, every word in a statute should be given meaning.[44] If the transfer of the assignor's right to sue is located in section 136(1)(b) as a form of 'remedy', what would the 'debt or other legal thing in action' specified in section 136(1)(a) refer to? Peter Gibson LJ's construction may tend towards rendering section 136(1)(a) redundant, and that would be a 'wrong rule of construction'.[45]

One's right to sue another in a court of competent jurisdiction is distinct from the outcomes or results of those proceedings. Judicial remedies like damages certainly follow from judicial proceedings that conclude favourably for the claimant. But if not,

[39] (n 26) 132.
[40] ibid.
[41] ibid 133.
[42] *Camdex International Ltd v Bank of Zambia (No 1)* [1998] QB 22 (CA) 40 (Gibson LJ).
[43] It was not cited in argument, nor was it referred to in any of the judgments.
[44] *Read v Brown* (n 26) 132.
[45] ibid.

no such remedies would be ordered – instead, judicial orders might be made in the defendant's favour (eg, for costs). So, while terming one's right to sue to be a form of judicial remedy is not incorrect, conceiving this right to be a *step* towards obtaining judicial remedies may be more accurate.

In light of *Read v Brown*, it seems that the reference in section 136(1)(b) to 'all … legal remedies' may well denote remedies by way of judicial orders. Hence, where section 136(1) was satisfied, judicial orders as might otherwise have been made in favour of the assignor had the action been brought by the assignor may now be made in favour of the 'statutory' assignee bringing the action in his own name.

This is practically significant. For example, an action in debt gives rise to a specific remedy whereby the debtor is ordered to perform his *primary obligation* to pay the fixed sum of money *to his creditor*. Suppose A had sold B goods for a price of £10,000. Because of substantive contract principles, B would become indebted to A given the A–B sale contract between them. B's primary obligation under that contract is to make payment *to A*. Hence, if A successfully sued B on the debt arising from *that A–B contract*, B (as debtor) could only be ordered to perform his primary obligation to make payment of the sums owed *to his creditor*, that is, *to A*.[46]

Suppose A equitably assigned the benefit of the A–B contract absolutely to C, and the section 136(1) writing and notice requirements were met. If section 136(1) operates identically to section 25(6), following *Read v Brown*, C would be enabled to sue B in his own name despite (still) being a stranger to the A–B contract given section 136(1)(a). However, merely enabling C to sue B at law in his own name would *not* mean that B could be ordered to make payment to C because the *primary obligations* under the contract (*inter alia*, to make payment *to A*) would remain unchanged, and C is enabled by section 136(1)(a) to sue only *as if* he were the creditor, even though he is not. But if C were permitted to bring an action in debt in his own name, only for B to be ordered to make payment to *A*, there would still be unfinished business.

Although sums paid to A pursuant to the A–B contract would probably be held by A on trust for C (given the trust-like relationship as arises between equitable assignor and assignee),[47] if A failed to hand them over to C, C would have to sue A in equity to compel A to do so. Since the Judicature Act 1873 was aimed at reducing multiplicity of proceedings, particularly the need for litigants to commence proceedings at

[46] At common law, 'every creditor has a right to insist on payment to himself, or to such person as he thinks fit': *Hodgson v Anderson* (1825) 3 B & C 842, 853–54; 107 ER 945, 949–50 (Bayley J). As noted in SJ Bailey, 'Assignments of Debts in England from the Twelfth to the Twentieth Century, Part III' (1932) 46 *LQR* 547, 550, 'this rule [in *Hodgson v Anderson*] … merely enabled the creditor to choose whom the debtor was to pay'. This may be conceived as a case where a creditor ('A') having the power to discharge the debt by accepting payment from the debtor ('B') had delegated its exercise to another ('X'). Alternatively, as a matter of construction or implication, the A–B contract could be one where B was duty-bound to A to make payment 'to A *or A's nominee*'. In either case, even if A had delegated to/nominated X, X does not become B's creditor since X did not sell B the goods which gave rise to the debt: A did. Hence, notwithstanding these possibilities, it remains the case that B's obligation *as a debtor* under the A–B contract is to pay A, his *creditor*.

[47] *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 Ch D 128 (CA) 136; *Warner Bros Records Inc v Rollgreen Ltd* [1976] 1 QB 430 (CA) 443–44.

law and in equity to completely resolve their legal difficulties,[48] it is arguable that Parliament incorporated the wording 'all legal … remedies' in section 25(6) in 1873 to address this problem. If so, this position would be preserved in section 136(1) given the equivalent wording in section 136(1)(b). That is, the courts would be permitted to make an order compelling B to make payment to C in respect of the debt arising from the A–B contract, *as if* C was a party thereto, *even though he was and is not a party.*

As for the 'other remedies' mentioned in section 137(1)(b), these arguably refer to self-help remedies, for example, the 'self-help remedy' of a contractual promisor to discharge a contract following an anticipatory repudiatory breach of contract by the contractual promisee. Suppose X contracts to buy 1,000 widgets from Y at a price of £10 per widget for delivery in six months' time. One month later, Y renounces the contract. If X 'accepts' Y's renunciation, that discharges the contract and generates in X an 'immediate right of action'[49] against Y. Hence, X may immediately sue Y for damages for the consequential losses from the renunciation. If there be an available market for the widgets, those losses would be quantified to be the difference between the contract and the market price.[50]

Suppose X had transferred the entirety of her business undertaking to Z. As part of this, X had equitably assigned the benefit of the X–Y contract to Z absolutely in a duly-signed writing, and written notice was given to Y thereby making the assignment 'statutory'. If not for section 136(1)(b), as a non-party to the X–Y contract, Z would have no entitlement to discharge it by 'accepting' Y's anticipatory repudiatory breach. But section 136(1)(b) allows Z to be treated as though he was a party to the X–Y contract for purposes of accessing 'other remedies' (even though he is not) – so Z may accept Y's renunciation, discharge the contract, and acquire 'an immediate right of action'. This dovetails with section 136(1)(a) such that Z may sue on that 'immediate right of action' in his own name, as though he were party to the X–Y contract.

iii. '[T]he Power to Give a Good Discharge for the Same without the Concurrence of the Assignor'

Turning to section 136(1)(c) ('the power to give a good discharge …', re-enacting the same words in section 25(6)): it does not follow from the 'statutory' assignee being entitled to sue the debtor/obligor in his own name (because of section 136(1)(a)) that he can also 'give' the debtor/obligor a 'good discharge, without concurrence of the assignor'.

Through the 1800s, it had become common practice for the prudent equitable assignee of a legal debt or chose in action to also insist that the assignor provide further authorisations for the assignee to deal with the assigned subject matter without further assignor involvement. For example, in an 1859 precedent for the

[48] See Tham (n 11) 329–39.

[49] *Johnstone v Milling* (1886) 16 QBD 460 (CA) 467 (Lord Esher MR). See also *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia (The Rialto)* [1996] 2 Lloyd's Rep 604 (CA) 697.

[50] Sale of Goods Act 1979, s 51(3).

assignment of a bond, we find the following language for a suggested power of attorney to be embedded within the indenture of assignment:[51]

> *And* for the considerations aforesaid the said (*assignor*) doth hereby constitute and appoint the said (*assignee*) his executors administrators and assigns his true and lawful attorney and attornies in the name or names of the said (*assignor*) his executors administrators or assigns to ask demand and receive all and every the sum and sums of money now due or hereafter to become due upon the said bond or obligation and on nonpayment thereof or any part thereof in the name or names of the said (*assignor*) his executors or administrators but at the proper costs and charges of the said (*assignee*) his executors administrators or assigns to commence and prosecute with effect any actions or suits against the said (*obligor*) his executors administrators or assigns until full satisfaction and payment of the said sum of £ ***And on receipt thereof to cancel or deliver up the said bond or obligation or to make and give good and sufficient releases and discharges for the sum or sums of money so received*** … (emphasis in bold italics added)

Similar language remained current in the period preceding the Judicature Act 1873 reforms. For example, in the 1871 edition of his *Practical Guide to Conveyancing*, Sir Howard Elphinstone warned that:[52]

> Bearing in mind the importance, where a legal chose in action is assigned, of being able to sue the debtor at law in the name of the original creditor, a power called a power of attorney is *always* inserted in the assignment of a legal chose in action, enabling the assignee 'to demand, sue for, recover, receive, *and give effectual discharges for the debt, in the name of the assignor*.' (emphasis added)

Furthermore, in an 1873 compendium prepared by Frederick Prideaux[53] and John Whitcombe, the following precedent for the assignment of a bond debt was suggested:[54]

> … And the said [assignor] doth hereby absolutely and irrevocably appoint the said [assignee], his executors, administrators, and assigns, the true and lawful attorney and attorneys of the said [assignor], his executors, or administrators, for him or them, and in his or their name or names, or otherwise, *to receive and give effectual discharges for*, and to sue for and recover the monies hereby assigned, or expressed so to be, … (emphasis added)

Lawyers of that period understood that the assignee had to be specifically authorised in relation to both the bringing of actions, as well as the giving of discharges: the one

[51] L Shelford, *Crabb's Complete Series of Precedents in Conveyancing and of Common and Commercial Forms in Alphabetical Order*, 5th edn (London, Butterworths, 1859) vol I, 361. For earlier examples, see G Horseman, *Precedents in Conveyancing* (London, His Majesty's Law Printers, 1785) vol I, 132–34; W West, *Symbolœography* (London, Charles Yetsweirt Esq, 1594) precedent for 'A letter of attorney to recover and retaine a debt' (Sect 521).

[52] HW Elphinstone, *A Practical Introduction to Conveyancing: Containing the Substance of Two Lectures Delivered Before the Incorporated Law Society in 1869, 1870 and 1871* (London, W Maxwell, 1871) 201–02.

[53] Frederick Prideaux was appointed reader in real and personal property to the Inns of Court in 1866: JM Rigg (revised E Metcalfe), 'Prideaux, Frederick (1817–1891)' in *Oxford Dictionary of National Biography Online* (Oxford, OUP).

[54] F Prideaux and J Whitcombe, *Prideaux's Precedents of Conveyancing*, 7th edn (London, Stevens & Sons, 1873), vol I, 375.

did not entail the other. Consequently, if words pertaining to the latter were absent, the giving of a discharge by an assignee might only be effective with the assignor's further concurrence.

Just as how the assignor's right to sue was replicated such that the assignee would, pursuant to the wording in that part of section 25(6) now re-enacted in section 136(1)(a), be impressed with a similar right *as though* the assignee was the creditor/obligee to the debt/chose as had been assigned, the wording in that part of section 25(6) now re-enacted in section 136(1)(c) also replicated the assignor's power to give a good discharge and impressed that on the assignee, thereby enabling the assignee to *also* give a good discharge, likewise. By enacting section 25(6), powers of attorney that had been *de riguer* in earlier times became unnecessary.[55] So long as section 25(6) (or, today, section 136(1)) applied, the assignee would be enabled to give a good discharge in its own right, without needing further assignor-concurrence.

B. The Disabling Aspect of Sections 25(6) and 136(1)

The discussion thus far has focussed on the enabling aspect of sections 25(6) and 136(1). However, they also have a disabling aspect.

In relation to the right to sue at law, the Court of Appeal's judgment in *Hughes v Pump House Hotel Co Ltd (No 1)*[56] suggests that, where section 25(6) applies, the 'statutory' assignor will become unable to sue on the chose as had been assigned. In that case, the plaintiff, Hughes, sued the defendant company for non-payment of the balance of the contract price for construction services which the defendant company had engaged Hughes to provide. However, Hughes had assigned such sums as would be due to him to Lloyd's Bank Ltd, to secure a loan. Relying on this, the defendants raised a preliminary issue that this was an absolute assignment within the meaning of section 25(6), and that Hughes was no longer able to sue on the construction contracts in question.

Although this submission was rejected by Wright J in the court below (who ruled that section 25(6) did not apply as Hughes's assignment had not been 'absolute'), the Court of Appeal held otherwise.[57] Consequently, the Court of Appeal dismissed Hughes's action because Hughes, 'had no right of action'.[58] This could be taken as authority for the notion that section 25(6) extinguishes the assignor's entitlement to sue. But there is no such express language in section 25(6) (or section 136(1)). So, the 'extinctive' effect rests in the verbs 'to pass' and 'to transfer' employed therein.

[55] See, eg, F Prideaux and J Whitcombe, *Prideaux's Precedents of Conveyancing*, 8th edn (London, Stevens & Sons, 1876) vol I, 398–99, where the elaborately-worded power of attorney of earlier editions has been expunged. However, old habits die hard, and powers of attorney are still often used in conjunction with assignments: see H Beale, L Gullifer and S Paterson, 'A Case for Interfering with Freedom of Contract? An Empirically Informed Study of Bans on Assignment' [2016] *JBL* 203, 223.

[56] [1902] 2 KB 190 (CA).

[57] ibid 194 (Mathew LJ); 198 (Cozens-Hardy LJ).

[58] ibid 198 (Cozens-Hardy LJ).

Once again, Lord Esher MR's judgment in *Read v Brown* helpfully reminds us that, '[t]he debt is transferred to the assignee and becomes *as though* it had been his from the beginning; it is no longer to be the debt of the assignor at all, who cannot sue for it, the right to sue being taken from him …'.[59] Though the latter phrase might suggest that the assignor's right to sue had been extinguished, that would be incoherent.

Lord Esher tells us that the assignee is to be treated *as though* it were the creditor. So, the assignee is *still* not the creditor. For consistency, the sentence 'it is no longer to be the debt of the assignor …' must mean that the assignor is to be treated *as though* it was not the creditor, *even though it still is* (based on the substantive law giving rise to the debt/chose as had been assigned).

To give effect to this, the 'procedural' approach employed in statutes like the Limitation Act 1980 seems apt. Adopting that approach, where a debt/chose in action has been assigned in a manner which triggers section 136(1), although the 'statutory' assignor remains creditor/obligee, in relation to the entitlements spelt out in section 136(1)(a), (b) and (c) (and which were formerly set out in section 25(6)), the statute *disables* the assignor from effectively invoking them by directing the court to view invocations of these entitlements by the assignor to be ineffective. Hence it becomes *as though* the assignor no longer has them.

V. THE EFFECT OF NOT FULFILLING SECTION 25(6) OR SECTION 136(1) REQUIREMENTS

For Lord Macnaghten, although the assignment before their Lordships in *Brandt's* might not have been 'absolute' as to bring it within section 25(6), that did not mean that the assignment could not continue to operate as an equitable assignment.[60] This could be taken as authority for the proposition that an equitable assignee who fails to bring itself within the ambit of section 25(6) (or, today, section 136(1)), is still entitled to rely on its entitlements as an equitable assignee. Though some commentators have taken the position that that is indeed the case in English law,[61] other works, including the current edition of *Snell's Equity*, have been more circumspect[62] given the approach taken by the High Court of Australia to Australian equivalents to sections 25(6) and 136(1).

A. The Australian Position

The High Court of Australia has construed Australian equivalents to sections 25(6) and 136(1) as having created requirements which, if unfulfilled, invalidate the assignment. The key Australian authority seems to be *Olsson v Dyson*.[63]

In that case, just prior to his death, a husband in South Australia purported to make his wife a parol gift of the chose in action arising from a loan of money. The

[59] *Read v Brown* (n 26) 132.
[60] *Brandt's* (n 10) and the text accompanying n 69.
[61] See n 11.
[62] McGhee (n 3); Liew (n 12).
[63] (1968) 120 CLR 365 (HCA), on appeal from the Supreme Court of Southern Australia.

High Court of Australia held that the parol gift failed for non-compliance with section 15 of the Law of Property Act 1936 (SA).[64] As Kitto J explained, there being no equity to perfect an incomplete gift, where the assignment was made parol and the husband having died without making a duly signed assignment in writing, he had failed to do all that he had to do to comply with section 15. Hence, the gift was still incomplete as at his death for want of writing under his hand.[65]

Windeyer J concluded likewise. He also reasoned that section 15 had to be followed for this gift to be complete at law, and that there was no equity to complete an incomplete gift.[66] This echoed points he had previously made in *Norman v Federal Commissioner of Taxation*:[67]

> [T]he law now provides a means whereby the legal owner of a chose in action may make a complete and perfect gift of it. That being so, and as equity does not perfect an imperfect gift, can there ever now be an effectual voluntary assignment unless all the statutory requirements are met? … Equity intervened to assist the assignments of choses in action because they were not assignable at law. Now that they are, why, it may be asked, should equity aid imperfect attempts at voluntary assignments of them. On the other hand, it can be urged that the statute provides a method or machinery whereby assignment may be effected, but that it does not detract from the validity of any transaction that would have been effective in equity if it had occurred before the statute came into operation. There is some authority for the latter proposition: see eg *German v Yates*.[68] And Lord Macnaghten's well-known words in *William Brandts' Sons & Co v Dunlop Rubber Co*, are sometimes invoked in support of it: 'Why that which would have been a good equitable assignment before the statute should now be invalid and inoperative because it fails to come up to the requirements of the statute, I confess I do not understand. The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree'.[69] But this was said in reference to an assignment for value. I do not think that his Lordship's remarks should be read as qualifying the principle that equity does not perfect imperfect voluntary assignments. If an attempt is made to assign, by way of gift, a chose in action assignable under the statute, … the requirements of the statute cannot be ignored; for the general rule of equity is that an effective assignment occurs only if the donor does all that, according to the nature of the property, he must do to transfer the property to the donee.

Here, Windeyer J attempted to distinguish *Brandt's* on grounds that it involved an assignment for value. But English judges have declined to follow suit.

B. The English Position

English judges have taken Lord Macnaghten's views in *Brandt's*[70] to be generally applicable, even to voluntary assignments unsupported by consideration. This can be seen in *German v Yates*.[71]

[64] Which is *in pari materia* with section 136(1).
[65] *Olsson* (n 63) 375. Barwick CJ and Menzies J agreed with Kitto J.
[66] ibid 385.
[67] (1963) 109 CLR 9 (HCA) 28.
[68] (1915) 32 TLR 52 (KBD).
[69] *Brandt's* (n 10) 461.
[70] Reproduced above, see the text accompanying nn 10 and 69.
[71] (n 68).

In that case, Sophia Yates gave Mrs German an IOU for a loan of £100. Later, Mrs German told Sophia Yates to pay the £100 when due to Maria Yates. Sophia Yates agreed, and gave Maria Yates a new IOU after Mrs German had destroyed the original one. No consideration was given by Maria Yates to Mrs German in relation to this transaction. Mrs German then passed away.

Mrs German's widower (acting as administrator of Mrs Gernan's estate) contended that if there had been an assignment of the benefit of the £100 debt to Maria Yates, it was ineffective; consequently, the debt remained part of Mrs German's estate. The report states:[72]

> [T]he subject matter here was a simple chose in action which could be transferred so as to give the transferee a right to sue under the Judicature Act *and could also be transferred by equitable assignment*. No form of words was required for an equitable assignment; the only thing that was necessary was to make the reasoning plain (*Brandt's v Dunlop* [1995] AC, at p 462 …).
>
> [Counsel for the administrator] had contended that since the Judicature Act the creditor could make a good legal assignment under the Act, and that if he purported to make an equitable assignment without consideration he was trying to do what could be quite well done in another way and the transaction failed. But he (Mr Justice Lush) could not accept that view. *Brandt's v Dunlop* (*supra*, at p 461) showed that the Act had not destroyed equitable assignments or impaired their efficiency in any way, and they still existed alongside of the new kind of assignment under section 25. Nor could he accept that the assignment here was invalid because it was incomplete; it was perfectly good and complete.

Plainly, Lush J did *not* take Lord Macnaghten's observation in *Brandt's* to apply only to assignments for value since he applied it to Mrs Green's absolute assignment to a volunteer. Nor was Lush J alone, for Atkinson J adopted the same position in *Holt v Heatherfield Trust Ltd*,[73] a case involving section 136(1) of the Law of Property Act 1925.

In *Holt*, the plaintiff, Holt ('C'), had been equitably assigned the benefit of a judgment debt which was owed to the assignor, Samuel Partington ('A'), by the judgment debtor, the Chloride Electrical Storage Co Ltd ('B'). A obtained judgment on 14 June 1940, and the benefit of the judgment was assigned in writing to C the same day, C receiving the written assignment on 15 June 1940. But written notice of the assignment was only sent to B on 17 June, B receiving the notice on 18 June.

In other proceedings, A owed a judgment debt to the defendant, Heatherfield Trust Ltd ('G'). To enforce the judgment it had obtained against A, G obtained a garnishee order nisi and served it on B on 17 June, after A had assigned the benefit of B's judgment debt to C, but before B received written notice of the assignment on 18 June. The issue was whether the garnishee order nisi on the judgment debt which B owed A ought to be discharged or made absolute given A's assignment to C.

[72] ibid 52–53.
[73] [1942] 2 KB 1 (KBD) 14.

Atkinson J concluded that C had the better claim to B's judgment debt, even though written notice of the assignment was only received by B on 18 June:[74]

> Bearing in mind these two results, first, that the assignment was a perfectly good equitable assignment, which could be turned into a legal assignment [pursuant to section 136(1)] at any moment by giving [written] notice, and which without notice, the assignee could have sued upon so long as he joined the assignor as defendant, and secondly, that a judgment creditor is in no better position than the assignor and cannot garnishee anything which the assignor could not honestly deal with, it seems to me perfectly clear that the plaintiff's [C's] title is a good one …

Having rejected G's contention that A's assignment to C was fraudulent,[75] Atkinson J observed that the purported assignment by A to C had been in consideration of loans which C had made to A previously.[76] But, this was irrelevant as Atkinson J followed *Glegg v Bromley*[77] and held that the issue of consideration was only pertinent where a future debt (ie, a debt which was not in existence at the time of the assignment, but which might come into existence at some future time) had been assigned.[78] Since the assignment by A to C was of a presently extant judgment debt, and not a future debt,[79] the presence or absence of consideration was inconsequential. That is, *even if* there had been no consideration from C for the assignment, A would *still* have validly equitably assigned the benefit of the judgment debt owed by B to C once the written assignment was executed, and *before* written notice was received by B: 'the assignment [from A] was a perfectly good equitable assignment, which could be turned into a legal assignment at any moment by giving notice …'.[80] This is completely at odds with the reasoning of the High Court of Australia in *Olsson v Dyson*, which was decided a few years later.

Closer to the present day, the disinclination of English courts to adopt the Australian line of reasoning persists. For example, the unreported cases of *Sycamore Sandpits Developments Ltd v Phoenix Assurance Co Ltd*[81] and *Technocrats International Inc v Fredic Ltd*[82] both tell us that assignments of a legal chose in action which fall outside the ambit of section 136(1) may still take effect as an equitable assignment.

[74] ibid.
[75] ibid 2.
[76] ibid 2–3.
[77] [1912] 3 KB 474 (CA).
[78] The position is different in Australia: see *Commissioner of Taxation of the Commonwealth of Australia v Everett* (1980) 143 CLR 440 (HCA) 450.
[79] *Holt* (n 73) 5.
[80] ibid 14 (Atkinson J).
[81] (QBD, 23 May 1986) in which Tudor Evans J accepted that an oral assignment of a legal chose in action arising from a policy of insurance was effective as an equitable assignment. Although the oral assignment was to have been in consideration for a nominal sum of £100, the £100 was never paid. Tudor Evans J held that the payment of the £100 was 'not necessary' for the oral assignment to be effective in equity.
[82] [2004] EWHC 692 (QB) [57] in which Field J held that a written assignment of the benefit of a contract to pay sums by way of commission which was signed by an agent of the assignor was not 'under the hand of the assignor' (at [53]), but could still take effect as an equitable assignment; Field J also doubted that consideration was required for the equitable assignment to be effective, but it would in any event have been present in light of a promise by the assignee to pay the assignor £350,000 for the assignment.

Furthermore, although *Sycamore Sandpits* and *Technocrats International* were also cases in which the assignments were arguably supported by some form of consideration, this did not appear to the court in either case to be critical.[83]

VI. CONCLUSION

These English cases tell us that sections 25(6) and 136(1) operate quite differently from their Australian cousins. Strong arguments can be made in support of the English proposition that immediate and absolute gifts of presently extant legal choses in action made with neither writing under the assignor's hand, nor *written* notice to the debtor/obligor, are effective.

First, in *Hockin v Royal Bank of Scotland plc*, Asplin J agreed with the proposition that 'section 136 Law of Property Act 1925 does not create a statutory right of assignment in itself as much as regulates the effects of assignments which have taken place'.[84] This necessarily denotes that assignments which would have been effective and valid independently of section 136 will continue to be effective and valid whether the requirements of section 136 are met, or not: *their* validity does not depend on section 136 – although the availability of the effects mandated by section 136 certainly do.

Neither section 25(6) nor section 136(1) defines what counts as an 'assignment' for the legislative effects spelt out therein to arise. Each states that, when there has been an absolute assignment of a debt or legal chose/thing in action, and if that assignment had been in 'writing under the hand of the assignor', when written notice of such assignment is also received by the debtor/obligor of the chose assigned, certain entitlements of the assignor would *then* 'pass' and 'transfer'.[85] Thus, satisfaction of the requirements of a duly signed writing and written notice to the debtor/obligor are pre-requisites for the passing and transfer of the stipulated entitlements: they are not pre-requisites for the validity of the *assignment* of the debt or legal chose in action. Consequently, if these pre-requisites are *not* met, all that follows is that the 'passing' and 'transferring' of these stipulated entitlements as effected by the statute will not occur, but the 'assignment' of the debt or legal chose in action would still take effect so far as the general law apart from the statute would permit. Sections 25(6) and 136(1) merely build upon pre-existing institutions of assignments of debts or choses/things in action such as the institution of *equitable* assignment: they do not modify the substantive law of such institutions, but merely set out a statutory superstructure.[86]

[83] See nn 81–82.

[84] *Hockin v Royal Bank of Scotland plc* [2016] EWHC 925 (Ch) [44].

[85] Hence, in *Curran v Newpark Cinemas* [1951] 1 All ER 295 (CA) 299H, the Court of Appeal concluded that where a debt or thing in action had not been effectively equitably assigned in the first place, and where none of the mechanisms permitting assignment at law apart from s 136(1) had been validly invoked, s 136(1) could not be relied on because there would have been no 'assignment' for it to be applied to.

[86] Tham (n 11) 435–36.

Second, as Sargant J observed in *Re Westerton*, 'the aim of the sub-section [ie, section 25(6)] was to inform procedure …'.[87] As explained in section IV above, given what was held in *Read v Brown*, the modifications effected by section 25(6) and its legislative successor, section 136(1), operate *despite* the substantive law giving rise to the debt/chose assigned stipulating otherwise. That is how an assignee of a debt or chose in action can be treated *as though* the debt or obligation(s) relating to the chose assigned was/were owed to the assignee, *even though* the debt/obligation(s) is/are not. Correspondingly, where these provisions apply, the assignor can be treated *as though* the debt/obligation(s) was/were *not* owed to it even though they still are.

Obviously, *Olsson v Dyson* has no binding force on an English court. But, as explained above, there are good conceptual reasons why the path trodden by the High Court of Australia need not be followed in England.[88] Notwithstanding the esteem in which the High Court of Australia is held, the hesitancy in the current edition of *Snell's Equity* on the point is, perhaps, ripe for review, 150 years after the publication of the first.

APPENDIX

Judicature Act 1873

25. And whereas it is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the said High Court of Justice to amend and declare the Law to be hereafter administered in England as to the matters next hereinafter mentioned: Be it enacted as follows:

…

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

…

[87] *Re Westerton* [1919] 2 Ch 104 (Ch) 133. See also *Marchant v Morton Down & Co* [1901] 2 KB 829 (KBD) 832; and *Torkington* (n 25) 435.

[88] Or, by jurisdictions employing similar legislation: see, eg, Civil Law Act 1909 (Singapore), s 4(8).

Law of Property Act 1925

136. Legal assignments of things in action.

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

(a) the legal right to such debt or thing in action;
(b) all legal and other remedies for the same; and
(c) the power to give a good discharge for the same without the concurrence of the assignor:

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

(a) that the assignment is disputed by the assignor or any person claiming under him; or
(b) of any other opposing or conflicting claims to such debt or thing in action; he may interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act 1925.

…