Subject-matter of assignment. The subject-matter of the assignments dealt with in this book is choses in action. **1-04**

(B) CHOSES IN ACTION

Definition. The classic definition of a chose in action is that of Channell J in *Torkington v Magee*[23]: "'Chose in action' is a known legal expression to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession". However, not every right that can be enforced by action is a chose in action. It must be a right that can be considered a species of property. While a right of action will necessarily involve a remedy, that does not mean that remedies are property in themselves, capable of being separately assigned. In *Investors Compensation Scheme Ltd v West Bromwich Building Society*[24] one of the questions at issue was whether a claim for rescission of a mortgage was in itself a chose in action and capable of being assigned. The House of Lords held that it was not. Lord Hoffmann said[25]: **1-05**

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

The description of a chose in action as "property" is a recognition that a chose in action is capable of being owned and (in the case of assignment) at least in principle capable of being transferred. But the concept excludes rights that are linked to tangible property, e.g. the ownership or right to possession of goods or land. A chose in action is, so it has been said,[26] "*personal* property of an incorporeal nature". The words "incorporeal nature" emphasise that a chose in action is an intangible.[27] The rules of law governing the transfer of intangibles differ significantly from those which govern the transfer of an immovable (land) or a tangible movable (goods).

The category of choses in action was at first a relatively narrow one, but as the common law developed it expanded to cover, as Holdsworth put it,[28] a "great mass of miscellaneous rights". At the present day it covers a wide spectrum of rights which differ widely from each other in essential characteristics, ranging from simple contract debts to shares in a company and intellectual property rights. To this long list must be added rights in equity (referred to as "equitable choses in action"[29]). It may therefore not be helpful to look simply at a general definition to determine whether a particular right is, or is not, a chose in action, and so whether it is assignable. It will be preferable to have regard to the nature of the particular right **1-06**

---

23 [1902] 2 K.B. 427, 430 (reversed [1903] 1 K.B. 644).
24 [1998] 1 W.L.R. 896.
25 At 915.
26 Elphinstone, "What is a Chose in Action?" (1893) 9 L.Q.R. 311, 312. See also *Colonial Bank v Whinney* (1886) 11 App. Cas. 426, 440.
27 See para.1-11.
28 *History of English Law* (London: Methuen & Co, 1925), Vol.7, p.516. See also Holdsworth, "The History of the Treatment of Choses in Action by the Common Law" (1920) 33 *Harvard Law Review* 967, 968.
29 See para.1-07.

transfer to the financier of its right to future payment from its customers.[8] This in turn enables the business to allow its customers to purchase goods or services on credit, which it would be less disposed to do had it to wait for its money. But there are many other situations, for example, debt collection, the satisfaction or reduction of existing or future indebtedness, the creation of security for a loan, the sale of a business as a going concern, loan participation[9] or the gift of intangible property to another family member, where assignment has an important role to play.

1-03 **Legal and equitable assignments.** It might therefore seem surprising that the common law, as it originally stood,[10] was disinclined to favour assignments. The reasons for this are discussed in a later chapter.[11] The transfer of rights from one person to another might nevertheless be achieved at common law by less direct and more cumbrous means: by novation,[12] by an acknowledgement by a debtor that he held funds in his hands belonging to his creditor for and on behalf of a third party,[13] and in certain situations, by use of a power of attorney.[14] But, as a general rule, an assignee could not pursue a claim in his own right in a court of law. Equity, on the other hand, was willing to recognise assignments. If the right or interest assigned was equitable,[15] so that a court of equity would have exclusive jurisdiction over it, the assignee was normally entitled to sue in his own name.[16] If the right or interest assigned was legal,[17] equity would compel the assignor to permit the assignee to use his name in a common law action. But, as a general rule, the assignor had to be joined as a party to the action in order to bind him at law.[18] Equity would also protect the position of the assignee by granting him an equitable interest in the subject-matter assigned, the legal right to which remained in the assignor.[19] In 1873, however, the Judicature Act introduced a new form of assignment which transferred to the assignee the legal right to the subject-matter assigned and enabled the assignee to sue in his own name. This was re-enacted in section 136 of the Law of Property Act 1925. As a result, at the present day, there are two main modes of assignment: first, an assignment at law under the 1925 Act (a "legal" or "statutory" assignment),[20] and secondly, an assignment in equity (an "equitable" assignment).[21] Various other statutes[22] nevertheless also provide for an assignment at law in particular situations.

8 See Chapter 8.
9 *Ellinger's Modern Banking Law*, 5th edn (Oxford: OUP, 2011) p.787.
10 See Bailey, "Assignment of Debts in England from the Twelfth to the Twentieth Century" (1931) 47 L.Q.R. 516; (1932) 48 L.Q.R. 248, 547.
11 See para.3-06 and McMeel, "The Modern Law of Assignment: Public Policy and Contractual Restrictions on Transferability" [2004] L.M.C.L.Q. 483, 488.
12 See para.1-56.
13 See para.1-59.
14 But a power of attorney suffered from the disadvantage that it was usually revocable.
15 See para.1-07.
16 See para.3-05.
17 See para.1-07.
18 See para.3-06.
19 See para.3-09.
20 See Chapter 2.
21 See Chapter 3.
22 See paras 1-22, 1-25 (insurance), paras 1-31–1-36 (intellectual property).

Subject-matter of assignment. The subject-matter of the assignments dealt with in this book is choses in action. 1-04

(B) CHOSES IN ACTION

Definition. The classic definition of a chose in action is that of Channell J in *Torkington v Magee*[23]: "'Chose in action' is a known legal expression to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession". However, not every right that can be enforced by action is a chose in action. It must be a right that can be considered a species of property. While a right of action will necessarily involve a remedy, that does not mean that remedies are property in themselves, capable of being separately assigned. In *Investors Compensation Scheme Ltd v West Bromwich Building Society*[24] one of the questions at issue was whether a claim for rescission of a mortgage was in itself a chose in action and capable of being assigned. The House of Lords held that it was not. Lord Hoffmann said[25]: 1-05

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

The description of a chose in action as "property" is a recognition that a chose in action is capable of being owned and (in the case of assignment) at least in principle capable of being transferred. But the concept excludes rights that are linked to tangible property, e.g. the ownership or right to possession of goods or land. A chose in action is, so it has been said,[26] "*personal* property of an incorporeal nature". The words "incorporeal nature" emphasise that a chose in action is an intangible.[27] The rules of law governing the transfer of intangibles differ significantly from those which govern the transfer of an immovable (land) or a tangible movable (goods).

The category of choses in action was at first a relatively narrow one, but as the common law developed, it expanded to cover, as Holdsworth put it,[28] a "great mass of miscellaneous rights". At the present day it covers a wide spectrum of rights which differ widely from each other in essential characteristics, ranging from simple contract debts to shares in a company and intellectual property rights. To this long list must be added rights in equity (referred to as "equitable choses in action"[29]). It may therefore not be helpful to look simply at a general definition to determine whether a particular right is, or is not, a chose in action, and so whether it is assignable. It will be preferable to have regard to the nature of the particular right 1-06

23 [1902] 2 K.B. 427, 430 (reversed [1903] 1 K.B. 644).
24 [1998] 1 W.L.R. 896.
25 At 915.
26 Elphinstone, "What is a Chose in Action?" (1893) 9 L.Q.R. 311, 312. See also *Colonial Bank v Whinney* (1886) 11 App. Cas. 426, 440.
27 See para.1-11.
28 *History of English Law* (London: Methuen & Co, 1925), Vol.7, p.516. See also Holdsworth, "The History of the Treatment of Choses in Action by the Common Law" (1920) 33 *Harvard Law Review* 967, 968.
29 See para.1-07.

concerned. This is especially the case because certain rights of action that are personal to the assignor cannot be assigned without the consent of the obligor[30] and because public policy may dictate that a particular right is not assignable.[31]

1-07 **Legal and equitable choses.** English law distinguishes, for historical reasons, between two types of choses in action: legal choses and equitable choses. A legal chose in action is one which, before the Supreme Court of Judicature Act 1873 came into force, could be recovered or enforced in a common law court, such as a debt, a contractual right, a policy of insurance or a share in a company. An equitable chose is one which is created by equity and which was enforceable only by a suit in equity. Examples of an equitable chose are a beneficial interest under a trust[32] (although an equitable chose does not necessarily need to arise by way of a trust),[33] a legacy, a share of a residuary estate[34] or under a will,[35] an equitable interest in stock or shares,[36] an equitable interest as a joint tenant[37] and a portion of an interest as a partner in a partnership.[38] Although the importance of any distinction between the two types of chose has, since 1873, been greatly reduced, it may still be of significance, for example, with respect to whether the assignor should be joined as a party to an action by the assignee.[39]

A "mere" equity,[40] for example, a right to rescind or to rectify a contract, is probably not a chose in action.[41] It is not assignable[42] unless it is transferred as an incident of property conveyed or a chose in action assigned[43] and is not sought to be assigned separately from the property or chose to which it is incident.[44] The same probably applies to a power if it is sought to assign the power separately from the

30 See para.4-34.
31 See para.4-17.
32 *Goodson v Ellisson* (1827) 3 Russ. 583; *Rycroft v Christy* (1840) 3 Beav. 238; *Cator v Croydon Canal Co* (1841) 4 Y. & C. Ex. 405, (1843) 4 Y. & C. Ex. 593, 594; *Meek v Kettlewill* (1842) 1 Hare 464, *Kekewich v Manning* (1851) 1 De G. M. & G. 176; *Harding v Harding* (1886) 17 Q.B.D. 442; *Re Chrimes* [1917] 1 Ch. 30, 36; *Re Pain* [1919] 1 Ch. 38; *Timpsons Executors v Yerbury* [1936] 1 K.B. 645; *Comptroller of Stamps (Victoria) v Howard-Smith* (1936) 54 C.L.R. 614; *Re Wale* [1956] 1 W.L.R. 1346; *Re Tyler* [1967] 1 W.L.R. 1269; *Crowden v Aldridge* [1993] 1 W.L.R. 433.
33 *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, 706–7. Cf. Smith and Leslie, *The Law of Assignment*, 2nd edn (Oxford: OUP, 2013), para.11.06.
34 *Timson v Ramsbottom* (1837) 2 Keen 35; *Re McArdle* [1951] Ch. 669.
35 *Rycroft v Christy* (1840) 3 Beav. 238.
36 *Nanney v Morgan* (1887) 37 Ch. D. 346; *Letts v IRC* [1957] 1 W.L.R. 201; *Grey v IRC* [1960] A.C. 1; *Vandervell v IRC* [1967] 2 A.C. 291; *Chinn v Collins* [1981] A.C. 533; *Neville v Wilson* [1997] Ch. 144; *Re Harvard Securities Ltd* [1997] 2 B.C.L.C. 369.
37 *Corin v Patton* (1989–1990) 169 C.L.R. 540. See also *First National Securities v Hegerty* [1985] 1 Q.B. 850.
38 *Commissioner of Taxation of the Commonwealth of Australia v Everett* (1979) 148 C.L.R. 440.
39 See paras 3-05, 3-14.
40 *Snell's Equity*, 33rd edn (London: Sweet & Maxwell, 2016), para.2-006.
41 Cf. *Howard v Fanshawe* [1895] 2 Ch. 581, 589; *Fitzroy v Cave* [1905] 2 K.B. 364, 371.
42 *Prosser v Edmonds* (1835) 1 Y. & C. Ex. 481; *Fitzroy v Cave* [1905] 2 K.B. 364, 371; *McGregor v Fraser* (1913) 32 N.Z.L.R. 1325. Cf. *Child v Dynes* [1985] 2 N.Z.L.R. 554, 560.
43 *Dickinson v Burrell* (1866) L.R. 1 Eq. 337; *Seear v Lawson* (1880) 15 Ch. D. 426; *Gross v Lewis Hillman Ltd* [1970] 1 Ch. 445, 460. See also *Howard v Fanshawe* [1895] 2 Ch. 581 (relief from forfeiture of a lease).
44 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, 916.

interest which it serves[45] and to a right to terminate assigned separately from the benefit of a contract.[46]

Existing and future choses. A distinction must be drawn between an existing chose, being a right that presently exists and is in the ownership of the assignor, and a future chose (or "expectancy"), that is, a right which does not yet exist or which the assignor has not yet acquired but which may be acquired by him in future. The importance of the distinction lies in the fact that an existing chose is capable of being the subject of a present assignment whereas the assignment of a future chose cannot take effect as a present assignment because the assignor has nothing presently to assign. A future chose cannot be assigned at law under section 136 of the Law of Property Act 1925.[47] In equity, the assignment of a future chose can, however, have an effect, but as an agreement to assign.[48] Such an agreement may be effective to transfer the chose once it comes into existence and is acquired by the assignor.[49] But, being an agreement to assign, it requires consideration to be enforceable by the assignee.[50] Examples of future choses are: property afterwards to be acquired,[51] the future receipts of a business,[52] a future judgment debt,[53] a fund expected but not yet received,[54] shares in a company not yet in existence,[55] property which the assignor hopes to inherit from a person living at the date of the assignment,[56] an expectancy dependent upon a person exercising a power of appointment,[57] a benefice to which the assignor might subsequently be appointed,[58] the proceeds of an indemnity assurance policy before the loss insured against has occurred,[59] and moneys arising from contracts not yet entered into[60] or from loans 1-08

45 *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2006] FCAFC 40 at [40].
46 *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2006] FCAFC 40 at [49]. Cf. Tolhurst, *The Assignment of Contractual Rights*, 2nd edn (Oxford: Hart Publishing, 2016), 6.11.
47 *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] Q.B. 825 at [75]; see para.2-14.
48 See para.3-21.
49 See para.3-21.
50 See para.3-40.
51 *Thompson v Cohen* (1872) L.R. 7 Q.B. 527; *Collyer v Isaacs* (1881) 19 Ch. D. 342; *Joseph v Lyons* (1884) 15 Q.B.D. 280; *Re Reis* [1904] 2 K.B. 769; *Pullan v Koe* [1913] 1 Ch. 9; *Re Cook's Settlement Trusts* [1965] Ch. 902. See also *Elders Pastoral Ltd v Bank of New Zealand (No. 2)* [1990] 1 W.L.R. 1478 (proceeds of future sale of stock).
52 *Re Jones, Ex p. Nichols* (1883) 22 Ch. D. 782; *Tailby v Official Receiver* (1888) 13 App. Cas. 523; *Wilmot v Alton* [1897] 1 Q.B. 17.
53 *R v Chester and North Wales Legal Aid Area Office (No.12)* [1998] 1 W.L.R. 1496.
54 *Palmer v Culverwell, Brooks & Co* (1901) 85 L.T. 758.
55 *Brennan v Morphett* (1908) 6 C.L.R. 22.
56 A "spes successionis", see *Meek v Kettlewell* (1842) 1 Hare 464; *Bennett v Cooper* (1846) 9 Beav. 252; *Re Parsons* (1890) 45 Ch. D. 51; *Re Tilt* (1896) 74 L.T. 163; *Re Ellenborough* [1903] 1 Ch. 697; *Re Mudge* [1914] 1 Ch. 115; *Re Lind* [1915] 2 Ch. 345; *Re Bowden* [1936] 1 Ch. 71. Contrast a contingent interest under the will of a deceased testator: *Peter v Shipway* (1909) 7 C.L.R. 232.
57 *Re Brooks' Settlement Trusts* [1939] Ch. 993.
58 *Metcalfe v Archbishop of York* (1836) 1 My. & Cr. 547.
59 *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] Q.B. 825.
60 *E. Pfeiffer Weinkellerei-Weinenkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 W.L.R. 150; *Annangel Glory Compania Naviera SA v M. Golodetz Ltd* [1988] 1 Lloyds Rep. 45; *Commercial Factors Ltd v Maxwell Printing Ltd* [1994] 1 N.Z.L.R. 724, 727. Cf. *Canadian Admiral Corp Ltd v L.F. Dommerich & Co Inc* (1964) 43 D.L.R. (2d) 1.

which have yet to be made.[61] On the other hand, the law treats as an existing chose a present contractual right to receive some performance in the future, for example, the right to future payments of rent under an existing lease or future instalments payable under a hire-purchase agreement already made.[62] This is so despite the fact that the right is not presently enforceable, for example, because the right is a right to a payment that will become due only at a future date or upon a future demand, and even though the exercise or enjoyment of the right may be subject to a contingency, for example, because it is conditional upon performance of certain obligations under the contract by the assignor or because the contract could be prematurely terminated for breach.

1-09 It will be apparent that the borderline between an existing chose and a future chose may not be easy to draw. It may be difficult to differentiate between a right that exists but is not presently enforceable but which may be enforceable in future, though subject to a condition or a contingency, and a right that does not yet exist but may do so in the future if a condition or contingency occurs.[63] Assignments of wages due or becoming due under an existing contract of employment,[64] of moneys due or to become due under an existing contract for the building of a ship[65] or for the construction of cottages,[66] of retention moneys payable under an existing building contract,[67] of costs ordered to be paid and taxed but not yet entered on the record,[68] of freight to be earned under an existing charter,[69] of "all moneys now or hereafter to be standing" to the credit of the assignor with a certain bank,[70] of the proceeds of an existing letter of credit[71] and of 90% of the income from royalties payable for three years under an existing patent licensing agreement[72] have been held to be assignments of an existing, and not of a future, chose. In *Bank of Boston Connecticut v European Grain and Shipping Ltd*[73] Mustill LJ said:

> "All contractual rights are vested from the moment when the contract is made, even though they may not presently be enforceable, either because the promisee must first perform his own part, or because some condition independent of the will of either party

61 But see *Walker v Bradford Old Bank Ltd* (1884) 12 Q.B.D. 511.
62 *Knill v Prowse* (1884) 33 W.R. 163; *Re Davis & Co, Ex p. Rawlings* (1888) 22 Q.B.D. 193.
63 See *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] Q.B. 825; Oditah, *Legal Aspects of Receivables Financing* (London: Sweet & Maxwell, 1991), 28–29.
64 *Crouch v Martin* (1707) 2 Vern. 595.
65 *Brice v Bannister* (1878) 3 Q.B.D. 569; *Buck v Robson* (1878) 3 Q.B.D. 686; *Re Toward* (1884) 14 Q.B.D. 310. Cf. *Durham Bros v Robertson* [1898] 1 Q.B. 765, 774.
66 *Contemporary Cottages (NZ) Ltd v Margin Traders Ltd* [1981] 2 N.Z.L.R. 114.
67 *G & T Earle Ltd v Hemsworth RDC* (1928) 44 T.L.R. 605, 758. See also *Hughes v Pump House Hotel Co Ltd* [1902] 2 K.B. 190.
68 *Hambleton v Brown* [1917] 2 K.B. 93.
69 *Douglas v Russell* (1831) 4 Sim. 524, (1833) 1 My & K. 488; *Lindsay v Gibbs* (1856) 22 Beav. 522; *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] A.C. 1056; *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd (The Bulk Chile)* [2012] EWHC 2107 (Comm), [2012] 2 Lloyd's Rep. 594 (affirmed [2013] EWCA Civ 184, [2013] 2 All E.R. (Comm) 295).
70 *Walker v Bradford Old Bank Ltd* (1884) 12 Q.B.D. 511.
71 *Marathon Electrical Manufacturing Corp v Mashreqbank PSC* [1997] 2 B.C.L.C. 460.
72 *Shepherd v Commissioner of Taxation* (1965) 113 C.L.R. 385.
73 [1989] A.C. 1056, 1066 (the decision of the Court of Appeal in this case was reversed by the House of Lords on other grounds); *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd (The Bulk Chile)* [2012] EWHC 2107 (Comm), [2012] 2 Lloyd's Rep. 594 at [65] (affirmed [2013] EWCA Civ 184, [2013] 2 All E.R. (Comm) 295). See also *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 W.L.R. 1035, 1040.

(such as the elapsing of time) has yet to be satisfied. Equally, all unperformed obligations to pay money are in one sense *debitum in praesenti solvendum in futuro*."

In contrast, the voluntary assignment of the first £500 of the net income to accrue to the assignor for four years from a trust fund in which he had a life interest was held in New Zealand to be an assignment of a future sum of money not yet in existence and to be ineffective without consideration[74] and the voluntary assignment by one partner to another of such income as from time to time would be earned from his interest in the partnership business was likewise held to be an assignment of a future chose and ineffective on the ground that it was uncertain which profits could or would be made or even whether the partnership would continue.[75] Further, in *Norman v Federal Commissioner of Taxation*[76] the High Court of Australia, by a majority, held that a voluntary assignment by a donor to his wife for a period of three years of the interest from £3,000 already deposited by him on loan to a firm (the firm being entitled to repay the loan, or part of it, at any time without notice) was a purported assignment of a mere expectancy which could not be assigned effectively without consideration. In the same case, the High Court held, this time unanimously, that a further gift by the donor of dividends on shares registered in his name could likewise not be effectively assigned without consideration as companies were not obliged to pay a dividend and the dividend was not a debt until declared. So far as the decision of the High Court with respect to interest is concerned, the majority of the court (Dixon CJ and Menzies and Owen JJ) regarded the right to interest accruing in the future on the loan as "a right to come into existence rather than a right already in existence"[77] because the accrual of interest was dependent upon a contingency, i.e. that the loan was not repaid. The minority (Windeyer and McTiernan JJ) were of the opinion that the right to interest was "not.... a right to arise in future but a present contractual right to be paid at a future date a sum of money to be calculated in an agreed manner"[78] and that it made no difference that the loan was repayable at will. It is submitted that the view of the minority is to be preferred.[79] **1-10**

An assignment of an existing right of action is an assignment of an existing chose.[80] But an assignment of the proceeds of an action, for example, the damages or other monetary compensation that may be awarded in an action in which judgment has not yet been given, can only take effect as a promise or agreement to assign a future chose.[81] Similarly a distinction may need to be drawn between an assignment of a right to receive something, for example goods or other property under

74 *Williams v Commissioner of Inland Revenue* [1965] N.Z.L.R. 395. Contrast *Spratt v Commissioner of Inland Revenue* [1964] N.Z.L.R. 272.
75 *Kelly v Commissioner of Inland Revenue* [1970] N.Z.L.R. 161.
76 (1963) 109 C.L.R. 9.
77 At 21. See also 16.
78 At 37. See also 18.
79 See discussion in *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), para.6-230. See also *Snell's Equity*, 33rd edn (London: Sweet & Maxwell, 2015), para.3-031; Cullity and Ford, "Gifts of Future Income from Choses in Action" (1966) 30 Conv. N.S. 286.
80 It may be impeachable nevertheless on grounds of public policy: see para.4-22.
81 *Glegg v Bromley* [1912] 3 K.B. 474 (Fletcher Moulton LJ, Parker J; contrast Vaughan Williams LJ); *Re Oasis Merchandising Services Ltd* [1998] Ch. 170, 177. See also *Pharaohs Plywood Co Ltd v Allied Wood Products Co (Pte) Ltd* [1980] L.S. Gaz. R. 130 (arbitration not yet concluded).

an existing contract, and an assignment of the fruits of a contingent future sale of the property.[82]

1-11 **Intangibles.** A chose in action is an intangible.[83] Professor Sir Roy Goode[84] has drawn a distinction between "pure" and "documentary" intangibles. A pure intangible is a right which is not in law considered to be represented by a document. On the other hand, "the feature characterizing a documentary intangible is that the debt or other obligation is considered in law to be locked up in the document".[85] Examples of documentary intangibles are negotiable instruments[86] and bills of lading.[87] Transfer of the rights contained in the document is effected by indorsement, if necessary, of the document and by its delivery to the transferee. On the other hand, although a document may evidence the existence of a pure intangible, for example, an I.O.U. may evidence an indebtedness and its amount, the debt is not represented by and contained in the document. An I.O.U. is not a promissory note.[88] The expression "assignment" in this book relates to the transfer of pure, that is, non-documentary intangibles.

(c) Examples of Choses in Action

1-12 **Debts.** A right to a debt is a right to be paid a sum of money. It is a chose in action.[89] In order for a debt to exist, the debtor must have incurred a legal obligation to pay. The money may be presently due and payable or it may be payable at some future time. Thus it may be payable on or before a specified future date, within a limited time, on demand, or on the occurrence of a specified event. Whether or not a right to be paid a sum of money on a contingency which may or may not happen or conditionally upon some future performance by the payee is technically a "debt",[90] provided the obligation to pay has been incurred and is in existence, the right to be paid is a present chose in action even though it may be enforceable only in the future.[91] However, debts which have yet to come into existence, though agreed to be assigned—as in the case of a "whole turnover" factoring agreement[92]—cannot be the subject-matter of a present assignment. Being future choses, they can only be the subject of an agreement to assign. The amount of a debt need not be presently ascertained.

1-13 **Judgment debts, etc.** A judgment debt is a chose in action. An assignment of a

---

82 *Masri v Consolidated Contractors International Co SAL* [2007] EWHC 3010 (Comm), [2008] 1 All E.R. (Comm) 305 at [123] (affirmed [2008] EWCA Civ 303, [2008] 2 Lloyd's Rep. 128).

83 This concept is more often employed in relation to the conflict of laws. See para.10-11. There may be intangible property other than choses in action, for example, export and milk quotas and carbon emission allowances: *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156 at [61].

84 McKendrick, *Goode on Commercial Law*, 5th edn (London: Penguin Books, 2017), para.2.56.

85 McKendrick, *Goode on Commercial Law*, 5th edn (London: Penguin Books, 2017), para.1.36.

86 See para.1-52.

87 See para.1-54.

88 *Gould v Coombs* (1845) 1 C.B. 543; *Akbar Khan v Attar Singh* [1936] 2 All E.R. 545.

89 See Law of Property Act 1925 s.136; *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548, 574; *Camdex International Ltd v Bank of Zambia* [1998] Q.B. 22, 34; *Foskett v McKeown* [2001] 1 A.C. 102, 126.

90 Cf. *Marren (Inspector of Taxes) v Ingles* [1980] 1 W.L.R. 983, 990 (contingent debt can be a debt).

91 See para.1-09.

92 See para.8-10.

judgment debt will enable an assignee to claim the debt and enforce the judgment[93] and to give a good discharge. The right to prove in a winding-up is a chose in action.[94]

1-14 **Other monetary claims.** Other rights to monetary amounts can be choses in action and assignable, for example, retention sums under a building contract,[95] freight to be earned under a charterparty[96] and wages, salary or remuneration to be earned under a contract of employment or a contract for services (even though the contract itself is personal and not assignable).[97] But a right to obtain an advance or loan of money is probably not a chose in action and so cannot be assigned.[98] A solicitor's bill of costs[99] and a claim against a director for breach of duty[100] have been held to be choses in action and assignable.

1-15 **Contractual rights.** The benefit of a right to performance of an existing contract is normally a chose in action.[101] The right can be enforced by action, that is, by an action for damages for non-performance or defective performance of the contract. It can therefore be assigned. As explained above,[102] the right to performance under an existing contract can be the subject-matter of a present assignment even though the performance is to take place in the future and even though its enforcement is subject to a future contingency that may or may not occur or be dependant upon the due performance of his obligations by the assignor.

An accrued right to damages in respect of a breach of contract committed before the assignment is a chose in action. However, such a right, being a "bare right of action", may not be assignable for reasons of public policy.[103] For this reason it has been said that the right should not be considered a chose in action.[104] But, in the modern law, an agreement to assign a cause of action will not be held to be contrary to public policy if the assignee has a genuine and legitimate interest in taking the assignment.[105] The better view, therefore is that it is a chose in action, but one which is susceptible of being rendered incapable of assignment by public policy.

1-16 No objection can, on the other hand, be taken on grounds of public policy to an assignment of the proceeds or "fruits" of an action for damages for breach of contract, at any rate where the assignee has no right to influence the conduct of the

---

93 *East End Benefit Building Society v Slack* (1891) 60 L.J. Q.B. 359, 360; *Crooks v Newdigate Properties Ltd* [2009] EWCA Civ 283, [2009] C.P. Rep. 34.

94 *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] A.C. 626, 658.

95 *Drew & Co v Joselyne* (1887) 18 Q.B.D. 590; *G & T Earle Ltd v Hemsworth RDC* (1928) 44 T.L.R. 605, 758; *Re Tout and Finch Ltd* [1954] 1 W.L.R. 178.

96 *Mangles v Dixon* (1852) 3 H.L.C. 702, 731.

97 *Crouch v Martin* (1707) 2 Vern. 595; *Re Mirams* [1891] 1 Q.B. 594; *Russell & Co Ltd v Austin Fryers* (1909) 25 T.L.R. 414.

98 *Western Wagon and Property Co v West* [1892] 1 Ch. 271; *May v Lane* (1894) 64 L.J. Q.B. 236; *Law v Coburn* [1972] 1 W.L.R. 1238. Cf. *JSC BTA Bank v Ablyazov (No.10)* [2012] EWHC 1819 (Comm), [2012] 2 All E.R. (Comm) 1243 (affirmed [2013] EWCA Civ 928, [2014] 1 Lloyd's Rep. 195 (not an "asset")).

99 *Ingle v M'Cutchan* (1884) 12 Q.B.D. 518; *Ibberson v Neck* [1886] 2 T.L.R. 427.

100 *Re Park Gate Waggon Works Co* (1881) 17 Ch. D. 234.

101 *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38, [2012] 1 A.C. 383 at [167]. Cf. *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015, [2009] I.N.L.R. 180 at [29], [43].

102 See para.1-09.

103 *Laurent v Sale & Co* [1963] 1 W.L.R. 829; see para.4-22.

104 *May v Lane* (1894) 64 L.J. Q.B. 236, 238.

105 See para.4-25.

action.[106] A right to the proceeds of an action is a chose in action. If judgment has been given in the action, it can be the subject-matter of a present assignment. But an assignment of a right to damages in an action where judgment has not yet been given can only take effect as an agreement to assign a future chose.[107]

Where an assignor promises or agrees for valuable consideration to assign an existing legal or equitable chose, or where the agreement relates to a future chose and the assignor later acquires the chose, the assignee obtains a beneficial interest in the chose.[108] The beneficial interest arises by way of a constructive trust, and that beneficial interest is itself a chose in action, capable of being assigned.

1-17 **Other contractual rights.** In addition to a right to positive performance under a contract, other contractual rights have been classified as choses in action. A covenant in restraint of trade is a chose in action and assignable unless it is a covenant personal to the assignor[109] and likewise an exclusive purchase obligation.[110] The benefit of an arbitration clause is a chose in action and normally assignable[111]; so is an option[112] and a right of pre-emption[113] unless personal to the grantee. A contractual right of indemnity is a chose in action and assignable unless, again, it is personal to the assignor.[114] Mooring rights have been held to be a chose in action and capable of assignment.[115] On the other hand, a licence to seize[116] and rights of entry and seizure[117] cannot be assigned. As mentioned above[118] a right of rescission or rectification is not in itself a chose in action and cannot be separately assigned.[119]

---

106 *Glegg v Bromley* [1912] 3 K.B. 474; *Re Oasis Merchandising Services Ltd* [1998] Ch. 170, 177.
107 *Glegg v Bromley* [1912] 3 K.B. 474; see para.1-10.
108 See paras 3-21, 3-23.
109 *Elves v Crofts* (1850) 10 C.B. 241; *Jacoby v Whitmore* (1883) 49 L.T. 335; *Baines v Geary* (1887) 35 Ch. D. 154; *Davies v Davies* (1887) 36 Ch. D. 359, 394; *Townsend v Jarman* [1900] 2 Ch. 698; *Welstead v Hadley* (1904) 21 T.L.R. 165; *Automobile Carriage Builders Ltd v Sayers* (1909) 101 L.T. 419. Cf. *Davies v Davies* (1887) 36 Ch. D. 359.
110 *Manchester Brewery Co v Coombs* [1901] 2 Ch. 608; *Caerns Motor Services Ltd v Texaco Ltd* [1995] 1 All E.R. 247. Cf. *Kemp v Baerselman* [1906] 2 K.B. 604.
111 *Aspell v Seymour* [1929] W.N. 152; *Shayler v Woolf* [1946] 1 Ch. 320; *Rumput (Panama) SA v Islamic Republic of Iran Shipping Lines (The Leage)* [1984] 2 Lloyd's Rep. 259; *Court Line v Gotaverken AB (The Halcyon the Great)* [1984] 2 Lloyd's Rep. 283; *The Padre Island* [1984] 2 Lloyd's Rep. 408; *Kaukomarkkinat O/Y v Elbe Transport-Union GmbH (The Kelo)* [1985] 2 Lloyd's Rep. 85; *Montedipe SpA v JTP-RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep. 11, 15. Cf. *Cottage Club Estates Ltd v Woodside Estates Co (Amersham) Ltd* [1928] 2 K.B. 463; *London Steamship Owners Mutual Insurance Association Ltd v Bombay Trading Co Ltd (The Felicie)* [1990] 2 Lloyd's Rep. 21, 25.
112 *Buckland v Papillon* (1866) L.R. 2 Ch. App. 67; *County Hotel and Wine Co Ltd v London & North Western Ry Co* [1918] 2 K.B. 251 (affirmed [1921] A.C. 85); *Carter v Hyde* (1923) 33 C.L.R. 115; *Griffith v Pelton* [1958] Ch. 205, 225; *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475 at [304] (affirmed [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788). Cf. *Re Cousins* (1885) 30 Ch. D. 203.
113 *Dear v Reeves* [2001] EWCA Civ 277, [2002] Ch. 1.
114 *Rendall v Morphew* (1914) 84 L.J. Ch. 517; *Re Perkins* [1916] 2 Ch. 476; *British Union and National Insurance Co v Rawson* [1916] 2 Ch. 476.
115 *J Miller Ltd v Lawrence & Bardsley* [1966] 1 Lloyd's Rep. 90.
116 *Re Davis & Co, Ex p. Rawlings* (1888) 22 Q.B.D. 193.
117 *Brown v Metropolitan Counties etc. Society* (1859) 28 L.J. Q.B. 236.
118 See para.1-07.
119 Contrast *Howard v Fanshawe* [1895] 2 Ch. 581 (relief from forfeiture).

Rights of action in tort.[120] A right of action in tort is a chose in action.[121] It has been stated that such a right is not assignable[122] on the ground that it is a "bare right of action" and to permit assignment would be contrary to the public policy which prohibits assignments that savour of maintenance or champerty.[123] However, it is open to an insurer who has indemnified his insured in respect of damage caused by a tort to take an assignment of the insured's right of action against the tortfeasor in order to support or enlarge a right already acquired by subrogation.[124] The better view, it is submitted, is that even a right of action in tort can be assigned if it is incidental or ancillary to the transfer of a property right or interest to the assignee[125] or if the assignee has a genuine commercial interest in taking the assignment and enforcing it for his own benefit.[126] But, in the absence of an interest sufficient to justify the assignee's pursuit of proceedings for his own benefit, the law will not recognise an assignment of a bare right of action in tort.[127] As in the case of contract, no objection can be taken on grounds of public policy to an assignment of the "fruits" of a tortious action.[128] 1-18

Rights of action in restitution. A restitution claim is a chose in action and would be subject to the same public policy considerations as a cause of action in contract or tort. 1-19

Guarantees. The benefit of a guarantee of a debt or of the performance of a contract is a chose in action and can be assigned.[129] While, however, it is normally immaterial to the guarantor whom he pays, there may be exceptional circumstances where the guarantee is personal to the assignor and the assignee will have no claim on the guarantee.[130] In the absence of an express assignment of the benefit of a guarantee, it is a question of construction whether the assignment of the principal debt or right to performance carries with it the benefit of the guarantee.[131] In particular in *Kumar v Dunning*[132] the Court of Appeal held that an assignment of the reversion passed the benefit of a covenant by the surety which guaranteed the tenant's covenants in a lease even though there was no express assignment of such benefit. It was held that the covenant by the surety "touched and concerned" the 1-20

---

120 Tan, "Champertous Contracts and Assignments" (1950) 106 L.Q.R. 656, 664–666.
121 *Curtis v Wilcox* [1948] 2 K.B. 474; *Ord v Upton* [2000] Ch. 352; *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149, [2012] Q.B. 640 at [12].
122 *May v Lane* (1894) 64 L.J. Q.B. 236, 238; *Defries v Milne* [1913] 1 Ch. 98, 109.
123 See para.4-22.
124 *King v Victoria Insurance Co Ltd* [1896] A.C. 250; *Compania Colombiana de Seguros v Pacific Steam Navigation Co (The Colombiana)* [1965] 1 Q.B.101. See para.1-67.
125 *Dawson v Great Northern & City Ry Co* [1905] 1 K.B. 260; *Trendtex Trading Corp v Credit Suisse* [1982] A.C. 679, 703. See para.4-24.
126 *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All E.R. 499, 509; *Trendtex Trading Corp v Credit Suisse* [1982] A.C. 679, 703; *Offer-Hoar v Larkstore Ltd* [2005] EWHC 2742 (TCC), [2006] P.N.L.R. 17, [2006] EWCA Civ 1079, [2006] 1 W.L.R. 2926. See para.4-25.
127 *Mulkerrins v Pricewaterhouse Coopers (a firm)* [2003] UKHL 41, [2003] 1 W.L.R. 1937 at [14]; *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149, [2012] Q.B. 640.
128 See para.1-16.
129 *Wheatley v Bastow* (1855) 7 De G. M. & G. 261; *Re Hallett & Co* [1894] 2 Q.B. 256; *West v Shun* (1915) 24 D.L.R. 813; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 K.B. 833.
130 *Sheers v Thimbleby & Son* (1897) 76 L.T. 709.
131 *Re Patrick* [1891] 1 Ch. 82, 87. Cf. *Morley v Morley* (1858) 25 Beav. 253, 257; *Re Barned's Banking Co* (1868) L.R. 3 Ch. App. 753.
132 [1989] Q.B. 193.

land demised.[133] This case was approved by the House of Lords in *P & A Swift Investments v Combined English Stores Group Plc*.[134] In the case of post-1995 tenancies, the benefit of a covenant by a surety guaranteeing the tenant's covenants will, by statute,[135] pass on assignment by the landlord of the whole or any part of the demised premises irrespective of whether it "touches and concerns" the demised land.

1-21 If the right to the principal debt is assigned and the benefit of the guarantee is also assigned, the assignee may enforce the principal debt and the guarantee to the exclusion of the assignor.[136] The right of the assignee against the guarantor is not destroyed because the guarantor has not been given notice of the assignment, but, in the absence of notice, the guarantor may pay the assignor and obtain a good discharge.[137] Where the benefit of the guarantee is assigned, but not the benefit of the principal debt, it has been held by the High Court of Australia[138] that the assignee cannot enforce the guarantee: there cannot be two persons entitled to enforce the same debt. For the same reason, where the benefit of the principal debt is assigned, but not the benefit of the guarantee, it may be that the assignor cannot enforce the guarantee.[139]

In *Kova Establishment v Sasco Investments Ltd*,[140] S guaranteed to A debts owed by B to A. C advanced money to B and assigned the debt to A. It was held that the assigned debt was not covered by the guarantee.

1-22 **Insurance policies: the policy itself.**[141] An insurance policy is a chose in action.[142] It can therefore, in principle, be assigned either by a statutory assignment under section 136 of the Law of Property Act 1925[143] or by an equitable assignment.[144] Nevertheless, as a general rule,[145] the policy itself (as opposed to rights under it) will not be assignable without the consent of the insurer. A policy of indemnity insurance cannot normally[146] be assigned without that consent. The assignee cannot be substituted as the assured under the policy in place of the assignor. The

133 Contrast *Pineman Ltd v Welbeck International Ltd* (1984) 272 E.G. 1166; *Re Distributors and Warehousing Ltd* [1986] B.C.L.C. 129. Cf. *Coastplace Ltd v Hartley* [1987] Q.B. 948.

134 [1989] A.C. 632.

135 Landlord and Tenant (Covenants) Act 1995 s.3(1) (subject to the qualifications in s.3(3)). Contrast ss.5, 16, 24, 25 (guarantor of tenant's covenants under lease is released on assignment of the lease by the tenant); and see *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904, [2012] Ch. 497.

136 *Wheatley v Bastow* (1855) 7 De G. M. & G. 261.

137 *Wheatley v Bastow* (1855) 7 De G. M. & G. 261, 279; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 K.B. 833, 841.

138 *Hutchens v Deauville Investments Pty Ltd* (1986) 68 A.L.R. 367, 373.

139 *International Leasing Corp Ltd v Aiken* [1967] 2 N.S.W.R. 427, 439. Cf. *Morley v Morley* (1858) 25 Beav. 253; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 K.B. 833 (trust for assignee). This assumes that notice of the assignment has been given to the debtor: before notice is given, the right to claim the principal debt from the debtor and the right to claim under the guarantee are still both vested in the assignor.

140 [1998] 2 B.C.L.C. 83.

141 See *Chitty on Contracts*, 32nd edn (London: Sweet & Maxwell, 2015), Vol.2, paras 42-089, 42-090.

142 *Re Moore* (1878) 8 Ch. D. 519, 520.

143 See Chapter 2. Cf. *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] Q.B. 825.

144 See Chapter 3; *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] Q.B. 825.

145 But see Marine Insurance Act 1906 s.50(1).

146 But see para.1-23 (marine insurance).

reason is that the personality of the assured is directly relevant to the risk assumed by the insurer and such an assignment would alter materially the character of that risk.[147] In *Peters v General Accident Fire and Life Assurance Corp Ltd*,[148] Goddard LJ, dealing with a purported assignment of a motor insurance policy, said:

> "I do not think you can assign the policy so as to make of what is a contract of personal indemnity to A a contract of personal indemnity to B … You cannot thrust a new assured upon a company against its will".

It is, however, possible, with the consent of the insurer, to assign a policy of indemnity where the subject-matter of the policy is property and the assignment accompanies a transfer of the property to the assignee, e.g. on the sale of a house. There is no automatic assignment of the policy together with the property.[149] But the policy can be assigned by the assignor to the assignee provided that: (1) the insurer consents to the assignment; and (2) the assignment is contemporaneous with the transfer of the property. An assignment of the policy *after* the transfer of the property will be ineffective as the assignor will by then have no insurable interest in the property and the policy will (so far as it concerns the property) have lapsed.[150] If the assignment of the policy takes place *before* the property is transferred, it may, it seems, be similarly ineffective as the policy will come to an end if the assignee has, at that time, no insurable interest in the property.[151]

1-23 In the case of a policy of marine insurance, these rules are to some extent relaxed even though a marine insurance policy is a policy of indemnity insurance. A marine insurance policy can be assigned by a statutory assignment under section 136 of the Law of Property Act 1925 or by an equitable assignment.[152] But it can also be assigned under section 50 of the Marine Insurance Act 1906,[153] which provides:

> "(1) A marine policy is assignable unless it contains terms expressly prohibiting assignment.[154] It may be assigned either before or after loss.
> (2) Where a marine policy has been assigned so as to pass the beneficial interest in such

147 *Peters v General Accident Fire and Life Assurance Corp Ltd* [1938] 2 All E.R. 267, 269. See para.4-40.

148 [1937] 4 All E.R. 628, 633; see also Sir Wilfred Greene MR in the Court of Appeal [1938] 2 All E.R. 267; *Lynch v Dalzell* (1729) 4 Bro. Parl. Cas. 431.

149 *Rayner v Preston* (1881) 18 Ch. D. 1.

150 *Lynch v Dalzell* (1729) 4 Bro. Parl. Cas. 431; *Powles v Innes* (1843) 11 M. & W. 10; *Lloyd v Fleming* (1872) L.R. 7 Q.B. 299; *North of England Pure Oil Cake Co v Archangel Maritime Insurance Co* (1875) L.R. 10 Q.B. 249; *Rogerson v Scottish Automobile and General Insurance Co* (1931) 41 Ll. L. Rep. 1, 3; *Tattersall v Drysdale* [1935] 2 K.B. 174, 179; *Peters v General Accident Fire and Life Assurance Corp Ltd* [1937] 4 All E.R. 628 (KBD), 631, [1938] 2 All E.R. 267 (CA); Marine Insurance Act 1906 s.51. But see *Powles v Innes* (1843) 11 M. & W. 10; *North of England Pure Oil Cake Co v Archangel Maritime Insurance Co* (1875) L.R. 10 Q.B. 249 at 253 (effect of contemporaneous agreement to assign). Contrast *Thomas v National Farmers Union Mutual Insurance Society Ltd* [1961] 1 W.L.R. 386; *Dodson v Peter H Dodson Insurance Services* [2001] 1 W.L.R. 1012 (terms of policy).

151 *Lloyd v Fleming* (1872) L.R. 7 Q.B. 299, 302. But an assignment to one who has an insurable interest in the property (e.g. as mortgagee) can be effective: *Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd* [1995] 1 W.L.R. 1140.

152 *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] Q.B. 825.

153 The Law Commission's Consultation Paper No. 201, *Insurance Contract Law: Post Contract Duties and Other Issues* (December 2011) at paras 16.40, 16.41, 17.38 recommended the amendment of subsection (3) to allow assignment "in any customary manner or as agreed between the parties to the transfer" in order to cater for the move away from indorsement and from paper documents.

154 *Laurie v West Hartlepool Indemnity Association* (1899) 15 T.L.R. 486.

policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(3) A marine policy may be assigned by indorsement thereon or in other customary manner."

For section 50 to apply, however, there must be an assignment which passes the whole of the beneficial interest in the policy to the assignee.[155] There is no automatic assignment of a marine policy together with the transfer of the subject-matter (property) insured: for such an assignment, there must be an express or implied agreement with the assignee to that effect.[156] Moreover, consistently with the common law rule relating to the ineffectiveness of an assignment after the transfer of the property insured has occurred, section 51 of the 1906 Act provides:

"Where the assured has parted with or lost his interest in the subject-matter insured and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:

Provided that nothing in this section affects the assignment of a policy after loss."

The words "before or at the time of so doing", however, suggest that the assignment need not necessarily be contemporaneous with the transfer of the property and that an agreement to assign before the assured has parted with or lost his interest in the property may rescue the assignment.[157] The policy can be assigned simply by indorsement and delivery of the policy[158] and it is assignable without the consent of the insurer provided that assignment is not prohibited by the terms of the policy.[159] Unlike an assignment under section 136 of the Law of Property Act 1925[160] no notice of an assignment under section 50 of the 1906 Act need be given to the insurer, although such notice is desirable in order to prevent the insurer from paying the assignor.[161]

1-24 A policy of life assurance clearly cannot be assigned in the sense of substituting the assignee for the assignor as the life assured. When reference is made to the assignment of a life policy, this normally refers to the assignment of a right to claim under the policy or to receive the proceeds of the policy.[162]

It is uncertain whether a policy of reinsurance can be assigned without the consent of the insurer, but it is probable that it cannot, as the identity of the reinsured is a matter of importance to the insurer.[163]

155 *Williams v Atlantic Assurance Co Ltd* [1933] 1 K.B. 81; *First National City Bank of Chicago v West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg) (The Evelpedis Era)* [1981] 1 Lloyd's Rep. 54; *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] Q.B. 825.

156 Marine Insurance Act 1906 s.15.

157 Cf. *North of England Pure Oil Cake Co v The Archangel Maritime Insurance Co* (1875) L.R. 10 Q.B. 249.

158 Marine Insurance Act 1906 s.50(3); *Baker v Adam* (1910) 15 Com. Cas. 227, 230; *Aron (J.) & Co (Inc) v Miall* (1928) 34 Com. Cas. 18, 21.

159 Marine Insurance Act 1906 s.50(1); *North of England Pure Oil Cake Co v The Archangel Maritime Insurance Co* (1875) L.R. 10 Q.B. 249, 254.

160 See Chapter 2.

161 See para.3-50 fn.272.

162 See para.1-25.

163 *WASA International (UK) Insurance Co Ltd v WASA International Insurance Co Ltd (Sweden)* [2002]

Rights under or to the proceeds of an insurance policy.[164] A right under or to the proceeds of an insurance policy is likewise a chose in action. In contrast with an assignment of the policy itself, it is open to the insured under a policy of insurance (unless prohibited by the terms of the policy) to assign his right to recover under the policy, or to recover the proceeds of the policy, either before or after the loss insured against has occurred. In either case no consent of the insurer is required. Where the loss has not yet occurred, future insurance claims, i.e. potential claims under the policy, which depend on casualties which may or may not occur, are to be classified as future choses in action.[165] Accordingly an assignment of such a claim cannot operate as a present assignment but only as an agreement to assign a future chose.[166] The claim cannot be the subject-matter of an assignment under section 136 of the Law of Property Act 1925,[167] and being only an agreement to assign, must be supported by consideration to be enforceable by the assignee.[168] If the subject-matter of the insurance is property, the assignor must again have had an insurable interest in the property at the time of the assignment, otherwise the policy will have lapsed.[169] After loss, however, different considerations apply. The assignment can be a present assignment of a right to be indemnified under the policy or to recover the proceeds.[170] The assignment may be equitable[171] or under section 136 of the Law of Property Act 1925.[172] Moreover "after the loss the right to indemnity no longer depends on the right of property in the subject-matter of the insurance, so far as it still exists".[173] The right does not therefore depend upon the presence of a continuing insurable interest in the property insured but is a present enforceable right against the insurer. **1-25**

After loss, rights under a policy of marine insurance can also be assigned under section 50 of the Marine Insurance Act 1906[174] which enables the assignee to sue in his own name. The requirement in subsection (2) of that section—that the assignment must be "so as to pass the beneficial interest" in the policy—can be satisfied. The claim on the insurer is, after the loss has occurred, to be regarded as the only property covered by the policy and the wording of section 50(2) is complied with by an assignment of the entire benefit of the claim or the entire proceeds of the claim.[175] Before loss, however:

EWHC 2698 (Ch), [2003] 1 B.C.L.C. 668 at [17].

164 See *Chitty on Contracts*, 32nd edn (London: Sweet & Maxwell, 2015) Vol.2, para.42-091.

165 *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] Q.B. 825 at [75]; see para.1-08.

166 See para.3-21.

167 *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] Q.B. 825.

168 See para.3-36.

169 *Lloyd v Fleming* (1872) L.R. 7 Q.B. 299, 302.

170 *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] Q.B. 825.

171 See Chapter 3.

172 See Chapter 2.

173 *Lloyd v Fleming* (1872) 7 Q.B. 299, 302.

174 See para.1-23.

175 *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] Q.B. 825 at [66], citing *Lloyd v Fleming* (1872) L.R. 7 Q.B. 299, 303; *Swan and Cleland's Graving Dock and Slipway Co v Maritime Insurance Co & Croshaw* [1907] 1 K.B. 116.

"A person cannot be said to have parted with his beneficial interest in ongoing insurance cover if he remains the person whose interest is insured, even if, for example, he has assigned the entire right to the benefit of any claims which arise in respect of that interest".[176]

Rights under the policy cannot therefore be assigned before loss under the 1906 Act.

1-26 Rights under a policy of life assurance[177] can be assigned in equity[178] or under section 136 of the Law of Property Act 1925[179] or alternatively, under the Policies of Assurance Act 1867. That statute allows the assignee to sue at law in his own name.[180] The assignment is required to be made in a prescribed form[181] and notice of the assignment must be given to the insurer in order that the assignee should be able to sue at law.[182] It would appear that, before the event insured against has occurred, the right to claim under an existing policy of life assurance is treated as an existing chose in action and not as a future chose.[183] It can therefore be the subject of a present assignment and not merely of an agreement to assign.

A further instance of assignment (or "transfer") of rights under a policy of insurance is provided by the Third Parties (Rights against Insurers) Act 2010. Where a person is insured against liability to third parties, the proceeds of an insurance claim will normally be paid by the insurer to the insured in order to enable the insured to meet his liability to third parties. But this would have the consequence, at common law, that, if the insured became insolvent, the proceeds would be payable to his estate and would become part of the insured's assets to be distributed among his creditors generally.[184] In order to avoid this result, the 2010 Act[185] provides that if, for example, the insured is an individual and becomes bankrupt[186] or being a body corporate is wound up,[187] and in certain other contingencies,[188] the rights of the insured against the insurer will be transferred to the third party to whom liability was incurred.[189] The transfer may be regarded as a form of statutory assignment, although it is involuntary and may be partial: if the liability of the insurer to the

[176] *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] Q.B. 825 at [64]. See also *Williams v Atlantic Assurance Co Ltd* [1933] 1 K.B. 81; *First National City Bank of Chicago v West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg) (The Evelpedis Era)* [1981] 1 Lloyd's Rep. 54.

[177] Defined in s.7 of the Policies of Assurance Act 1867.

[178] See Chapter 3. *Fortescue v Barnett* (1834) 3 My. & K. 36; *Pearson v The Amicable Assurance Office* (1859) 27 Beav. 229; *Re King* (1879) 14 Ch. D 179. Cf. *Crossley v City of Glasgow Life Assurance Co* (1876) 4 Ch. D. 421 (deposit of policy not assignment); *Re Williams* [1917] 1 Ch. 1 (gratuitous assignment).

[179] *Re Williams* [1917] 1 Ch. 1, 4; see Chapter 2.

[180] Section 1.

[181] Section 5 (endorsement on the policy or a separate deed of assignment as provided in the Schedule to the Act).

[182] Section 3.

[183] *Chowne v Baylis* (1862) 31 Beav. 351; *Re Griffin* [1902] 1 Ch. 135. This may be on the assumption that the event insured against (death) is bound to happen in the future. But, in the case of certain policies which fall within the definition of a policy of life assurance, the event may not happen.

[184] *Re Harrington Motor Co Ltd* [1928] 1 Ch.105.

[185] Brought into force (with amendments) by the Third Parties (Rights against Insurers) Regulations 2016 (SI 2016/550).

[186] Section 4.

[187] Section 5.

[188] Sections 4, 5, 6, 6A.

[189] Section 1.

insured exceeds the liability of the insured to the third party, there is no transfer of the excess.[190]

Credit insurance policies. Rights under credit insurance policies[191] are frequently assigned to a bank by the seller/insured in order to obtain finance to support the seller's export activities. The assignment may be of any amount that may be payable by the insurer in respect of a specified transaction or class of transactions covered by the policy or of all amounts payable under the policy. Since the assignment will normally be effected at a time when any sums payable under the policy are contingent and the event on which those sums will become payable will not yet have occurred, it is submitted that the assignment can only take effect as an agreement to assign a future chose.[192] In *Paul & Frank Ltd v Discount Bank (Overseas) Ltd*[193] Pennycuick J held that a letter issued by a company to the ECGD directing the ECGD to pay any sums becoming due under the policy to the defendant bank was not an absolute assignment of the benefit of the policy but was by way of charge. However, he held that the assignment was not a registrable "charge on book debts of the company" under section 95 of the Companies Act 1948 as, at the date of the letter, the policy would not be entered in the books of the company before liability was established or the amount ascertained.[194] **1-27**

Shares. Issued shares are choses in action.[195] Nevertheless, as Millett J pointed out in *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)*[196]: **1-28**

"It is, of course, true that shares in a corporation are choses in action, but they are not generally classified as such whether for the purposes of domestic law or for those of private international law. They form a separate sub-species of chose in action with its own rules. No one seeking to discover the rules relating to the transfer of shares would look for them under the heading 'assignment of choses in action'."

Accordingly it will suffice to mention very briefly the statutory provisions which set out the requirements for the certification, transfer and registration of the legal title to shares. The root of the legal title to certificated shares is the register of members kept by the company[197] although a share certificate issued by the company is sufficient evidence unless the contrary is proved, of a person's title to shares.[198] Chapter 1 of Part 21 of the Companies Act 2006 deals with the requirements for the transfer of certificated shares. Section 770 (1) of the Act requires a "proper

[190] Section 8.

[191] See *Benjamin's Sale of Goods*, 9th edn (London: Sweet & Maxwell, 2014), Ch.25.

[192] See para.1-08.

[193] [1967] Ch. 348.

[194] But, in reaching this conclusion, he appears to have held that the charge was over an existing contingency contract under which book debts might arise in future rather than a charge over future book debts (which would have been registrable: *Independent Automatic Sales Ltd v Knowles & Foster* [1962] 1 W.L.R. 974). Registration no longer depends on such distinctions: Companies Act 2006 s.859A; Financial Collateral Arrangements (No.2) Regulations 2003 (SI 2003/3226, as amended by SI 2009/2462, SI 2010/2993).

[195] *Colonial Bank v Whinney* (1886) 11 App. Cas. 426; *Harrold v Plenty* [1901] 2 Ch. 314, 316; *Re VGM Holdings Ltd* [1942] 1 Ch. 235, 240.

[196] [1995] 1 W.L.R. 978, 991 (affirmed [1996] 1 W.L.R. 387 (CA)).

[197] Companies Act 2006 ss.112, 113.

[198] Companies Act 2006 s.768.

the assignor to dispute the assignment if he thinks fit[87] and protects the defendant obligor by ensuring that, if he is found liable, he can obtain a complete discharge from his liability by paying the assignee,[88] which avoids subjecting the debtor or obligor to more than one action arising from a single transaction.[89] If the assignee has acquired only a part of the chose, for example, if the assignment is of part of a debt or is by way of charge, or if the assignment is disputed, the assignor should be joined. But if this is not the case, and if the assignment is unconditional and there are no other special circumstances,[90] joinder may be merely a formality. It will serve no useful purpose and will not be insisted upon.[91] The joinder may also be dispensed with if the obligor disclaims any necessity for joinder of the assignor[92] or it is impossible to join the assignor.[93]

3-15 Since joinder may in certain circumstances still be required, the question arises whether the requirement of joinder in those circumstances is to be regarded as a matter of substantive law or merely as a procedural matter. So long as the assignee's rights were regarded as consisting only of a right against the assignor, it would have to follow that the requirement was substantive and the action would have to be dismissed if the assignor was not joined since the assignee would have no status to enforce the legal right assigned. But that is no longer the case and the assignee has a cause of action in equity in his own right.[94] Nevertheless, it could be argued that, if the assignee seeks to invoke a common law remedy (such as damages), the joinder of the assignor would be required as a matter of substantive law. How, it may be asked, can the holder of an equitable interest in a legal chose assert a legal remedy in his own right?[95] The short answer is that, as a result of two House of Lords cases, *William Brandt's Sons & Co v Dunlop Rubber Co Ltd*[96] and *Performing Right Society Ltd v London Theatre of Varieties Ltd*,[97] it is clearly

Ferrous Ltd [2015] EWHC 1667 (Comm), [2015] 2 B.C.L.C. 560 at [23]; *Treadtel International Pty Ltd v Cocco* [2016] NSWCA 360 at [76].

87 *Central Insurance Co Ltd v Seacalf Shipping Corp (The Ailos)* [1983] 2 Lloyd's Rep. 25; *Euroscross Sales Ltd v Cornhill Insurance Ltd* [1995] 1 W.L.R. 1517.

88 *Weddell v J.A. Pearce & Major* [1988] Ch. 26, 41; *Deposit Protection Board v Barclays Bank Plc* [1994] 2 A.C. 367, 387.

89 *Deposit Protection Board v Barclays Bank Plc* [1994] 2 A.C. 367, 381.

90 *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] A.C. 1 (perpetual injunction); *Weddell v J.A. Pearce & Major* [1988] Ch. 26 (damages); *Three Rivers D.C. v Governor and Company of the Bank of England* [1996] Q.B. 292.

91 *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] Q.B. 825 at [60]; *Kapoor v National Westminster Bank Plc* [2011] EWCA Civ 1083; [2012] 1 All E.R. 1201 at [39]; *Roberts v Gill & Co* [2010] UKSC 22, [2011] 1 A.C. 240 at [67], [127]; *Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd* [2017] EWHC 67 (TCC), [2017] B.L.R. 180 at [50].

92 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] A.C. 454; *General Nutrition Investment Co v Holland and Barrett International Ltd (Formerly NBTY Europe Ltd)* [2017] EWHC 746 (Ch) at [35].

93 *Wilson v Ragosine & Co Ltd* (1915) 84 L.J. K.B. 2185; *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] A.C. 1, 19; *Commercial Factors Ltd v Maxwell Printing Ltd* [1994] 1 N.Z.L.R. 724, 734.

94 See para.3-07.

95 *Meagher Gummow & Lehane's Equity Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), para.6-520; *Snell's Equity*, 33rd edn (London: Sweet & Maxwell, 2015), para.3-023. See also *Warner Bros. Records Inc v Rollgreen Ltd* [1976] Q.B. 430 (option).

96 [1905] A.C. 454, 461, 462.

97 [1924] A.C. 1, 14, 19, 20, 29.

established that any requirement of joinder is procedural and not substantive.[98] An action commenced by an equitable assignee without joining the assignor is not a nullity and is effective, for example, to stop time running for the purposes of limitation or of a contractual provision requiring proceedings to be commenced within a certain period of time.[99] Where joinder is, as a matter of practice, required, this may be done at any stage of the case[100] although the claim may be stayed until this is done.[101] The Civil Procedure Rules[102] further provide that the court may order a person to be added as a new party either if it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings or if there is an issue involving the new party and an existing party which is connected to the matter in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

Title to sue. An equitable assignee has sufficient title to present a bankruptcy petition[103] or a winding-up petition[104] against the debtor, to vote at a creditors' meeting,[105] to prove in the bankruptcy or liquidation,[106] to obtain a grant of administration of a deceased debtor's estate[107] and to avail himself of the rights of a judgment creditor against a judgment debtor.[108] He can also commence or continue an arbitration under an arbitration clause in a contract which has been assigned to him.[109] **3-16**

Joinder of assignee. Since the effective right to a legal chose equitably assigned is in the assignee,[110] the assignor will rarely be entitled to sue in his own **3-17**

98 *Three Rivers D. C. v Governor and Company of the Bank of England* [1996] Q.B. 292, 298, 307–308. See also *Central Insurance Co Ltd v Seacalf Shipping Corp (The Aiolos)* [1983] 2 Lloyd's Rep. 25, 32, 33–34; *Weddell v J.A. Pearce & Major* [1988] Ch. 26, 40, 43; *Kapoor v National Westminster Bank Plc* [2011] EWCA Civ 1083, [2012] 1 All E.R. 1201 at [39]; *Roberts v Gill & Co* [2010] UKSC 22, [2011] 1 A.C. 240 at [67]; *Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd* [2017] EWHC 67 (TCC), [2017] B.L.R. 180 at [50]; Tolhurst, "Equitable Assignment of Legal Rights: A Resolution of a Conundrum" (2002) 118 L.Q.R. 98.

99 *Robinson v Unicos Property Corp* [1962] 1 W.L.R. 520, 525; *Weddell v J.A. Pearce & Major* [1988] Ch. 26; *Commercial Factors Ltd v Maxwell Printing Ltd* [1994] 1 N.Z.L.R. 724; *Jennings v Credit Corp Australia Pty Ltd* (2000) 48 N.S.W.L.R. 709; *Roberts v Gill & Co* [2010] UKSC 22, [2011] 1 A.C. 240 at [67], [102], [128]. Contrast *Compania Colombiana de Seguros v Pacific Steam Navigation Co (The Colombiana)* [1965] 1 Q.B. 101.

100 *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] A.C. 1, 13.

101 *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] A.C. 1, 13; *E.M. Bowden's Patents Syndicate Ltd v Herbert Smith & Co* [1904] 2 Ch. 86, [1904] 2 Ch. 122.

102 CPR rr.19.1, 19.2. See also r.19.4.

103 *Re Baillie* (1875) L.R. 20 Eq. 762; *Re Macoun* [1904] 2 K.B. 700; *McIntosh v Shashoua* (1931) 46 C.L.R. 494. Cf. *Re Adams* (1878) 9 Ch. D. 307; *Re Hastings* (1884) 14 Q.B.D. 184.

104 *Re Montgomery Moore Ship Collision Doors Syndicate Ltd* (1903) 72 L.J. Ch. 624; *Re Steel Wing Co Ltd* [1921] 1 Ch. 349. Cf. *Parmalat Capital Finance Ltd v Food Holdings Ltd* [2008] UKPC 23, [2008] B.C.C. 371 (assignor).

105 *Kapoor v National Westminster Bank Plc* [2011] EWCA Civ 1083, [2012] 1 All E.R. 1201.

106 *Re Blakely Ordnance Co* (1867) L.R. 3 Ch. App. 154; *Re Globe Trust Ltd* [1916] W.N. 100.

107 *Macnin v Coles* (1863) 33 L.J.P.M. & A. 175.

108 *East End Benefit Building Society v Slack* (1891) 60 L.J. Q.B. 359, 364.

109 *Rumput (Panama) SA v Islamic Republic of Iran Shipping Lines (The Leage)* [1984] 2 Lloyd's Rep. 259; *Court Line v Gotaverken AB (The Halcyon the Great)* [1984] 2 Lloyd's Rep. 283, 289; *Montedipe SpA v JTP-RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep. 11, 19. Contrast *Cottage Club Estates Ltd v Woodside Estates Co (Amersham) Ltd* [1928] 2 K.B. 463; *London Steamship Owners Mutual Insurance Association Ltd v Bombay Trading Co Ltd (The Felicie)* [1990] 2 Lloyd's Rep. 21, 25.

110 See para.3-08.

name for himself[111] although he may do so as trustee for and with the consent of the assignee.[112] If an action is in fact brought by the assignor in his own right to recover the chose, or part of it, for himself, then the assignee must be joined as a party to the action.[113]

(c) AGREEMENTS TO ASSIGN

3-18 **Agreements to assign.** The law relating to agreements to assign is by no means free from difficulty and a number of differing views have been expressed as to the principles applicable.[114] Two situations have to be considered. Both of them involve the application of the equitable maxim "Equity looks upon as done that which ought to be done".[115] But the details of how the maxim operates in each context are to some extent contentious and uncertain.

3-19 **Agreement to assign an existing chose in future.**[116] The first situation is where the assignor expressly or impliedly[117] promises or agrees for valuable consideration[118] to assign an existing legal or equitable chose in future (as opposed to a present assignment intended to operate immediately). Equity will give effect to such an agreement by treating the agreement as performed to the extent that it will cause a beneficial interest in the chose to vest in the assignee. This interest arises as a result of the imposition of a constructive trust, the assignor holding the chose as trustee for the benefit of the assignee.[119] What is uncertain is the conditions that have

111 *Three Rivers D.C. v Governor and Company of the Bank of England* [1996] Q.B. 292, 304, 313. But in that case (at 303) Staughton LJ stated that "where the assignee is a party to the action, and expressly declines to make a claim, I can see no reason why the assignor should not claim what is his legal right". See also *Paragon Finance Plc v Pender* [2005] EWCA Civ 760, [2005] 1 W.L.R. 3412; *Kapoor v National Westminster Bank Plc* [2011] EWCA Civ 1083, [2012] 1 All E.R. 1201 at [40]; *Bexhill UK Ltd v Razzaq* [2012] EWCA Civ 1376.

112 That is, in a pleaded representative capacity: *Three Rivers D.C. v Governor and Company of the Bank of England* [1996] Q.B. 292. See *The Wasp* (1867) L.R.1 Ad. & Ed. 367.

113 *Walter & Sullivan Ltd v J. Murphy & Sons Ltd* [1955] 2 Q.B. 584; *Deposit Protection Board v Barclays Bank Plc* [1994] 2 A.C. 367, 380; *Three Rivers D.C. v Governor and Company of the Bank of England* [1996] Q.B. 292, 313. Cf. *Parmalat Capital Finance Ltd v Food Holdings Ltd* [2008] UKPC 23, [2008] B.C.C. 371 (winding-up petition).

114 See e.g. Worthington, *Proprietary Interests in Commercial Transactions* (Oxford: OUP, 1997); Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security*, 6th edn (London: Sweet & Maxwell, 2017), paras 2-11–2-14; Tolhurst, *The Assignment of Contractual Rights*, 2nd edn (Oxford: Hart Publishing, 2016) Ch.6; Beale et al, *The Law of Security and Title-Based Financing*, 2nd edn (Oxford: OUP, 2012); *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), para.6-195; Liew, *Rationalising Constructive Trusts* (Oxford: Hart Publishing, 2017) Ch.8.

115 *Banks v Sutton* (1732) 2 P. Wms. 700, 715.

116 See, in general, Turner, "Understanding the Constructive Trust Between Vendor and Purchaser" (2012) 128 L.Q.R. 582, which discusses contracts for sale of land, but the analysis of which is generally relevant to the present discussion.

117 *Clarence House Ltd v National Westminster Bank Plc* [2009] EWCA Civ 1311, [2010] 1 W.L.R. 1216 (agreement implied from a "virtual assignment").

118 See e.g. *Palmer v Carey* [1926] A.C. 703, 706–707; *Re Holt's Settlement* [1969] 1 Ch. 100, 116.

119 *Holroyd v Marshall* (1862) 10 H.L.C. 191, 209; *Howard v Miller* [1915] A.C. 318; *Central Trust and Safe Deposit Co v Snider* [1916] 1 A.C. 266; *Hawks v McArthur* [1951] 1 All E.R. 22; *Oughtred v IRC* [1960] A.C. 206, 227; *Haque v Haque* (1964) 114 C.L.R. 98; *Re Holt's Settlement* [1969] 1 Ch. 100, 116; *Chinn v Collins* [1981] A.C. 533, 548; *United Bank of Kuwait Plc v Sahib* [1997] Ch. 107, 120; *Neville v Wilson* [1997] Ch. 144; *Baxter International Inc v Nederlands Produktielaboratorium voor BloedTransfusiapparatuur BV* [1998] R.P.C. 250.

to be satisfied for such a trust to arise and the moment in time when it comes into existence.

There is high authority for the requirement that the agreement must be specifically enforceable: that the incidents of trusteeship only exist if and so far as a court of equity would in all the circumstances of the case grant specific performance of the contract.[120] The reason given is that the interest of the assignee is "an interest commensurate with the relief which equity would give by way of specific performance".[121] It has, however, been suggested that, where the consideration is executed, that is, where the assignee has performed the obligations on his part which constitute the consideration for the assignor's promise to assign, then, regardless of whether the agreement is specifically enforceable or not, equity will impose a constructive trust as it would be unconscionable for the assignor to deny the efficacy of the assignment.[122] The requirement of a specifically enforceable agreement would only therefore apply to agreements where the consideration has not yet been executed.

3-20 Whether or not this is the case, it is uncertain when exactly the trust will arise. The obvious time might seem to be the moment at which the agreement is entered into.[123] But this presupposes that the agreement will in due course be performed, which may not be the case. The agreement may be avoided or rescinded, or the assignee may not perform his obligations under the agreement. Dealing with the position of a vendor of land subject to a contract to purchase made for value in *Lysaght v Edwards*,[124] Sir George Jessel MR stated that a trust *sub modo* arises on the making of the contract but that the constructive trust comes into existence when title is made out by the vendor and accepted by the purchaser. Also in *Jerome v Kelly*,[125] Lord Walker of Gestingthorpe said that it would be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of the beneficial interest) in the land; and "if the contract proceeds to completion, the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and the purchase price is paid in full".[126] Beneficial interest in the land is, he said, in a sense split between buyer and seller. The position with regard to agreements to assign an interest in personalty is likely to be less complicated than that which applies with respect to uncompleted sales

120 *Holroyd v Marshall* (1862) 10 H.L.C. 191, 209; *Howard v Miller* [1915] A.C. 318, 326; *Central Trust and Safe Deposit Co v Snider* [1916] 1 A.C. 266, 272; *Palmer v Carey* [1926] A.C. 703, 706; *Haque v Haque* (1964) 114 C.L.R. 98, 124; *Re Holt's Settlement* [1969] 1 Ch. 100, 116; *Swiss Bank Corp v Lloyd's Bank Ltd* [1982] A.C. 584, 595; *Neville v Wilson* [1997] Ch. 144, 157; *Clarence House Ltd v National Westminster Bank Plc* [2009] EWCA Civ 1311, [2010] 1 W.L.R. 1216 at [45].

121 *Howard v Miller* [1915] A.C. 318, 326.

122 Tolhurst, *The Assignment of Contractual Rights*, 2nd edn (Oxford: Hart Publishing, 2016), para.7.16; *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), para.6-050; *Snell's Equity*, 33rd edn (London: Sweet & Maxwell, 2015), paras 3-030 and 5-015. But cf. Liew, *Rationalising Constructive Trusts* (Oxford: Hart Publishing, 2017) Ch.8 s.8.3.3.

123 Chambers, "The Importance of Specific Performance" in Degeling and Edelman (eds), *Equity in Commercial Law* (Sydney: Lawbook Co, 2005) 454-455; Turner, "Understanding the Constructive Trust Between Vendor and Purchaser" (2012) 128 L.Q.R. 582, 597; *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), para.6-055; *Snell's Equity*, 33rd edn (London: Sweet & Maxwell, 2015), paras 24-002–24-004; Liew, *Rationalising Constructive Trusts* (Oxford: Hart Publishing, 2017) Ch.8 s.8.1.1.

124 (1876) 2 Ch. D. 499, 517; *Chang v Registrar of Titles* (1976) 137 C.L.R. 177, 184.

125 [2004] UKHL 25, [2004] 1 W.L.R. 1409.

126 At [32].

of land. It is suggested that a trust will arise and a beneficial interest in the chose agreed to be assigned will become vested in the assignee at the latest when the consideration is executed. Before that time, after the agreement has been made but before the consideration has been executed, the position is admittedly obscure. But it is likely that a trust *sub modo* will arise which will vest a defeasible interest in the assignee. That interest may not amount to full beneficial ownership but will be something more than a mere contractual right.[127] Upon the consideration being executed, this would progress to a full equitable title to the chose assigned. However, if the agreement is subject to some further condition outside the control of either the assignor or the assignee or is subject to an express contingency (for instance, approval by a third party) then it may be the intention of the parties that no trust shall arise until the condition is fulfilled or the contingency occurs.

3-21 **Agreement to assign a future chose.** The second situation is where there is a promise or agreement for valuable consideration to assign a future chose. The distinction between an existing chose, which may be presently assigned, and a future chose (or an "expectancy"), i.e. a right which does not yet exist or which the assignor has not yet acquired, is discussed in Chapter 1.[128] A purported assignment of a future chose cannot take effect as a present assignment of the chose because the assignor has nothing presently to assign. It can have effect, however, as an agreement to assign. An agreement for consideration to assign a future chose is binding on the conscience of the assignor and, once the consideration is paid or executed, immediately the chose is acquired by him, it will be held by him on constructive trust for the assignee.[129] An equitable interest will attach automatically[130] to the chose and vest in the assignee, provided that the chose is sufficiently identifiable as the subject-matter of the agreement.[131] The authorities are ambiguous as to the position which attains where the agreed consideration has not been paid or executed prior to the chose being acquired by the assignor. But it has been suggested that, if the agreement is specifically enforceable,[132] the position is

[127] See para.5-08.
[128] See para.1-08.
[129] *Holroyd v Marshall* (1862) 10 H.L.C. 191; *Re Clarke* (1887) 36 Ch. D. 348; *Tailby v Official Receiver* (1888) 13 App. Cas. 523; *Re Reis* [1904] 2 K.B. 769 (affirmed sub. nom. *Clough v Samuel* [1905] A.C. 442); *Glegg v Bromley* [1912] 3 K.B. 474; *Re Lind* [1915] 2 Ch. 345; *Cotton v Heyl* [1930] 1 Ch. 510; *Re Gillott's Settlement* [1934] 1 Ch. 97, 108; *Palette Shoes Pty Ltd v Krohn* (1937) 58 C.L.R. 1, 27; *Re Trytel* (1952) 2 T.L.R. 32; *Syrett v Egerton* [1957] 1 W.L.R. 1130; *Campbell Connelly & Co Ltd v Noble* [1963] 1 W.L.R. 252; *Norman v Federal Commissioner of Taxation* (1963) 109 C.L.R. 9, 24; *Pharaohs Plywood Co Ltd v Allied Wood Products Co (Pte) Ltd* [1980] L.S. Gaz. R. 130; *Elders Pastoral Ltd v Bank of New Zealand (No.2)* [1990] 1 W.L.R. 1478; *Re Oasis Merchandising Services Ltd* [1998] Ch. 170; *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] Q.B. 825 at [80]; *Bexhill UK Ltd v Razzaq* [2012] EWCA Civ 1376 at [42]; *Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd* [2017] EWHC 67 (TCC), [2017] B.L.R. 180 at [41] (agreement to provide funding facility amounting to valuable consideration).
[130] *Re Lind* [1915] 2 Ch. 345; *Re Gillott's Settlement* [1934 1 Ch. 97, 108; *Palette Shoes Pty Ltd v Krohn* (1937) 58 C.L.R. 1, 24; *Pharaohs Plywood Co Ltd v Allied Wood Products Co (Pte) Ltd* [1980] L.S. Gaz. R. 130.
[131] *Tailby v Official Receiver* (1888) 13 App. Cas. 523, 529, 543; *Re Clarke* (1887) 36 Ch. D. 348; *Re Wait* [1927] 1 Ch. 606, 622, 635; *Syrett v Egerton* [1957] 1 W.L.R. 1130; *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74, 91, 95.
[132] See para.3-19.

similar to the case involving an agreement to assign an existing chose in future: a trust *sub modo* arises which will vest a defeasible interest in the assignee.[133]

3-22 The leading case is *Holroyd v Marshall*[134] where T mortgaged machinery in his mill and it was provided that "all machinery, implements, and things, which, during the continuance of this security, shall be fixed or placed in or about the said mill … in addition or substitution for" the existing machinery should be bound by the mortgage. T acquired additional machinery and placed it in the mill during the continuance of the security. The House of Lords held that the moment the additional machinery was placed in the mill, it was held on trust by T for the mortgagees who acquired a beneficial interest in the machinery. That interest prevailed against judgment creditors of T who had levied execution against the machinery. Lord Westbury said[135]:

> "… if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired."

However, in his judgment, Lord Westbury went on to limit the operation of the principle to cases in which the agreement "is one of that class of which a Court of Equity would decree the specific performance".[136] Doubt was nevertheless subsequently cast on this latter proposition by the House of Lords in *Tailby v Official Receiver*,[137] where the subject-matter of an assignment by way of mortgage included "all the book debts … which may during the continuance of this security become due and owing to the … mortgagor" in the course of his existing business or any other business which he might subsequently conduct. The issue was whether the mortgagee's title to a book debt which, in the course of the mortgagor's business, had become due after the date of the mortgage was good against the official receiver of the bankrupt mortgagor's estate, the mortgagor having become bankrupt after the debt was due. The House of Lords held that the description of the property assigned was sufficiently certain for the principle in *Holroyd v Marshall* to apply[138] and that the mortgagee's title prevailed. But, commenting on Lord Westbury's judgment in that case, Lord Macnaghten said[139]:

> "It is difficult to suppose that Lord Westbury intended to lay down as a rule to guide or perplex the Court, that considerations applicable to cases of specific performance, properly so-called, where the contract is executory, are to be applied to every case of equitable assignment dealing with future property… The truth is the cases of equitable assignment or

[133] Liew, *Rationalising Constructive Trusts* (Oxford: Hart Publishing, 2017) Ch.8 s.8.3.1. Cf. *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), paras 6-265, 6-270; *Snell's Equity*, 33rd edn (London: Sweet & Maxwell, 2015), paras 3-030, 5-015.
[134] (1862) 10 H.L.C. 191, discussed in *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 20015), paras 6-240–6-245. See also Getzler, "Assignment of Future Property and Preferences" in J Glister and P Ridge (eds) *Fault Lines in Equity* (Oxford: Hart Publishing, 2012) p.73.
[135] At 211.
[136] At 211.
[137] (1888) 13 App. Cas. 523.
[138] Lord Fitzgerald dissenting.
[139] At 547. See also *Re Clarke* (1887) 36 Ch. D. 348, 352.

specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties."

Lord Herschell and Lord Watson also agreed[140] that specific enforceability of the agreement was not essential.

It has been suggested that Lord Westbury's reference to specific performance is best seen simply as an aspect of the identification requirement: that the property acquired must be capable of being identified as that which the assignor agreed to assign or purported presently to assign.[141] But it is submitted that, read in context, these cases, which concern contracts for security, demonstrate that specific enforceability is indeed necessary for the principle in *Holroyd v Marshall* to apply. A purely executory contract for security is not specifically enforceable, but becomes so once the creditor advances the loan money to the debtor.[142] Hence the statements to the effect that consideration must have passed before the property is acquired indicate the need for the contract to be specifically enforceable at the time the property is acquired in order for a constructive trust to arise.[143]

3-23 Since the principle in *Holroyd v Marshall* presupposes that, at the time of an agreement to assign a future chose there can be no present transfer of the chose by assignment because the subject-matter of the assignment does not exist or has not yet been acquired by the assignor, and that a trust is constituted and an equitable interest in the chose vests in the assignee only at the moment when it is acquired by the assignor, it might seem to follow that the rights of the assignee prior to that moment could rest only in contract.[144] The only liability of the assignor in the interim period would be a personal contractual liability arising out of the agreement to assign. But in *Re Lind*[145] the Court of Appeal held that the rights of the assignee were not merely contractual. The facts of *Re Lind* are given elsewhere,[146] but in essence they involved an agreement by a borrower with each of two successive lenders to assign to them his expectant share of his mother's estate as security for a loan. In the interim period, before the expectancy materialised, the borrower became bankrupt and was in due course discharged from the bankruptcy, the lenders not having proved in the bankruptcy. Subsequently, after his discharge, the borrower executed a further assignment of the expectancy for value to the claimant. If the borrower's liability to provide security had rested solely in contract it would have been provable in the bankruptcy and discharged. The Court of Appeal, however, held that the lenders retained their rights and took priority over the claim-

140 At 532, 533, 535.

141 *Re Clarke* (1887) 36 Ch. D. 348, 355; *Tailby v Official Receiver* (1888) 13 App. Cas. 523, 531, 533.

142 *Swiss Bank Corp v Lloyds Bank Ltd* [1982] A.C. 584, 595; Keeler, "Some Reflections on Holroyd v Marshall" (1967–70) 3 Adel. L. Rev. 360, 374.

143 Liew, *Rationalising Constructive Trusts* (Oxford: Hart Publishing, 2017) Ch.8 s.8.3.3. See also Worthington, "Proprietary Remedies: The Nexus between Specific Performance and Constructive Trusts" (1996) 11 *Journal of Contract Law* 1, 5–6. But cf. *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), para.6-270; *Snell's Equity*, 33rd edn (London: Sweet & Maxwell, 2015), para.5-015.

144 *Collyer v Isaacs* (1881) 19 Ch. D. 342.

145 [1915] 2 Ch. 345. See also *Metcalfe v Archbishop of York* (1836) 1 My. & Cr. 547, 557; *Carr v Allott* (1858) 27 L.J. Ex. 385; *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] A.C. 1 32; *Palette Shoes Pty Ltd v Krohn* (1937) 58 C.L.R. 1, 27. Contrast *R v Chester and North Wales Legal Aid Area Office (No.12)* [1998] 1 W.L.R. 1496, 1505. See *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), paras 6-305–6-320; Getzler, "Assignment of Future Property and Preferences" in J Glister and P Ridge (eds) *Fault Lines in Equity* (Oxford: Hart Publishing, 2012), p.73, 81.

146 See para.5-08.

ant despite the discharge. Swinfen Eady LJ said[147]:

"an agreement to charge future property creates an immediate equitable charge upon the property coming into existence, independently of the contract to execute some further charge, and cannot be said to rest in contract only."

Phillimore LJ said[148]: "it is I think well and long settled that the right of the assignee is a higher right than the right to have specific performance of a contract". And Bankes LJ said[149]:

"It appears to me to be manifest… that equity regarded an assignment for value of future-acquired property as containing an enforceable security as against the property assigned quite independent of the personal obligation of the assignor arising out of his imported covenant to assign."

The reason why the right of an assignee for value of future property, even before the property is acquired by the assignor, is said to be a right of a different or "higher" kind than a mere contractual right seems to derive from the fact that, when the property is acquired, a beneficial interest vests immediately and automatically in the assignee without the need for any further act or assurance on the part of the assignor.[150] The agreement to assign does not merely impose upon the assignor a contractual obligation to effect an assignment of the property if and when it is acquired but vests the property ipso facto in the assignee on acquisition. Nevertheless the exact nature of this "higher" right is uncertain. It may be that the right of the assignee is some form of inchoate interest, or equity, which arises at (or is taken to relate back to) the time when the agreement is made.

Relation back.[151] There is indeed some authority which suggests that once the future chose comes into existence and is acquired by the assignor, the rights of the assignee are deemed to relate back to the date of the agreement to assign. In *Tailby v Official Receiver*[152] Lord Watson said: **3-24**

"The rule of equity which applies to the assignment of future choses in action is, as I understand it, a very simple one … As soon as they come into existence assignees who have given valuable consideration will, if the new chose in action is in the disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him, or had been within his disposition and control at the time when the assignment was made."

If it is in fact the case that the assignment is deemed to relate back in time to when the agreement was made, this may have a significant effect for the purposes of priority, as the rights of the assignee will be taken to have arisen at the date of

147 At 358.

148 At 365.

149 At 373–374.

150 Contrast *Reeve v Whitmore* (1863) 33 L.J. Ch. 63; *Thompson v Cohen* (1872) L.R. 7 Q.B. 527; *Cole v Kernot* (1872) L.R. 7 Q.B. 534n (licence to seize).

151 See Liew, *Rationalising Constructive Trusts* (Oxford: Hart Publishing, 2017), p.182.

152 (1888) 13 App. Cas. 523, 533. See also *Holroyd v Marshall* (1862) 10 H.L.C. 191, 220; *Re Lind* [1915] 2 Ch. 345, 374; *Independent Automatic Sales Ltd v Knowles & Foster* [1962] 1 W.L.R. 974, 985; *Winn v Burgess* Unreported 8 July 1986 CA (Civ Div); *Foamcrete (UK) Ltd v Thrust Engineering Ltd* [2002] B.C.C. 221; *Peer International Corp v Termidor Music Publishers Ltd* [2002] EWHC 2675 (Ch) at [79]; Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security*, 6th edn (London: Sweet & Maxwell, 2017), paras 2-13–2-14; McKendrick, *Goode on Commercial Law*, 5th edn (London: Penguin Books, 2017), para.23.21.

the agreement to assign and not at the later date when the chose was acquired. Suppose, for example, that, on 1 June, A enters into an agreement for value with B to assign to B a chose in action to be acquired in future by A. On 1 September, A acquires the chose in question. In equity, the right to the chose will vest automatically in B on that date.[153] But if, on 1 August, a judgment creditor of A sought to attach the debt,[154] or if A was the subject of a bankruptcy[155] or winding-up[156] petition, or if a floating charge previously created by A crystallised,[157] then B's right to the debt as assignee would, for the purposes of priority, be taken to relate back to 1 June, the date of the agreement to assign, and not be taken to have arisen as at the date of the assignment (1 September). It is, however, legitimate to ask why there should be any principle of relation back and why this should be allowed to disturb the normal priority rules.[158] In any event it is submitted that this principle would not be held to validate, for the purposes of the rule in *Dearle v Hall*,[159] a notice of assignment given after the date of the agreement to assign but before the date on which the chose assigned was acquired by the assignor[160] or to preclude the obligor from asserting certain rights of set-off[161] which accrued during the same period.

(D) FORM

3-25 **Requirement of writing.** Section 53(1)(c) of the Law of Property Act 1925 provides:

> "(1) Subject to the provision hereinafter contained with respect to the creation of interests in land by parol— [...]
>
> (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.
>
> (2) This section does not affect the creation or operation of resulting, implied or constructive trusts."

Section 53(1)(c) applies to dispositions of personalty.[162]

[153] See para.3-21.
[154] See para.5-03; *Winn v Burgess* Unreported 8 July 1986 CA (Civ Div).
[155] See para.5-15.
[156] See para.5-29.
[157] See para.6-56.
[158] See the criticism by Matthews, "The Effect of Bankruptcy upon Mortgages of Future Property" [1981] L.M.C.L.Q. 40 and the defence of the principle in Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security*, 6th edn (London: Sweet & Maxwell, 2017), para.2-14; Bridge et al, *The Law of Personal Property* (London: Sweet & Maxwell, 2013), paras 27-013, 29-010.
[159] (1828) 3 Russ. 1; see Chapter 6.
[160] Oditah, *Legal Aspects of Receivables Financing* (London: Sweet & Maxwell, 1991), p.239. Notice of assignment must be given at the same time as or after the assignment: see para.6-18. However, for the purposes of registration of a charge under s.859A of the Companies Act 2006 (see para.6-46) which constitutes constructive notice of the charge, it has been held that a charge over future debts is created at the date of the instrument and not when the debts come into existence: *Independent Automatic Sales Ltd v Knowles & Foster* [1962] 1 W.L.R. 974.
[161] That is, "independent" set-off, see para.7-20.
[162] *Grey v IRC* [1960] A.C. 1; *Oughtred v IRC* [1960] A.C. 206; *Vandervell v IRC* [1967] 2 A.C. 291; *Re Tyler* [1967] 1 W.L.R. 1269, 1274.

Equitable assignment of a legal chose. Writing is not required by section 53(1)(c) for the equitable assignment of a legal chose.[163] Suppose that A, the legal and beneficial owner of a legal chose (for example, shares in a company or a contract debt) orally assigns the chose to B. It is clear that the assignment can only be equitable as the formal requirements for a legal assignment have not been met.[164] The legal title to the chose therefore remains in A, the assignor. The effect of the assignment in equity is, at first sight, to cause A's equitable interest in the chose to be transferred from him to B, the assignee. Before the assignment the legal and equitable interests in the chose were both vested in A, the assignor. By the assignment it might seem that A has effected a disposition of his equitable interest in the chose to B and that such disposition would, by section 53(1)(c), be required to be in writing. However, when a person owns the entire estate in property, both legal and beneficial, it is erroneous to suppose that he has two interests in the property, one legal and the other equitable, and that, when A assigns the chose in equity to B while retaining the legal title, there is a "disposition" of that equitable interest. While he owns the entire estate in the property, no distinction is drawn between the legal and equitable interests. In *Westdeutsche Landesbank Girozentrale v Islington LBC*[165] Lord Browne-Wilkinson said: 3-26

> "A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title."

Therefore the equitable assignment of a legal chose by A to B does not transfer any existing equitable interest of the assignor to the assignee: it causes a new equitable interest to arise in the assignee distinct from the estate held by A before the assignment. There is no disposition of an equitable interest subsisting at the time of the assignment but rather the creation of a new equitable interest in B. Writing is therefore not required.

There is also no requirement of writing for a declaration of trust by the legal and beneficial owner of personalty. So if A, the legal and beneficial owner of a legal chose, declares himself to be a trustee of the chose in favour of B, no writing is required. Nor is writing required where A, the legal and beneficial owner of a legal chose, effectively transfers ownership of the chose to T with an oral direction that it is to be held on trust for B, or if A effectively transfers ownership of the chose to T with an oral direction that it is to be held on trust for A himself. Again there is no disposition of an equitable interest subsisting at the time of the disposition but the creation of a new equitable interest in B or A, as the case may be. So also if A, the legal and beneficial owner of a legal chose, equitably assigns the chose to T to hold on trust for B, no writing is required. While A remains the legal title holder of the chose, a newly created, bare equitable title in the chose is created in T which he holds on trust for B, and a new equitable interest in the chose vests beneficially in B. 3-27

[163] *Coulter v Chief Constable of Dorset Police* [2004] 1 W.L.R. 1425 (Ch. D), [2005] 1 W.L.R. 130 (CA).
[164] See para.2-05.
[165] [1996] A.C. 669, 706. See also *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] A.C. 694, 712.

Further, in *Vandervell v Inland Revenue Commissioners*,[166] V was the beneficial owner of a parcel of shares held by a bank on a bare trust. He orally directed the bank to transfer the legal title to the shares to the Royal College of Surgeons with the intention that the College should also acquire the beneficial interest. V's agent received from the bank the share certificates and a transfer in blank. These were, on V's instructions, handed to the College which was duly registered as owner of the shares. The House of Lords held that no writing signed by V was required for the transfer. Lord Donovan said[167]:

> "the legal and equitable estates in the shares were in separate ownership: but when [V], being competent to do so, instructed the bank to transfer the shares to the college, and made it abundantly clear that he wanted to pass, by means of that transfer, his own beneficial, or equitable, interest, plus the bank's legal interest, he achieved the same result as if there had been no separation of the interests. The transfer thus made pursuant to his intentions and instructions was a disposition not of the equitable interest alone, but of the entire estate in the shares... I see no room for the operation of s.53(1)(c)."

And Lord Upjohn said[168]:

> "... when the beneficial owner owns the whole beneficial estate and is in a position to give directions to his bare trustee with regard to the legal as well as the equitable estate there can be no possible ground for invoking the section where the beneficial owner wants to deal with the legal estate as well as the equitable estate."

3-28 **Equitable assignment of an equitable chose.** On the other hand, an equitable assignment of an equitable chose must be in writing. Such an assignment is a disposition of a subsisting equitable interest and must comply with section 53(1)(c) of the Law of Property Act 1925. It has been held that the word "disposition" in the subparagraph must be given a wide meaning.[169] It includes a direction by a beneficiary under a trust to his trustee to transfer his interest to a third party or a direction to the trustee thenceforth to hold the interest on trust for a third party.[170] Although it has been said[171] that this latter method is not truly an assignment but merely an alteration of the trusts on which the interest is held, it constitutes a "disposition" of the interest by the assignor to the assignee.[172] In *Grey v Inland Revenue Commissioners*,[173] H was the beneficial owner of a parcel of shares held by two trustees on a bare trust. The trustees were also trustees of six existing settlements in favour of H's six grandchildren. H orally and irrevocably directed the trustees to hold the shares thenceforth on those six settlements. The House of Lords held that writing signed by H was required, since H had attempted a disposition of his subsisting

166 [1967] 2 A.C. 291. See also *Comptroller of Stamps (Victoria) v Howard-Smith* (1936) 54 C.L.R. 614, 622. But see the criticism in *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), para.7-115.

167 At 317–318.

168 At 311.

169 *Re Danish Bacon Co Ltd Staff Pension Fund Trusts* [1971] 1 W.L.R. 248, 254; Law of Property Act 1925 s.205(1)(ii).

170 *Rycroft v Christy* (1840) 3 Beav. 238; *Bentley v Mackay* (1851) 15 Beav. 12, 19; *Lambe v Orton* (1860) 1 Dr. & Sm. 125; *Re Chrimes* [1917] 1 Ch. 30; *Comptroller of Stamps (Victoria) v Howard-Smith* (1936) 54 C.L.R. 614, 622; *Re Wale* [1956] 1 W.L.R. 1346, 1350. Contrast (revocable mandate), para.1-61.

171 *Crowden v Aldridge* [1993] 1 W.L.R. 433, 439.

172 *Grey v IRC* [1960] A.C. 1.

173 [1960] A.C. 1.

equitable interests in the shares. It transpired that the trustees at a later date had declared by way of deed that they had since the earlier date held, and continued to hold, the shares for H's grandchildren, and the House of Lords was satisfied that this fulfilled section 53(1)(c).

It is, however, unclear whether writing is required where B, a beneficiary under a trust, directs, T, his trustee, to transfer the legal title in the shares to another, T2, to hold on trust for X, a third party. These facts are similar to those that arose in *Grey*, since in that case it was only due to the coincidence of trustees of, on the one hand, the trust in favour of H and on the other hand, the settlements in favour of H's grandchildren which precluded the need for a transfer of the legal title of the shares between two different trustees. Yet, according to the majority in *Vandervell*, writing is not required where B deals with both the legal and equitable title to the shares, as opposed to dealing solely with the equitable title. As a result, *Grey* and *Vandervell* provide contradictory authorities on these facts, and the better view appears to be that *Vandervell* ought to be confined to its facts, and that writing is in fact required for B effectively to dispose of his beneficial interest to X.[174]

3-29 It is also debatable whether a declaration of trust in favour of a third party by the holder of an equitable interest must be in writing.[175] On one view, it creates a subtrust of his equitable interest and a new subsidiary equitable interest becomes vested in the third party. No writing is therefore required. On another view, however, the declaration has the effect of transferring the equitable interest of the person making the declaration to the third party and is therefore a disposition of a subsisting equitable interest which must be in writing. The answer may possibly depend on whether the person making the declaration of trust still has some obligations to perform, in which case he will not have disposed of his subsisting equitable interest to the third party,[176] or whether there is the equivalent of an assignment to the third party of the entire equitable interest by the person making the declaration, who then drops out of the picture,[177] in which case writing may be required. The preferable view may be that, although the declaration may as a matter of practicality leave the person making it with little to do, and the third party may be dealing directly with the original trustee, there is as a matter of law no assignment by the person making the declaration to the third party and writing is not required.[178]

Difficulty also arises as to whether writing is required where the holder of a beneficial interest in a trust fund surrenders or releases his equitable interest to the legal owner and in so doing vests an interest in, or enlarges an interest already vested in, a third party. It is arguable that this involves the extinction of a subsisting equitable interest and not a disposition.[179] Some indirect support for this argu-

174 Green, "Grey, Oughtred and Vandervell — A Contextual Reappraisal" (1984) 47 M.L.R. 385.

175 Baker (1958) 74 L.Q.R. 180.

176 *Re Lashmar* [1891] 1 Ch. 258; *Grey v IRC* [1960] A.C. 1; *Crowden v Aldridge* [1993] 1 W.L.R. 433, 439; *Comptroller of Stamps (Victoria) v Howard-Smith* (1936) 54 C.L.R. 614, 622; *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), paras 7-200–7-215. See also *Snell's Equity*, 33rd edn (London: Sweet & Maxwell, 2015), paras 3-018, 22-035 and 22-040.

177 *Grey v IRC* [1958] Ch. 690, 715 (CA).

178 *Nelson v Greening & Sykes (Builders) Ltd* [2007] EWCA Civ 1358 at [56]–[57].

179 See Monroe, "After Grey and Oughtred" [1960] B.T.R. 17, 20. Contrast *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), para.7-255.

ment can, perhaps, be found in *Re Vandervell's Trusts (No.2)*.[180] In that case an option to purchase certain shares was held by trustees on a resulting trust for V. The trustees exercised the option and took a transfer of the shares. With V's knowledge and consent they paid for the shares by using money held on trust by them for V's children. It was held by the Court of Appeal that the shares were, when acquired, held on trust for the children. No written declaration of trust had been executed by V, but such a declaration could be implied from certain acts by the trustees. The court held that section 53(1)(c) was not applicable as neither the extinction of a resulting trust nor the creation of a beneficial interest in the shares by the declaration of trust amounted to a disposition of a subsisting equitable interest within the meaning of that paragraph. As Lord Denning MR put it[181]: "A resulting trust for the settlor is born and dies without any writing at all", and "a trust of personalty can be created without writing". Another view, however, might be that the effect of the surrender or release is to transfer the existing equitable interest of the beneficiary to the legal owner and it therefore operates as a disposition of an existing equitable interest.

3-30 **Agreement for value to assign an equitable chose.** An agreement for valuable consideration to assign an interest in property, provided that the agreement is specifically enforceable, gives rise to a constructive trust and the assignor holds the property as trustee for the assignee.[182] It is not easy to ascertain the effect of this principle on whether an agreement to assign an equitable chose is required to be in writing by section 53(1)(c). The argument is that no writing is required for an agreement for value to assign an equitable interest because such an agreement causes a constructive trust of the equitable interest to arise, which vests the equitable title to the interest in the assignee by operation of law.[183] The creation of a constructive trust is excluded from the application of section 53(1)(c) by section 53(2). This matter was considered, though inconclusively, by the House of Lords in *Oughtred v Inland Revenue Commissioners*.[184] In that case the issue was whether a deed of transfer of settled shares by trustees to a mother in implementation of an oral agreement for value between the mother and her son, who held an absolute reversionary interest in the shares, was assessable to ad valorem stamp duty under the Stamp Act 1891. It was argued that the entire beneficial interest in the shares was already vested in the mother under a constructive trust arising out of the oral agreement with the son and no further written document assessable to stamp duty was required. The question therefore arose whether the oral agreement was effective to transfer the son's reversionary interest to the mother or whether section 53(1)(c) of the Law of Property Act 1925 made writing necessary to effect a transfer. At first instance Upjohn J stated[185] that, having regard to section 53(2), no writing was required, and continued:

> "This was an oral agreement for value, and accordingly, on the making thereof, [the son] became a constructive trustee of his equitable reversionary interest in the trust funds for [the mother]. No writing to achieve that result was necessary, for an agreement of sale and

[180] [1974] Ch. 269.
[181] At 320.
[182] See para.3-09.
[183] See para.3-09.
[184] [1960] A.C. 206.
[185] [1958] Ch. 383, 390.

> purchase of an equitable interest in personalty (other than chattels real) may be made orally, and section 53 has no application to a trust arising by construction of law".

On appeal to the Court of Appeal,[186] the court reversed the decision of Upjohn J but found that the issue of stamp duty did not call for a decision on this point, although it stated that the court was not necessarily prepared to accept Upjohn J's conclusion.

In the House of Lords, a majority of their Lordships held that, even if the oral agreement was effective to pass the equitable title to the shares to the mother, the instrument by which the transaction was completed was none the less a "conveyance on sale" within section 54 of the Stamp Act 1891 and so subject to stamp duty. One of the members of the minority, Lord Radcliffe, however, approved the judgment of Upjohn J and said[187]: 3-31

> "The reasoning of the whole matter, as I see it, is as follows: On June 18 1956, the son owned an equitable reversionary interest in the settled shares: by his oral agreement of that date he created in his mother an equitable interest in his reversion, since the subject-matter of the agreement was property of which specific performance would normally be decreed by the court. He thus became a trustee for her of that interest sub modo: having regard to subsection (2) of section 53 of the Law of Property Act 1925, subsection (1) of that section did not operate to prevent that trusteeship arising by operation of law."

On the other hand, the other member of the minority, Lord Cohen, stated[188] that section 53(1)(c) applied and that accordingly the son could not assign the equitable interest to the mother except by writing, although he found that it did not follow that the deed of transfer was a conveyance of the equitable interest on which ad valorem stamp duty was payable. Among the majority, Lord Denning was of the opinion[189] that the wording of section 53(1)(c) clearly made writing necessary to effect a transfer and that section 53(2) did not do away with that necessity. However, Lord Jenkins,[190] with whom Lord Keith agreed, found it unnecessary to decide the question because the deed of transfer was stampable as a conveyance on sale whether or not the beneficial interest in the shares was already vested in the mother under a constructive trust. As a result, the question whether an agreement for value to assign an equitable interest is effective without writing can truly be regarded as having been left open by the House of Lords.

Subsequent cases have nevertheless tended to follow the view expressed by Lord Radcliffe.[191] In *Neville v Wilson*[192] an informal (oral) agreement was entered into between the shareholders in a company, N Ltd, for the division of N Ltd's equitable interest in 120 shares in another company, the division to be in proportion to their shareholdings in N Ltd. The effect of the agreement, so the Court of Appeal held, was that each shareholder agreed to assign his interest in the other shares of N Ltd's equitable interest in exchange for the assignment by the other shareholders of their 3-32

[186] [1958] Ch. 678, 687.
[187] [1960] A.C. 206, 227.
[188] At 230.
[189] At 233.
[190] At 240.
[191] *Re Holt's Settlement* [1969] 1 Ch. 100, 116; *DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] 1 W.L.R. 852; *Neville v Wilson* [1997] Ch. 144. See also *Meagher Gummow and Lehane's Equity Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), para.7-195.
[192] [1997] Ch. 144 (criticised in Bridge et al, *The Law of Personal Property* (London: Sweet & Maxwell, 2013), para.15-072).

interests in his own aliquot share. There was thus an agreement for value to assign an equitable interest. Since the agreement was not in writing, the question arose whether it was rendered ineffectual by section 53(1)(c). The Court of Appeal held that the effect of each individual agreement was to constitute the shareholder an implied or constructive trustee for the other shareholders so that the requirement of writing in subsection (1)(c) of section 53 was dispensed with by subsection (2).

It nevertheless seems curious that, whereas writing is clearly required for an actual assignment of an equitable interest, an agreement for value to assign such an interest can be made informally. This point was made succinctly by counsel for the Inland Revenue (Mr. Wilberforce QC) in *Oughtred* when he said[193]: "It cannot be right that an oral contract can transfer property when an oral disposition cannot". For this reason, in *United Bank of Kuwait Plc v Sahib*[194] Chadwick J observed: "I should, perhaps, add (without seeking to decide the point) that I am far from persuaded that section 53(2) of the Law of Property Act 1925 can have any application in a case where it is sought to avoid the effect of section 53(1)(c) by relying on an oral contract to make the disposition which section 53(1)(c) requires to be in writing", though, like the House of Lords in *Oughtred*, he found it unnecessary to decide the point in the case before him.

3-33 **Disclaimer.** A disclaimer by an assignee of an equitable interest assigned to him is not required to be in writing. A disclaimer operates by way of avoidance and not by way of disposition, and therefore there is no requirement of writing under section 53.[195]

3-34 **Writing and signature.** Section 53(1)(c) requires that the disposition must be in writing[196] and not merely evidenced by writing, and that it must be signed. The writing can consist of two or more documents, only one of which is signed, provided they are sufficiently interconnected.[197] The writing must describe the subject-matter, though it seems that it may sufficiently describe it even though the description has to be supplemented by extrinsic evidence.[198] It is submitted that the required writing and signature can be contained in an email or other means of electronic communication capable of being reproduced in visible form.[199] Where the subsisting equitable interest is "an interest which is the subject of a notice in the [land] register",[200] section 91 of the Land Registration Act 2002 provides that, subject to compliance with certain conditions as set out in that section,[201] electronic dispositions will be regarded as fulfilling the formality requirement.

193 [1960] A.C. 206, 221.
194 [1997] Ch. 107, 129.
195 *Re Paradise Motor Co Ltd* [1968] 1 W.L.R. 1125. Cf. *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), paras 7-245, 7-250. See also *Snell's Equity*, 33rd edn (London: Sweet & Maxwell, 2015), para.27-030.
196 *Grey v IRC* [1958] Ch. 690, 706 (CA).
197 *Re Danish Bacon Co Ltd Staff Pension Fund Trusts* [1971] 1 W.L.R. 248, 254.
198 *Plant v Bourne* [1897] 2 Ch. 281 (on the Statute of Frauds 1677).
199 See paras 2-10–2-11.
200 These interests are set out in ss.32–33 of the 2002 Act.
201 Subsection (3).

Disapplication of section 53(1)(c). The Financial Collateral Arrangements (No.2) Regulations 2003[202] disapply section 53(1)(c) in respect of charges and other forms of financial security within their scope but the Regulations themselves apply only when the security financial collateral arrangement is "evidenced in writing".[203] 3-35

(E) CONSIDERATION

Whether consideration required. The question whether consideration is required for an equitable assignment, and in particular for an equitable assignment of a legal chose, has been said to be one which is "vexed and difficult".[204] Equity, so the maxim runs, will not assist a volunteer. In *Re Westerton*[205] Sargant J asserted that, since a legal chose in action could not, prior to 1873, have been transferred at law, the assignee could only have sued in the name of the assignor, and the use of the assignor's name could only have been enforced by filing a bill in equity, but "equity would not have granted that relief unless the assignment had been for valuable consideration". Moreover, in *Glegg v Bromley*,[206] Parker J went so far as to say "For every equitable assignment … there must be consideration", although this statement was made in the context of a contract to assign, not an actual assignment. On the other hand, a person ought to have it in his power to make a voluntary gift to another of any of his property, whether tangible or intangible, and there are many cases where assignments have been recognised as effective in equity despite the absence of consideration.[207] These decisions show, it is submitted, that consideration is not a requirement for an equitable assignment, whether the chose assigned is legal or equitable, provided that: 3-36

(1) there is a final and settled intention on the part of the assignor to transfer the chose immediately to the assignee;
(2) the intention is to transfer the chose outright and not by way of security;
(3) there is a present assignment as opposed to a promise or agreement to assign;

202 SI 2003/3226 reg.4(2).
203 Regulation 3.
204 *Norman v Federal Commissioner of Taxation* (1963) 109 C.L.R. 9, 29. See also Jenks, "Consideration and the Assignment of Choses in Action" (1900) 16 L.Q.R. 241; Anson, "Assignment of Choses in Action" (1901) 17 L.Q.R. 90; Costigan, "Gifts Inter Vivos of Choses in Action" (1911) 27 L.Q.R. 326; Bailey, "Assignments of Debts in England from the Twelfth to the Twentieth century" (1932) 48 L.Q.R. 547; Sykes, "Consideration in Equitable Assignments of Choses in Action" (1936) 1 *Res Judicatae* 125; Megarry, "Consideration and Equitable Assignments of Legal Choses in Action" (1943) 59 L.Q.R. 58; Hollond, "Further Thoughts on Equitable Assignments of Legal Choses in Action" (1943) 59 L.Q.R. 129; Megarry (1951) 67 L.Q.R. 295; Sheridan, "Informal Gifts of Choses in Action" (1955) 33 Can. Bar Rev. 284; Hall, "Gift of Part of a Debt" [1959] C.L.J. 99; Zines, "Equitable Assignments: When will Equity Assist a Volunteer?" (1965) 38 A.L.J. 337; Macnair, "Equity and Volunteers" (1988) 8 *Legal Studies* 172; Marshall, *The Assignment of Choses in Action* (London: Sir Isaac Pitman, 1950), Ch.4.
205 [1919] 2 Ch. 104, 111.
206 [1912] 3 K.B. 474, 491.
207 *Fortescue v Barnett* (1834) 3 My. & K. 36, 42; *Kekewich v Manning* (1851) 1 De G. M. & G. 176, 187; *Re King* (1879) 14 Ch. D. 179; *Standing v Bowring* (1885) 31 Ch. D. 282; *Harding v Harding* (1886) 17 Q.B.D. 442, 445, 446; *Re Patrick* [1891] 1 Ch. 82, 87; *Re Griffin* [1899] 1 Ch. 408; *Re Smith* (1901) 84 L.T. 835; *Holt v Heatherfield Trust Ltd* [1942] 2 K.B. 1, 3, 5; *Re Rose* [1949] Ch. 78; *Letts v IRC* [1957] 1 W.L.R. 201; *Rose v IRC* [1952] Ch. 499; *Taylor v Deputy Federal Commissioner of Taxation* (1969) 123 C.L.R. 206; *Shepherd v Commissioner of Taxation* (1965) 113 C.L.R. 385; *Re Paradise Motor Co Ltd* [1968] 1 W.L.R. 1125; *Mascall v Mascall* (1985) 50 P. & C. R. 119; *Pennington v Waine* [2002] EWCA Civ 227, [2002] 1 W.L.R. 2075.

(4) the assignment is of an existing chose; and
(5) the assignment is "complete", that is to say, the assignor has done everything which is necessary on his part to transfer the chose to the assignee.

3-37 **(1) Settled intention to effect an immediate transfer.** For a voluntary assignment to be effective in equity it must take the form of, and be intended as, an immediate and irrevocable transfer of the chose. There must be manifested a final and settled intention to make an immediate transfer of the chose to the assignee. In *Re Williams*[208] the donor, owner of a life policy, gave the policy to his housekeeper with a signed indorsement: "I authorise [the housekeeper] and no other person to draw this insurance in the event of my predeceasing her … ". He paid the premiums on the insurance until his death. The Court of Appeal held that these words did not constitute an effective voluntary assignment. They denoted a mere revocable authority and not an immediate and irrevocable transfer of the policy to the housekeeper.

3-38 **(2) Not by way of security.** The intention of the assignor must be to transfer the chose, in whole or in part, unconditionally to the assignee and not merely to create a charge or to effect an assignment by way of security. A transaction which is a charge or by way of security will normally rest in contract and then consideration is required.[209]

Even if the transaction is not contractual, it may involve the assignment of a future indebtedness or a future chose[210] or not be intended as an immediate transfer but dependent upon a contingency, e.g. default by the assignor.

3-39 **(3) Not a promise or agreement to assign.** Consideration is ordinarily required for a promise or agreement to assign. A voluntary assignment must therefore be a present assignment and not a promise to assign the chose in future or an agreement (or contract) to assign. "Consideration is always necessary to attract the support of equity to a transaction that is a contract rather than a conveyance".[211] In *Re McArdle*[212] the residual estate of the testator was held by a trustee upon trust for the testator's five children, subject to a prior life interest in favour of his widow. The wife of one of the children carried out and paid for certain alterations and improvements to the property comprised in the estate. After this had been done the five children signed a document addressed to her which stated:

> "In consideration of your carrying out certain alterations and improvements to the property … we… hereby agree that the executors… shall repay to you from the estate when so distributed the sum of £488 in settlement of the amount spent on such improvements".

The Court of Appeal held that, if the five children had given a direction to and authorised the trustee to hand over a part share of the estate, there would have been an actual assignment for which no consideration would have been required. But since the document was in the language of contract, it could not take effect as a gift. As a contract it required consideration. The only consideration (the carrying out of the work) being in fact past, it was not enforceable.

---

208 [1917] 1 Ch. 1. See also *Re Shield* (1885) 53 L.T. 5; *Pulley v Public Trustee* [1956] N.Z.L.R. 771.
209 *Matthews v Goodday* (1861) 31 L.J. Ch. 282; *Re Earl of Lucan* (1890) 45 Ch. D. 470.
210 See para.1-08.
211 *Norman v Federal Commissioner of Taxation* (1963) 109 C.L.R. 9, 31; *Holt v Heatherfield Trust Ltd* [1942] 2 K.B. 1, 3.
212 [1951] 1 Ch. 669.

In this context "consideration" means any consideration sufficient to support a simple contract.[213] An antecedent debt or liability is not consideration[214] unless there can be implied therefrom a forbearance sue.[215] A deed does not supply consideration in equity: "Equity, paying no attention to the mere presence of a seal, does not regard a voluntary promise as binding on the conscience of the promisor and therefore withholds its assistance from a volunteer".[216]

3-40 **(4) Existing and not a future chose.** For a voluntary assignment to be upheld, it must be an assignment of an existing, not of a future, chose.[217] A purported assignment of a future chose can only have effect as a promise or agreement to assign[218] and so requires consideration for it to be enforceable by the assignee.[219]

3-41 **(5) "Everything which is necessary".** Equity will not perfect an imperfect gift. But if the gift has been so far completed, that is to say, if everything has been done which according to the nature of the property[220] is necessary to be done on the part of the assignor to transfer the chose to the assignee, then equity will recognise the gift without requiring consideration. The test to ascertain whether the gift has been "completed" or "perfected" was set out by Turner LJ in *Milroy v Lord*[221]:

> "I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, *the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him.* He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of those modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If *it is intended to take effect by transfer, the Court will not hold the*

---

213 See *Chitty on Contracts*, 32nd edn (London: Sweet & Maxwell, 2015), Ch.4.
214 *Roger v Comptoir d' Escompte de Paris* (1869) L.R. 2 P.C. 53; *Jones v Barker* [1909] 1 Ch. 321; *Glegg v Bromley* [1912] 3 K.B. 474; *Re McArdle* [1951] 1 Ch. 669; *Chitty on Contracts*, 32nd edn (London: Sweet & Maxwell, 2015), para.4-032.
215 *The Alliance Bank Ltd v Broom* (1864) 2 Drew & Sm. 289; *Glegg v Bromley* [1912] 3 K.B. 474; *Holt v Heatherfield Trust* [1942] 2 K.B. 1, 3; *Chitty on Contracts*, 32nd edn (London: Sweet & Maxwell, 2015), para.4-058.
216 *Redman v Permanent Trustee Co of NSW Ltd* (1916) 22 C.L.R. 84, 96. See also *Meek v Kettlewell* (1842) 1 Hare 464; *Kekewich v Manning* (1851) 1 De G. M. & G. 176, 188; *Re Earl of Lucan* (1890) 45 Ch. D. 470; *Re Ellenborough* [1903] 1 Ch. 697. But a deed may: (a) entitle the assignee to sue the assignor for damages for breach of contract (*Cannon v Hartley* [1949] Ch. 213); (b) establish a trust in favour of the assignee; (c) constitute a valid assignment of property to which the promisor becomes entitled and which is in fact paid to or vested in the promisee (without the need for the assistance of equity) (*Re Bowden* [1936] 1 Ch. 71; *Re Adlard* [1954] Ch. 29; *Re Ralli's Will Trusts* [1964] 1 Ch. 288); (d) manifest the intention of the assignor to make an immediate and irrevocable transfer.
217 For the distinction between existing and future choses, see para.1-08.
218 See para.3-21.
219 See para.3-21.
220 *Re Williams* [1917] 1 Ch. 1, 8.
221 (1862) 4 De G. F. & J. 264, 274–275 (emphases added).

intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

In that case M executed a voluntary deed purporting to assign 50 shares in the Louisiana Bank to L, to be held by him on certain trusts for the benefit of the claimants (his niece etc.). The shares were only transferable at law by the execution of an appropriate transfer form and the registration of the transfer in the books of the bank. M gave L a power of attorney to execute a transfer of the shares and to receive dividends. L also held the share certificates. Although dividends were paid to the claimants during M's lifetime, no transfer was ever made. Upon the death of M, the question arose whether the shares were still part of M's estate. The Court of Appeal in Chancery held that M had no intention to constitute himself a trustee of the shares, but to vest the shares in L, so there was no valid trust of the shares in M, and the purported disposition of the shares by M to L failed as an imperfect voluntary gift. They were therefore still part of M's estate.

3-42 The rule enunciated by Turner LJ in *Milroy v Lord* has been the subject of subsequent interpretation and development.[222] Although not stated in so many words, the rule has been interpreted to mean that the assignor must have done everything which is necessary to be done by him, and only by him, to transfer the property to the assignee. If he has done everything within his power that he has to do, then the gift is "complete" even though steps remain to be taken by the assignee or by a third party which are necessary to vest the subject-matter of the assignment in the assignee. "If … the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee needs no assistance from equity and the gift is complete".[223] While everything that the assignor, and only the assignor, can do must be done, the assignor is not required to do things which he may do but which the assignee or a third party could also do. It follows that, even if it is within the power of the assignor to do the necessary act, then if the act could and would in the ordinary way be done by the assignee[224] or if the act, e.g. the giving of notice, could equally be done by the assignor or by the assignee,[225] the omission of that act by the assignor will not invalidate the gift.

The rule has most often been invoked in cases in which an assignee has sought to rely upon an equitable assignment to establish a beneficial interest in property which is transferable at law but where certain special requirements for the transfer of a legal title to the property have not been complied with. The words "everything which is necessary" then refer to everything which is necessary to transfer a legal title to the property to the assignee. The rule has been applied in cases concerning shares, stock and bonds,[226] promissory notes,[227] chattels,[228] bank deposits,[229] debts,[230]

[222] See Zines, "Equitable Assignments: When will Equity Assist a Volunteer?" (1965) 38 A.L.J. 337; Liew, *Rationalising Constructive Trusts* (Oxford: Hart Publishing, 2017), Ch.9.

[223] *Mascall v Mascall* (1985) 50 P. & C. R. 119, 126.

[224] *Mascall v Mascall* (1985) 50 P. & C. R. 119. See also *Anning v Anning* (1907) 4 C.L.R. 1049, 1057; *Corin v Patton* (1990) 169 C.L.R. 540, 559.

[225] *Re Patrick* [1891] 1 Ch. 82; *Holt v Heatherfield Trust Ltd* [1942] 2 K.B. 1, 4.

[226] *Moore v Moore* (1874) L.R. 18 Eq. 474; *Standing v Bowring* (1885) 31 Ch. D. 282; *Re Shield* (1885) 53 L.T. 5; *Re Smith* (1901) 84 L.T. 835; *Re Fry* [1946] 1 Ch. 312; *Re Rose* [1949] Ch. 78; *Rose v IRC* [1952] Ch. 499; *Letts v IRC* [1957] 1 W.L.R. 201; *Re Paradise Motor Co Ltd* [1968] 1 W.L.R. 125; *Choithram (T) International SA v Pagarani* [2001] 1 W.L.R. 1; *Pennington v Waine* [2002] EWCA Civ 227, [2002] 1 W.L.R. 2075.

land,[231] life insurance policies[232] and royalties.[233] The rule has also been invoked in relation to the transfer of equitable interests[234] although less frequently, since the formalities for the transfer of equitable interests—at least in personalty—are less exacting. Moreover in *Vandervell* Lord Wilberforce suggested that the rule can be invoked where a beneficiary under a bare trust of a legal chose attempts orally to transfer the chose absolutely to an assignee.[235] Thus if the subject-matter assigned is an equitable chose, the assignment is complete when the assignor has unequivocally expressed the intention that the chose thereafter should belong to the assignee[236] in equity or absolutely, as the case may be.

The second principle or sub-rule. The second principle, or sub-rule, set out by Turner LJ in *Milroy v Lord* that "if it is intended to take effect by transfer, the Court will not hold the intended transfer as a declaration of trust" is prone to misunderstanding. No consideration is required for a voluntary declaration of trust. The sub-rule is clearly designed to prevent the re-classification of an incompletely constituted gift as a voluntary declaration of trust,[237] or a non-binding contract as an equitable assignment of its subject-matter,[238] so as to rescue the intended but defective method of settlement from invalidity. However, where the assignor has in fact done everything in his power to transfer the property as required by the main rule, then, pending the transfer of the legal or equitable title, the assignor is in the position of a trustee of the legal or equitable title in the property for the benefit of the assignee. This constructive trust is not caught by the sub-rule, as was explained by Lord Evershed MR in *Rose v Inland Revenue Commissioners*[239] when he said: **3-43**

> "I agree that if a man purporting to transfer property executes documents which are not apt to effect that purpose, the court cannot then extract from those documents some quite

[227] *Richardson v Richardson* (1867) L.R. 3 Eq. 686; *Re Richards* (1887) 36 Ch. D. 541; *Anning v Anning* (1907) 4 C.L.R. 1049. See also *Timpson's Executors v Yerbury* [1936] 1 K.B. 645.

[228] *Richards v Delbridge* (1874) L.R. 18 Eq. 11; *Re Breton's Estate* (1881) 17 Ch. D. 416; *Anning v Anning* (1907) 4 C.L.R. 1049; *Re Freeland* [1952] Ch. 110.

[229] *Moore v Moore* (1874) L.R. 18 Eq. 474; *Re Griffin* [1899] 1 Ch. 408; *Anning v Anning* (1907) 4 C.L.R. 1049; *Choithram (T) International S.A. v Pagarani* [2001] 1 W.L.R. 1.

[230] *Re Patrick* [1891] 1 Ch. 82; *Anning v Anning* (1907) 4 C.L.R. 1049; *Norman v Federal Commissioner of Taxation* (1963) 109 C.L.R. 9; *Olsson v Dyson* (1970) 120 C.L.R. 365.

[231] *Warriner v Rogers* (1873) L.R. 16 Eq. 340; *Brunker v Perpetual Trustee Co Ltd* (1937) 57 C.L.R. 555; *Taylor v Deputy Federal Commissioner of Taxation* (1969) 123 C.L.R. 206.

[232] *Re King* (1879) 14 Ch. D. 179; *Re Williams* [1917] 1 Ch. 1. See also *Fortescue v Barnett* (1834) 3 My. & K. 36; *Pearson v The Amicable Assurance Office* (1859) 27 Beav. 229.

[233] *Shepherd v Commissioner of Taxation* (1905) 113 C.L.R. 385; *Coulls v Bagot's Executor and Trustee Co Ltd* (1966) 119 C.L.R. 460.

[234] *Donaldson v Donaldson* (1854) Kay 711; *Re Way's Trusts* (1864) 2 De G. J. & S. 365; *Re Walhampton Estate* (1884) 26 Ch. D. 391; *Harding v Harding* (1886) 17 Q.B.D. 442; *Anning v Anning* (1907) 4 C.L.R. 1049; *Scoones v Galvin* [1934] 53 N.Z.L.R. 1004; *Corin v Patton* (1989) 169 C.L.R. 540. See also *Nanney v Morgan* (1887) 37 Ch. D. 346.

[235] *Vandervell v IRC* [1967] 2 A.C. 291, 330.

[236] *Voyle v Hughes* (1854) 2 Sm. & G. 18; *Re Spark's Trusts* [1904] 1 Ch. 451; *Brunker v Perpetual Trustee Co Ltd* (1937) 57 C.L.R. 555, 599; *Re Burton's Settlements* [1955] Ch. 82; *Re Wale* [1956] 1 W.L.R. 1346; *Letts v IRC* [1957] 1 W.L.R. 201.

[237] *Jones v Lock* (1865) L.R. 1 Ch. App. 25; *Moore v Moore* (1874) L.R. 18 Eq. 474; *Heartley v Nicholson* (1874) L.R. 19 Eq. 233; *Re Burton's Estate* (1881) 17 Ch. D. 416; *Richards v Delbridge* (1874) L.R. 18 Eq. 11; *Re Shield* (1885) 53 L.T. 5; *Olsson v Dyson* (1970) 120 C.L.R. 365; *Pappadakis v Pappadakis* [2000] W.T.L.R. 719. Cf. *Paul v Constance* [1977] 1 W.L.R. 527; *Choithram (T) International SA v Pagarani* [2001] 1 W.L.R. 1.

[238] *Re McArdle* [1951] 1 Ch. 669, 676.

[239] [1952] Ch. 499, 510–511.

different transaction and say that they were intended merely to operate as a declaration of trust, which ex facie they were not; but if a document is apt and proper to transfer the property — is in truth the appropriate way in which the property must be transferred — then it does not seem to me to follow from the statement of Turner L.J. that, as a result, during some limited period or otherwise, a trust may not arise for giving effect to the transfer. The simplest case will, perhaps, provide an illustration. If a man executes a document transferring all his equitable interest, say, in shares, that document, operating, and intended to operate, as a transfer, will give rise to and take effect as a trust; for the assignor will then be a trustee of the legal estate in the shares for the person in whose favour he has made an assignment of his beneficial interest. And, for my part, I do not think that the case of *Milroy v Lord* is an authority which compels this court to hold that in this case — where, in the terms of Turner L.J.'s judgment, the settlor did everything which, according to the nature of the property comprised in the settlement, was necessary to be done by him in order to transfer the property — the result necessarily negatives the conclusion that, pending registration, the settlor was a trustee of the legal interest for the transferee."

3-44 **Application of the rule.** The courts have exhibited a progressively benevolent approach[240] to the application of the rule in *Milroy v Lord* as can be seen from four cases concerning the validity of purported assignments of shares in companies. In *Re Fry* (1946)[241] the testator, an American resident and domiciled in the United States, executed voluntary transfers to his son in England of shares in an English company. Restrictions were imposed on the transfer of securities by the Defence (Finance) Regulations 1939 and the company was obliged to, and did, refuse registration of the shares unless the consent of the Treasury was obtained. The forms necessary to obtain consent were sent to the testator, who signed and returned them to England, but he died before consent was obtained. Romer J held that the testator had not done everything necessary to transfer title to the shares, i.e. he had not obtained the necessary consent from the Treasury. The gift was therefore ineffective.

In *Re Rose* (1949)[242] the testator executed a voluntary transfer to H of 5,000 preference shares in a private company and handed to H the executed transfer form and the relevant share certificates. The directors of the company, as they were entitled to do, refused to register the shares (although they did do so after the testator's death). Jenkins J held that there was an effective gift of the shares during the testator's lifetime as he had done everything in his power to divest himself of the shares. "There was nothing else the testator could do".[243]

In *Re Rose, Rose v Inland Revenue Commissioners* (1952)[244] the donor executed a voluntary transfer of certain shares in a company to his wife absolutely and to a third party as trustee. On the same day, the transfers together with the relevant share certificates were handed to the transferees or their agents. The company was a private company and the directors of the company could decline to register any transfer. For estate duty purposes it was necessary to ascertain the date on which the transfer of ownership of the shares was effected. Was this only on registration or earlier on execution of the transfers? The Court of Appeal held that the gift was complete on execution of the share transfers. Even though legal title to the shares could not pass until registration, upon execution of the transfers the donor was in

240 See Tijo and Yeo, "Re Rose Revisited: The Shorn Lamb's Equity" [2002] L.M.C.L.Q. 296.
241 [1946] Ch. 312.
242 [1949] Ch. 78.
243 At 89.
244 [1952] Ch. 499.

the position of a trustee of the legal title to the shares for the transferees. The beneficial ownership of the shares passed at that time.

3-45 In *Pennington v Waine* (2002)[245] a still more radical approach was adopted by the Court of Appeal where A wished to transfer voluntarily 400 of her shares in a company to H and to make him a director, which required him to hold at least one share in the company. A signed a share transfer form and the company's auditors wrote to H to inform him of the share transfer, asking him to complete a prescribed form of consent to act as a director. H signed the form and it was countersigned by A. But the signed share transfer form was retained by the auditors and not sent to H. A died, making specific gifts of the balance of her shareholding, but she made no mention of the 400 shares. The executors of A's will sought directions as to whether there had been a valid equitable assignment of the 400 shares. The Court of Appeal held that the gift was effective in equity despite the fact that there had been no delivery of the share transfer form or the share certificates to H or to the company. Arden LJ (with whom Schiemann LJ agreed) pointed out[246] that, with respect to its policy of not assisting a volunteer, "equity tempered the wind to the shorn lamb" in three ways: first, by the rule in *Milroy v Lord* itself, as extended in *Re Rose, Rose v Inland Revenue Commissioners*[247]; secondly, by utilising the constructive trust[248]; thirdly, by applying a benevolent construction to words of gift.[249] She stated[250]: "The question whether an apparently incomplete gift is to be treated as completely constituted is that a donor will not be permitted to change his or her mind if it would be unconscionable, in the eyes of equity, vis-à-vis the donee to do so". She continued[251]: "There can be no comprehensive list of factors which makes it unconscionable for the donor to change his mind: it must depend on the court's evaluation of all the relevant considerations". In the instant case, A of her own free will had intended to make an immediate gift. H had been informed of it and had agreed to become a director of the company on an assumption that he had received a gift of qualifying shares. As a result, even if delivery of the shares had been required, it would have been unconscionable for the executors to refuse to hand over the shares to H.

3-46 A more benevolent attitude may also be detected with respect to the application of the second principle or sub-rule in *Milroy v Lord* in the decision of the Judicial Committee of the Privy Council in *Choithram (T) International SA v Pagarani* (2001).[252] In that case, while the donor was seriously ill in England, he executed a trust deed establishing a philanthropic foundation and appointed himself one of the trustees. He then stated orally that he gave all his wealth to the foundation, including specifically his deposit balances and shares in four companies. He told the accountant to those companies that he was to transfer the deposit balances and shares to the foundation. At board meetings of the companies the same day the donor

245 [2002] EWCA Civ 227, [2002] 1 W.L.R. 2075.
246 At [54]. The third member of the Court of Appeal, Clarke LJ, after examining in detail the judgments in *Re Rose, Rose v Inland Revenue Commissioners* [1952] Ch. 499, concluded that, in the absence of a contrary intention, the execution of a share transfer form should have effect as an equitable assignment without the need for delivery of the form or the share certificates to the donee or to the company.
247 At [55]–[56].
248 At [59].
249 At [60].
250 At [64].
251 At [64].
252 [2001] 1 W.L.R. 1. See also *Shah v Shah* [2010] EWCA Civ 1408, [2011] W.T.L.R. 519.

reported orally that he had established the foundation and had gifted all his wealth to it, and resolutions were passed by the companies accordingly. But shares in some of the companies were not transferred before he died. The trial judge and Court of Appeal in the Virgin Islands, applying *Milroy v Lord*, held that the transfer failed as a gift to the foundation since the donor had not done all in his power to perfect the gift, and that his words of gift could not be treated as if he had declared himself a trustee for the foundation as they made no reference to trusts. The Privy Council, however, held that equity "will not strive officiously to defeat a gift".[253] The case fell between the two common form situations referred to in *Milroy v Lord*. A benevolent construction should be put on the donor's words "I give to the foundation" as meaning "I give to the trustees of the foundation trust deed to be held by them on the trusts of foundation trust deed". There was no distinction between cases where a donor declares himself to be the sole trustee for the donee or for a purpose and where (as here) he declares himself to be one of the trustees for that donee or purpose. As Lord Browne-Wilkinson said,[254] "It would be unconscionable and contrary to the principles of equity to allow such a donor to resile from his gift". Further, if one of a larger body of trustees, in this case, the donor, has the trust property vested in him, he is bound by the trust and must give effect to it by transferring that trust property into the name of all the trustees. The gift was therefore effective as a declaration of trust.

With regard to the main rule, it can be observed that the courts are moving away from a strict application of the rule in *Milroy v Lord* and towards a more flexible test for the efficacy of voluntary assignments. Nevertheless, courts have yet to adopt wholesale the approach of enquiring whether an intended gift had reached a stage where, in the circumstances of the individual case, it would be unconscionable to allow the assignor, his creditors or personal representatives, to go back on the gift. In particular, the judgment in *Pennington v Waine* has not been given a wide ratio, with judges instead preferring to confine that judgment to its facts or to explain the result in that case as being an application of the doctrine of proprietary estoppel.[255] Moreover, with regard to the sub-rule, there have been subsequent cases concerning an incomplete transfer of shares[256] where it has been held, on the facts, that no amount of benevolent construction could lead to the conclusion that the donor intended to declare himself a trustee and that there was no evidence of any change of position by the donee sufficient to render it inequitable for the gift not to be binding on the donor.

3-47 **Defective legal assignments.** It is arguable that, where it is open to an assignor to effect a legal assignment of the chose in accordance with section 136 of the Law of Property Act 1925,[257] but he has not done so, that is, if the assignment is not by writing under the hand of the assignor,[258] then the assignor has not done all that is necessary on his part to transfer the legal title to the chose to the assignee and the

[253] At 11.
[254] At 12.
[255] *Zeital v Kaye* [2010] EWCA Civ 159, [2010] B.C.L.C. 1 at [40]; *Curtis v Pulbrook* [2011] EWHC 167 (Ch), [2011] 1 B.C.L.C. 638 at [43]. Cf. *Jordan v Roberts* [2009] EWHC 2313 (Ch) at [250]. See Liew, *Rationalising Constructive Trusts* (Oxford: Hart Publishing, 2017), Ch.9 s.9.1.4.
[256] *Zeital v Kaye* [2010] EWCA Civ 159, [2010] B.C.L.C. 1, [37]; *Curtis v Pulbrook* [2011] EWHC 167 (Ch), [2011] 1 B.C.L.C. 638 at [44]. Cf. *Shah v Shah* [2010] EWCA Civ 1408, [2011] W.T.L.R. 519 at [20].
[257] See Chapter 2.
[258] See para.2-10.

assignment, if voluntary, cannot be upheld as an equitable assignment. This was the view taken by the High Court of Australia in *Olsson v Dyson*[259] where the court held ineffective an alleged voluntary *oral* assignment by a husband to his wife of a debt and interest thereon, one of the grounds being that the legal requirements for a statutory assignment had not been met, and of the legal requirements not even those had been fulfilled of which the husband alone was capable.

It is unclear whether the approach of the High Court should be followed. On the one hand, the fact that the assignor fails to comply with the requirements of section 136 of the 1925 Act proves precisely that the assignor has not done all that is necessary to effectuate a transfer of the chose, this being a precondition for a constructive trust to arise.[260] On the other hand, the provision for statutory assignments introduced by section 25(6) of the Judicature Act 1873, and re-enacted in section 136 of the 1925 Act, was designed to facilitate assignment by enabling an assignment to be effected at law and not to impair the efficacy of equitable assignments. It would be surprising if the enactment of the statute should have the effect of rendering invalid certain equitable assignments that would previously have been valid. Moreover, if the chose assigned is not capable of assignment at law, e.g. because it is part of a debt[261] or is not absolute,[262] then it could not be said that an oral assignment was ineffective because the assignor had failed to observe the requirements for a statutory assignment. The reasoning in *Olsson v Dysson* would not apply in such case. Yet it would be anomalous if, for example, a gift of part of a debt was effective, but a gift of the whole debt in the same circumstances would be without effect. The position to be adopted in English law awaits resolution by the courts.

Strong v Bird. The rule in *Strong v Bird*[263] constitutes an exception to the principle that equity will not assist a volunteer and will not perfect an imperfect gift. An imperfect gift may be perfected in equity by the appointment of the donee as an executor of the donor's estate. If an assignor purports to make a voluntary assignment during his lifetime but fails to complete the gift, then, provided his intention continued to the time of his death, the appointment of the assignee as an executor of his estate will complete the assignment notwithstanding the rule in *Milroy v Lord*. The conditions necessary for the rule to be applied were set out by Kitto J in *Cope v Keene*[264] as follows: 3-48

> "(1) that at some time in his lifetime the testator made a purported immediate gift of specific property to another person (or in the case of a debt a purported immediately operative voluntary release of it); (2) that though the testator's intention at the time was that what he did should take effect by way of present gift, it failed to do so for want of compliance with the legal requisites for a complete divesting of the title from the intending donor to the intending donee; (3) that the testator still had when he died the intention that the property should be treated as having been effectively given to the intended done; (4) that the testator left a will appointing the intended donee as the executor or one of the executors of the testator."

[259] (1969) 120 C.L.R. 365. But see *Corin v Patton* (1990) 169 C.L.R. 540.
[260] Cf. Edelman and Elliott, "Two Conceptions of Equitable Assignment" (2015) 131 L.Q.R. 228, 233–234.
[261] See para.2-15.
[262] See para.2-12.
[263] (1874) L.R. 18 Eq. 315.
[264] (1968) 118 C.L.R. 1. See also *Re Innes* [1910] 1 Ch. 188; *Re Pink* [1912] 2 Ch. 528; *Matthews v Matthews* (1913) 17 C.L.R. 8; *Re Freeland* [1952] Ch. 110.

tion provides that the assignment is "subject to equities having priority over the right of the assignee". The Policies of Assurance Act 1867,[10] which enables assignees of policies of life assurance to sue in their own names, also provides, in section 2, that "In any action on a policy of life assurance, a defence on equitable grounds, or a reply to such defence on similar grounds, may be respectively pleaded and relied upon in the same manner and to the same extent as in any other personal action". Section 50(2) of the Marine Insurance Act 1906[11] also provides that, where a marine policy has been assigned, the defendant is entitled to make any defence "arising out of the contract" which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.[12]

7-03 **Notice of assignment.** Once the obligor receives notice of the assignment, this will normally preclude him from setting up any new equities which arise after that time,[13] although there are situations where events that occur after the giving of notice will nevertheless found an equity which is binding on the assignee.[14] The notice that is required to preclude new equities arising may be oral or in writing and need be in no particular form.[15] But it should at least indicate that there has been an assignment and identify the debt or other subject-matter of the assignment and sufficiently identify the assignee.[16] A discussion of the rules relating to the giving of notice can be found in the chapter on Priorities in this book.[17] However, it should be noted that notice must be given after or at the same time as the assignment and not before.[18] A notice that is given before an assignment, i.e. notice of an agreement to assign or of a future assignment, will be without effect. Thus in the case of a factoring agreement which simply provides for the offer of each debt to the factor as it arises (a "facultative" agreement),[19] a letter sent to the trader's customers notifying them of the existence of the agreement is not an effective notice.[20] Each

10 See para.1-26.
11 See para.1-23.
12 *William Pickersgill & Sons Ltd v London and Provincial Marine and General Insurance Co Ltd* [1912] 3 K.B. 614; *Bank of New South Wales v South British Insurance Co Ltd* (1920) 4 Ll. L.Rep. 384; *Graham Joint Stock Shipping Co Ltd v Merchants Marine Insurance Co Ltd (The Ioanna)* [1924] A.C. 294; *Black King Shipping Corp and Wayang (Panama) SA v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep. 437; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 A.C. 233. Post-assignment breaches by the assignor may affect the assignee (*Black King Shipping Corp v Massie* [1985] 1 Lloyd's Rep. 437, 517–519; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1988] 1 Lloyd's Rep. 514, 546–547, [1989] 2 Lloyd's Rep. 238, 264, [1992] 1 A.C. 233). But the words "any defence arising out of the contract" probably preclude any defence of set-off arising from a cross-claim which does not arise out of or in respect of the contract itself.
13 See para.7-20.
14 See para.7-20.
15 See para.3-51.
16 See para.6-16.
17 See para.6-13. See also para.2-16 (statutory assignments).
18 *Williams v Atlantic Assurance Co Ltd* [1933] 1 K.B. 81, 106; *W.F. Harrison & Co Ltd v Burke* [1956] 1 W.L.R. 419, 422 (statutory assignments); *Canadian Admiral Corp Ltd v L.F. Dommerich & Co Inc* (1964) 43 D.L.R. (2d) 1; *New Zealand Factors Ltd v Farmers Trading Co Ltd* [1992] 3 N.Z.L.R. 703; *Commercial Factors Ltd v Maxwell Printing Ltd* [1994] 1 N.Z.L.R. 724.
19 See para.8-11.
20 *Canadian Admiral Corp Ltd v L.F. Dommerich & Co Inc* (1964) 43 D.L.R. (2d) 1; *New Zealand Factors Ltd v Farmers Trading Co Ltd* [1992] 3 N.Z.L.R. 703; *Commercial Factors Ltd v Maxwell Printing Ltd* [1994] 1 N.Z.L.R. 724.

debt has to be brought within the agreement by offer and acceptance and it is only then that there is an assignment of the debt to the factor. Since the letter is notice given in advance of the assignment, it is ineffective to prevent the accrual of new equities, in particular rights of set-off, against the factor. Moreover, in a number of nineteenth century cases (the "army agents" cases),[21] where army officers assigned the amounts to be realised on the sale of their commissions, it was arranged that those amounts were to be made available to them through army agents. It was held that any notice of an assignment given to the army agents before the army agents had received the relevant funds, and so had not yet come under an obligation to pay, was ineffective. In *Addison v Cox*[22] Lord Selborne said the notice must be a notice given to a person who is "bound by some contract or obligation, existing at the time when the notice reaches him, to receive and pay over, or to pay over, if he has previously received, the fund".

There can be no present assignment of a future chose,[23] but there can be a present assignment of a right to receive future payments under an existing contract.[24] In a borderline case, *Marathon Electrical Manufacturing Corp v Mashreqbank PSC*,[25] a company (MIG) was the beneficiary under a letter of credit issued by a foreign bank and instructed the defendants, its bankers, to collect the moneys payable under the letter of credit. MIG then assigned the proceeds to be received from the letter of credit to the claimants and gave notice of the assignment to the defendants. It was argued that the notice was ineffective because it had been given prior to the existence of the relative indebtedness on the part of the defendants in respect of the proceeds under the credit. But Mance J said: "Whether one is considering an assignment of the benefit of the right to receive payment under a credit or, as here, an assignment of the actual proceeds as and when collected under a credit, the facility to assign is one which has obvious commercial benefit to the beneficiary".[26] The notice was therefore held to be effective.

(B) DEFENCES THAT IMPEACH THE EXISTENCE OR ENFORCEABILITY OF THE CHOSE IN ACTION ASSIGNED

7-04 **Defects of title.** If the title of the assignor to the chose in action assigned is defective, he can confer no better title on the assignee. In *Redman v Permanent Trustee Co of New South Wales Ltd*[27] it was alleged that H had assigned part of an equitable life interest appointed to her by will. The validity of the appointment was contested and the High Court of Australia held it to be void. Griffith CJ and Barton J[28] further held that, assuming that there was an assignment, the invalidity of the appointment affected the title of the assignee no less than that of the assignor. They said[29]:

21 *Buller v Plunkett* (1860) 1 John. & H. 441; *Somerset v Cox* (1865) 33 Beav. 634; *Yates v Cox* (1868) 17 W.R. 20; *Calisher v Forbes* (1871) L.R. 7 Ch. App. 109; *Addison v Cox* (1872) L.R. 8 Ch. App. 76; *Johnstone v Cox* (1880) 16 Ch. D. 571, (1881) 19 Ch. D. 17.
22 (1872) L.R. 8 Ch. App. 76, 79. See also *Re Dallas* [1904] 2 Ch. 385, 398.
23 See para.1-08.
24 See para.1-09.
25 [1997] 2 B.C.L.C. 460.
26 At 467.
27 (1916) 22 C.L.R. 84.
28 Isaacs and Rich JJ decided the issue on another ground.
29 At 91.

"The assignee of an equitable interest, even for valuable consideration, takes subject to all the equities and infirmities of his assignor's title. It is one of the infirmities of the title of the assignor of an equitable interest that his right to it may be disputed and defeated by litigation in a competent Court between competent parties".

7-05 **Vulnerability of assignee to defences.** The assignee is also vulnerable to defences of the obligor that impeach the existence or enforceability of the chose in action assigned even though he purchased the chose for value and had no knowledge of the circumstances constituting the defence at the time he took his assignment.[30] The obligor is entitled to raise against the assignee those defences that would have been available to him against the assignor at the date of the assignment or before he received notice of the assignment. So, for example, he can raise the defence that his contract with the assignor, the benefit of which the assignor has purported to assign, is void for want of consideration or for incapacity or mistake or for failure to comply with some statutory requirement of form.[31] He is also entitled to raise the defence that the contract is voidable, for example, on the ground of fraud, misrepresentation,[32] non-disclosure,[33] duress,[34] or undue influence on the part of the assignor, and to set the contract aside[35] (subject to the restrictions on the right to rescind, e.g. affirmation, which in any event apply to such a defence).[36] Thus if A is induced to enter into a contract with B by the fraud of B, and B assigns to C the right to receive the moneys payable under the contract, the rule that assignments are subject to equities means that C gets no better rights than B.

If the chose in action assigned is a contractual right, defences that are available to the obligor under the terms of the contract are likewise available against the assignee. Thus a term of a life insurance policy which avoids the policy if the assured dies by his own hand is binding on the assignee.[37] Since the assignor's rights are vulnerable to such defences from the time the contract is made, the assignee's rights are similarly vulnerable even though the event giving rise to the defence may not have occurred at the date of the assignment or even at the time that the obligor received notice of the assignment. Similarly, the obligor will have a defence if his duty to perform the obligation assigned is conditional upon counter-performance by the assignor and such counter-performance is not forthcoming, as where a builder assigns the money which will become due to him under a building contract from the employer, but the condition on which the money is to become due, i.e. completion of the works, is not fulfilled. In the case of the assignment of a debt,

30 *Cockell v Taylor* (1852) 15 Beav. 103, 118.
31 See also *Sinclair v British Telecommunications Plc* [2000] 2 All E.R. 461 (stay of action).
32 *Graham v Johnson* (1869) L.R. 8 Eq. 36; *Wakefield and Barnsley Banking Co v Normanton Local Board* (1881) 44 L.T. 697; *Graham Joint Stock Shipping Co Ltd v Merchants Marine Insurance Co Ltd (The Ioanna)* [1924] A.C. 294; *Banco Santander SA v Banque Paribas* [2000] 1 All E.R. (Comm) 776; *Safa Ltd v Banque du Caire* [2000] 2 Lloyd's Rep. 600, 608. Cf. *P. Samuel & Co Ltd v Dumas* [1924] A.C. 431; *Central Bank of India Ltd v Guardian Assurance Co Ltd* (1936) 54 Ll. L. Rep. 247, 259.
33 *Re Palmers' Decoration and Furnishing Co* [1904] 2 Ch. 743.
34 *William Pickersgill & Sons Ltd v London and Provincial Marine and General Insurance Co Ltd* [1912] 3 K.B. 614.
35 *Stoddart v Union Trust Ltd* [1912] 1 K.B. 181, 188, 191.
36 *Wakefield and Barnsley Banking Co v Normanton Local Board* (1881) 44 L.T. 697, 700.
37 *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch. 291. Cf. *Solicitors' and General Life Assurance Socy v Lamb* (1864) 2 De G. J. & S. 251; *City Bank v Sovereign Life Assurance Co* (1884) 50 L.T. 565.

the debtor is entitled to any rebate or discount to which he may be entitled under the terms of the contract or other instrument that created the debt.[38]

An assignee of the benefit of a contract containing a term which confers upon the obligor a lien or right of retention is bound by that provision,[39] even though the lien or right of retention arises, and is exercised, only after the assignment.[40]

Illegality. Where the benefit of a contract is assigned but the contract is illegal or contrary to public policy, the assignee will, to the same extent as the assignor, be unable to enforce the contract against the obligor.[41] But the assignment of an illegal contract is not in itself necessarily illegal, and if an assignee takes for value and has no knowledge of the illegality, then he may be able to enforce the assignment (though, of course, the contractual rights that are the subject-matter of the assignment will be worthless), or to recover from the assignor the consideration paid for the assignment.[42] **7-06**

Release. If the obligor is released by the assignor from his obligations under the contract assigned before he receives notice of the assignment, he will be discharged from liability to the assignee.[43] But a purported release by the assignor after the obligor receives notice of the assignment will be without effect.[44] **7-07**

Payment. Where the right to receive payment of a debt is assigned, the assignee is bound by the state of account between the assignor and the debtor at the time of his assignment. He is further bound to give credit for all payments made by the debtor to the assignor before he has given notice of his assignment to the debtor.[45] But a payment to the assignor after the debtor receives notice of the assignment can be disregarded by the assignee.[46] As Lord MacNaghten put it in a case where such a payment had been made: "As far as he was concerned, it was no payment at all. [The debtor] might just as well have given the money to an utter stranger, or thrown it into the sea".[47] The debtor must therefore pay a second time if so required by the assignee. However, if, before notice, the debtor has given a cheque to the assignor **7-08**

38 *Bibby Factors Northwest Ltd v HFD Ltd* [2015] EWCA Civ 1908, [2016] 1 Lloyd's Rep. 517.
39 *Re Keever* [1967] Ch. 182; *George Barker (Transport) Ltd v Eynon* [1974] 1 W.L.R. 462. See also *Kelly v Hutton* (1868) L.R. 3 Ch. App. 703; *Re McKerrell* [1912] 2 Ch. 648.
40 *George Barker (Transport) Ltd v Eynon* [1974] 1 W.L.R. 462. But see *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep. 142 (bank cannot claim lien for advances made after notice of assignment).
41 *Luhrs v Baird Investments Ltd* [1958] N.Z.L.R. 663; *Stenning v Radio and Domestic Finance Ltd* [1960] N.Z.L.R. 7.
42 *Portland Holdings Ltd v Cameo Motors Ltd* [1966] N.Z.L.R. 571. Cf. *Cannan v Bryce* (1819) B. & Ald. 179.
43 *Stocks v Dobson* (1853) 4 De G. M. & G. 11; *Graham v Johnson* (1869) L.R. 8 Eq. 36.
44 *Legh v Legh* (1799) 1 B. & P. 447; *Aspinall v London & North Western Ry Co* (1853) 11 Hare 325; *De Pothonier v De Mattos* (1858) El. Bl. & El. 461.
45 *Williams v Sorrell* (1799) 4 Ves. Jun. 389; *Norrish v Marshall* (1821) 5 Madd. 475, 481; *Bickerton v Walker* (1885) 31 Ch. D. 151.
46 *Legh v Legh* (1799) 1 B. & P. 447; *Stephens v Venables (No.1)* (1862) 30 Beav. 625; *Brice v Bannister* (1878) 3 Q.B.D. 569; *Re Neil* (1890) 62 L.T. 649; *Liquidation Estates Purchase Co Ltd v Willoughby* [1898] A.C. 321; *Yates v Terry* [1902] 1 K.B. 527. Contrast *Re Pawson's Settlement* [1917] 1 Ch. 541 and *Aplin v Cates* (1860) 30 L.J. Ch. 6.
47 *Liquidation Estates Purchase Co Ltd v Willoughby* [1898] A.C. 321, 336.

in payment of the debt, he is under no duty to stop payment of the cheque on being notified of the assignment.[48]

7-09 **Variation of contract.** Since an obligor with notice of the assignment cannot be released by the assignor from performance of his obligations under the contract assigned and since he cannot discharge those obligations, for example, the duty to pay, by dealing with the assignor, it seems logically to follow that he cannot after notice vary the terms of the contract by agreement with the assignor—at least so as to prejudice the rights of the assignee acquired by the assignment.[49] Although it could be argued that an assignee must accept that contracts can at any time be varied by agreement of the parties, it is clear that, after notice, any prejudicial variation will require the consent of the assignee. This result is, however, in practice sometimes inconvenient. Suppose that a contractor under a contract for the construction of a building has assigned his right to payment by the employer to a third party, a financier, as security for a loan. If, after notice of the assignment is given to the employer, the contractor and the employer wish to vary the terms of the contract, for example, by reducing the size of the building or omitting part of the works or relaxing the terms of payment, they would be precluded from doing so without the financier's consent. Similarly other commercial contracts, for example, for the supply of goods, could not be varied once the customer received notice of an assignment by the supplier. But such variations are extremely common. Article 9-405 of the American Uniform Commercial Code caters for this type of situation by making an inroad into the "notice" rule.[50] It provides that "A modification of or substitution for an assigned contract is effective against an assignee if made in good faith. The assignee acquires corresponding rights under the modified or substituted contract". The provision is nevertheless subject to the qualification that it applies only so far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance or the right to payment or a part thereof has been fully earned by performance and the account debtor has not received notification of the assignment under section 9-406(a). The assignment may, however, provide that the modification or substitution is a breach of contract by the assignor.

7-10 **Termination of contract.** There is no reason to suppose that, even after notice of the assignment, the obligor could not accept a repudiatory breach of the contract by the assignor and so bring the contract to an end even though this might mean that the obligor ceased to be under any further liability, e.g. to make payments under the contract, to the assignee.[51] It is submitted that the obligor should not be placed in any worse situation by reason of the assignment and that he should be entitled to exercise such rights as are conferred on him by law. Similarly he should be entitled, even after notice, to exercise any right of termination provided by the contract. But the assignor and the obligor could not, after notice of the assignment

[48] *Bence v Shearman* [1898] 2 Ch. 582.

[49] *Roxburghe v Cox* (1881) 17 Ch. D. 520, 526; *Brice v Bannister* (1878) 3 Q.B. 569, 576, 580; *First National City Bank of Chicago v West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg) (The Evelpidis Era)* [1981] 1 Lloyd's Rep. 54, 64. Cf. *Rolt v White* (1862) 7 L.T. 345 (variation before notice). It seems that the contract may be varied even after notice for the benefit of the assignee: *Royal Exchange Assurance v Hope* [1928] Ch. 179.

[50] Article 11: 308 of the *Principles of European Contract Law* and III – 5: 112(4) of the *Principles, Definitions and Model Rules of European Private Law (DCFR)* also make an inroad into the rule.

[51] See e.g. *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 W.L.R. 161.

has been given to the obligor, agree to discharge the contract without the consent of the assignee even if this was done in order to substitute a new contract in its place, i.e. to effect a novation.[52]

7-11 **Assignor's warranty against defences.** If the assignee is unable to enforce the right assigned to him because the title of the assignor is defective or because of a defence of the obligor against the assignor which is successfully asserted against him, the assignee may have a remedy against the assignor for breach of an express or implied warranty that the chose assigned is what it purports to be.[53]

(c) SET-OFF[54]

7-12 **Set-off.** A set-off is said to exist when a person against whom a claim is made (the obligor) is entitled, in answer to the claim, to plead that a countervailing monetary claim which he has against the claimant absolves him, either wholly or partially, from liability to the claimant. A right of set-off may arise at law[55] or in equity.[56] It may also be conferred by statute[57] or by contract[58]; and it may arise automatically on insolvency.[59] The rule that an assignee takes subject to equities may have the result that the claim assigned will be rendered valueless or of less value because of the existence of a right of set-off on the part of the obligor against the assignor. The extent to which an assignee is affected by such a right will differ according to the type of set-off involved.

7-13 **Situations analogous to set-off.** Set-off is a common term for a variety of concepts. In particular there are three situations which should be distinguished at the outset from the various forms of set-off which are dealt with later in this chapter. The first situation is "netting", that is to say, where dealings between the parties give rise to a running account, consisting of debits and credits, receipts and payments on both sides, and an account is taken from time to time of what is owed, one way or the other and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party.[60] A typical example is the

[52] Unless (possibly) the new contract was not equally or more beneficial to the assignee.

[53] *National Bank of Abu Dhabi PJSC v BP Oil International Ltd* [2016] EWHC 2892 (Comm) (appeal outstanding). See also *Principles, Definitions and Model Rules of European Private Law (DCFR)*, III – 5.112. It is submitted that such a warranty is given by an assignor only to his immediate assignee and is not transferred by onward assignment.

[54] See Derham, *The Law of Set-off*, 4th edn (Oxford: OUP, 2010); *Meagher, Gummow and Lehane's Equity Doctrine and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), Ch.39; Wood, *Set-off and Netting, Derivatives, Clearing Systems*, 2nd edn (London: Sweet & Maxwell, 2007); Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security*, 6th edn (London: Sweet & Maxwell, 2017), Ch.7; McCracken, *The Banker's Remedy of Set-off*, 4th revised edn (Haywards Heath: Bloomsbury, 2017); Wood, *Law and Practice of International Finance* (London: Sweet & Maxwell, 2007); *Snell's Equity*, 33rd edn (London: Sweet & Maxwell, 2015), para.3-026. See also *Principles, Definitions and Model Rules of European Private Law (DCFR)*, III – 5:116(3), III – 6:101–108.

[55] See para.7-16.

[56] See para.7-18.

[57] See para.7-31.

[58] See para.7-29.

[59] See para.7-31.

[60] Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security*, 6th edn (London: Sweet & Maxwell, 2017), paras 7-09, 7-18–7-21, and Financial Markets and Insolvency (Settlement Final-

relationship between banker and customer. In such an accounting situation there is no true set-off, since set-off postulates mutual but independent obligations between the parties. There is only one debt and it is simply a matter of striking a balance on the account between the parties to ascertain what is due.[61] Nevertheless, where one of the parties ("the assignor") has assigned the balance standing to his credit on the account, it may be helpful to use the term "set-off" to identify those contra-items which it is permissible for the other party ("the debtor") to utilise in order to reduce that credit balance in the hands of the assignee. In most cases this will be determined by the contract terms agreed between the assignor and the debtor.[62] But otherwise the following propositions appear to apply:

(1) after notice of the assignment the debtor cannot set off against the assignee a debt which accrues due subsequently to the date of notice,[63] even though that debt may arise out of a liability which existed at or before the date of the notice;
(2) the debtor may set off as against the assignee a debt which accrues due before notice of the assignment, although it is not payable until after that date[64]; and
(3) where the debt assigned is at the date of notice of the assignment payable in the future, the debtor can set off against the assignee a debt which becomes payable by the assignor to the debtor after notice of assignment, but before the assigned debt becomes payable, if, but only if, the debt to be set off has accrued due at the date of notice of assignment.[65]

7-14 The second situation is an extension of the first.[66] Where a customer has more than one account with a bank, the bank is entitled in certain circumstances to net out the debit and credit balances on the accounts in order to ascertain what is owing by the customer to the bank or by the bank to the customer, as the case may be. This is sometimes referred to as a right of set-off; but it is more accurately described as a right on the part of the bank to combine or consolidate accounts.[67] There is not really any question of countervailing claims. The bank is entitled to treat the separate accounts of the customer as a single account for the purpose of determining whether that account is in credit or debit. So, for example, the bank can refuse to honour a cheque drawn by the customer on one account which is in credit on the ground that, having regard to an overdraft on another account, the combined ac-

ity) Regulations 1999 (SI 1999/2979) reg.3; *British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 W.L.R. 758; *Enron Europe Ltd v Revenue and Customs Commissioners* [2006] EWHC 824 (Ch), [2006] S.T.C. 1339 (close-out netting).

61 *Green v Farmer* (1768) 4 Burr. 2214; *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1971] 1 Q.B. 1, 46, [1972] A.C. 785; *Re Charge Card Services Ltd* [1987] Ch. 150, 173, [1989] Ch. 497.

62 See para.7-29 (contractual set-off).

63 *Watson v Mid Wales Ry Co* (1887) L.R. 2 C.P. 593; *Re Pinto Leite & Nephews* [1929] 1 Ch. 221, 233.

64 *Wilson v Gabriel* (1863) 4 B. & S. 243; *Christie v Taunton, Delmard, Lane & Co* [1893] 2 Ch. 175.

65 *Jeffryes v Agra and Masterman's Bank* (1866) L.R. 2 Eq. 674; *Re Pinto Leite & Nephews* [1929] 1 Ch. 221, 236. See also *Liverpool Freeport Electronics Ltd v Habib Bank Ltd* [2007] EWHC 1149 (QB) at [136].

66 See Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security*, 6th edn (London: Sweet & Maxwell, 2017), para.7-31. Cf. *Re K* [1990] 2 Q.B. 298; McCracken, *The Banker's Remedy of Set-off*, 4th revised edn (Haywards Heath: Bloomsbury, 2017), Ch.1.

67 *Ellinger's Modern Banking Law*, 5th edn (Oxford: OUP, 2011), pp.248–268. The right to combine accounts can be expressly or impliedly excluded.

counts of the customer show a net debit position.[68] Again, however, in the case of an assignment, in the absence of contrary agreement, the three propositions set out above appear to apply.[69]

The third situation is very different. The rule in *Mondel v Steel*[70] permits a purchaser of goods or services to set up against the supplier a breach of warranty in diminution or extinction of the price—a rule which is confirmed in the case of a sale of goods by section 53(1)(a) of the Sale of Goods Act 1979. Such a defence is probably limited to contracts of sale of goods and contracts of work and labour or for labour and materials and does not extend to contracts generally. It may, and usually does, rely on a cross-claim for unliquidated damages, but it is a substantive defence nevertheless.[71] Again, this may be referred to as a "set-off", but it is preferable to describe it as a right of *abatement* or reduction of the price: the purchaser defends himself by showing how much less the goods or services supplied are worth to him by reason of the breach.[72] As such it may be raised by the purchaser against an assignee of the supplier whether the cross-claim accrued before or after he received notice of the assignment.[73] It has, however, been contended[74] that claims for abatement arising after notice of the assignment should not be capable of being raised against the assignee. But it is submitted that abatement in substance reduces the value of the supplier's claim and that the assignee can stand in no better position than the supplier/assignor.[75]

Legal and equitable set-off. The law relating to set-off is complex and technical, a "ready source of confusion",[76] reflecting the historical difference between the approaches of common law and equity in matters of set-off. The Judicature Acts did not "fuse" the principles of law and equity relating to set-off but made available in all circumstances the rights of set-off applied at law and in equity. The general effect, as will be seen, is that today a set-off is allowed at law of claims that are liquidated, even if unconnected, and in equity of claims that are connected, even if unliquidated, but not a set-off of claims that are both unliquidated and unconnected.[77] This result has been criticised as "unsatisfactory"[78] and to "appear" **7-15**

68 *Garrett v McKewan* (1872) L.R. 8 Ex. 10, 14; *Re European Bank* (1872) L.R. 8 Ch. App. 41, 44; *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1971] 1 Q.B. 1, 74, [1972] A.C. 785.

69 See *Ellinger's Modern Banking Law*, 5th edn (Oxford: OUP, 2011), p.369.

70 (1841) 8 M. & W. 858. See also *Hanak v Green* [1958] 2 Q.B. 9, 17, 29; *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] A.C. 689, 717; *Aries Tanker Corp v Total Transport Ltd (The Aries)* [1977] 1 W.L.R. 185, 188; *BICC Plc v Burndy Corp* [1985] Ch. 232, 247.

71 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] A.C. 689, 717; *Aectra Refining and Manufacturing Inc v Exmar NV (The New Vanguard and The Pacifica)* [1994] 1 W.L.R. 1634, 1649; *Sim v Rotherham Metropolitan BC* [1987] 1 Ch. 216, 258. Contrast *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 C.L.R. 584, 593, 601–603, 619; *Newman v Cook* [1963] V.R. 659.

72 *Mondel v Steel* (1841) 8 M. & W. 858, 871.

73 This is, in effect, the same rule as in the case of an equitable set-off: see para.7-20.

74 Oditah, *Legal Aspects of Receivables Financing* (London: Sweet & Maxwell, 1991), p.236.

75 In any event, the plea of equitable ("transaction") set-off could alternatively be available: see *Sim v Rotherham Metropolitan BC* [1987] 1 Ch. 216, 258 and para.7-20, below.

76 *Fearns v Anglo-Dutch Paint & Chemical Co Ltd* [2010] EWHC 2366 (Ch), [2011] 1 W.L.R. 366 at [15].

77 *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 W.L.R. 270, 274, 275–276.

78 *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 W.L.R. 270, 274.

to lack logic and sense".[79] Yet, although the law may be unsatisfactory, it is clear,[80] and the differing legal and equitable rules will affect the extent to which the obligor can set off against an assignee a claim which he has against the assignor.

7-16 **Legal set-off.** A right of set-off was generally unknown in the common law before its introduction by the Statutes of Set-Off 1728[81] and 1735[82] (now repealed). Legal set-off derives from those statutes.[83] It applies where parties are in litigation. Mutual debts in the form of liquidated demands may be set off the one against the other with judgment being rendered for the net balance. The most important aspect of legal set-off is that it is permitted, in the words of section 5 of the Act of 1735, "notwithstanding that such debts are deemed in law to be of a different nature", so that cross-claims arising out of unconnected transactions can be set off. For this reason it is sometimes termed "independent" set-off,[84] since the claim and cross-claim can be independent of each other. Legal set-off is essentially procedural in nature. In *Stein v Blake*[85] Lord Hoffmann said:

> "Legal set-off does not affect the substantive rights of the parties against each other, at any rate until both causes of action have been merged in a judgment of the court. It addresses questions of procedure and cash-flow. As a matter of procedure, it enables a defendant to require his cross-claim (even if based on wholly different subject matter) to be tried together with the plaintiff's claim instead of having to be the subject of a separate action. In this way it ensures that judgment will be given simultaneously on claim and cross-claim and thereby relieves the defendant from having to find the cash to satisfy a judgment in favour of the plaintiff … before his cross-claim has been determined."

Legal set-off is not a substantive defence; it is not self executing; it must be pleaded; and it is given effect only in the judgment of the court.[86]

7-17 **Prerequisites of legal set-off.** Before the procedural reforms of the nineteenth century, where proceedings were commenced in a court of common law, both the claim and the cross-claim had to be legal and not equitable claims because equitable claims could not normally be brought in a common law court. But a right of legal set-off would ordinarily be recognised in equity[87] and equity would further apply the Statutes of Set-Off by analogy even where the claim or cross-claim was

---

79 *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 W.L.R. 270, 276.

80 *B Hargreaves Ltd v Action 2000 Ltd* [1993] B.C.L.C. 1111, 1116.

81 2 Geo. II, c.22.

82 8 Geo. II, c.24.

83 The rights in those statutes have been continued by s.49(2) of the Senior Courts Act 1981 and CPR r.16.6.

84 See Wood, *Set-off and Netting, Derivatives, Clearing Systems*, 2nd edn (London: Sweet & Maxwell, 2007); Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security*, 6th edn (London: Sweet & Maxwell, 2017), paras 7-04, 7-35.

85 [1996] A.C. 243, 251.

86 *Stein v Blake* [1996] A.C. 243, 251, 256. See also *Aectra Refining and Manufacturing Inc v Exmar NV (The New Vanguard and The Pacifica)* [1994] 1 W.L.R. 1634, 1650–1651; *Glencore Grain Ltd v Agros Trading Co* [1999] 2 Lloyd's Rep. 410, 427; *Fuller v Happy Shopper Markets Ltd* [2001] 1 W.L.R. 1681; *Fearns v Anglo-Dutch Paint & Chemical Co Ltd* [2010] EWHC 2366 (Ch), [2011] 1 W.L.R. 366 at [15].

87 *Re Whitehouse & Co* (1878) 9 Ch. D. 595. But "the Court of Equity, following the spirit of the statutes, would not allow a man to set off, even at law, where there was an equity to prevent his doing so; that is to say, where the rights, although legally mutual, were not equitably mutual": at 597.

equitable.[88] Today the equitable rule prevails and it does not matter whether the claim or cross-claim is legal or equitable. The cross-claim can be set off where the requirements for legal set-off are satisfied. Those requirements can be listed as follows:

(1) The claim and cross-claim must be mutual.[89] "Mutuality" does not require that they should arise at the same time or that there should be a connection between them. But it does require that they should be between the same parties and in the same right or interest.[90]

(2) Both the claim and the cross claim must be for liquidated amounts or in sums capable of being ascertained without valuation or estimation.[91] The 1728 Act[92] referred to mutual *debts* between the claimant and the defendant and, although this has been expanded slightly, it still excludes claims for wholly unliquidated amounts. The justification for allowing the set-off of a liquidated claim was explained by Cockburn CJ in *Stooke v Taylor*[93] on the ground that "its existence and its amount must be taken to be known to the plaintiff, who should have given credit for it in his action against the defendant". In consequence of this requirement, it is well established that a cross-claim for unliquidated damages cannot be the subject-matter of a legal set-off.[94] The cross-claim must be in respect of a liquidated debt, or a money demand which can "readily and without difficulty be ascertained".[95] The complementary part of the rule, that the claim against which a legal set-off is raised must likewise be liquidated, seems also to be well established.[96]

---

88 *Clark v Cort* (1840) Cr. & Ph. 154.

89 *Gye v McIntyre* (1991) 171 C.L.R. 609, 623 ("the word 'mutual' conveys the notion of reciprocity rather than that of correspondence").

90 *Kinnerley v Hossack* (1809) 2 Taunt. 170; *Jones v Fleeming* (1827) 7 B. & C. 217; *Arnold v Bainbrigge* (1853) 9 Ex. 153; *Rees v Watts* (1855) 11 Ex. 410; *Ince Hall Rolling Mills Co Ltd v Douglas Forge Co* (1882) 8 Q.B.D. 179, 183; *Bowyear v Pawson* (1881) 6 Q.B.D. 540; *First National City Bank of Chicago v West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg) (The Evelpidis Era)* [1981] 1 Lloyd's Rep. 54. Cf. *Pedder v The Mayor, Aldermen and Burgesses of Preston* (1862) 12 C.B. (N.S.) 535.

91 *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 W.L.R. 270; *Stein v Blake* [1996] A.C. 243, 251; *Aectra Refining and Manufacturing Inc v Exmar NV (The New Vanguard and The Pacifica)* [1994] 1 W.L.R. 1634, 1649; *Fearns v Anglo-Dutch Paint & Chemical Co Ltd* [2010] EWHC 2366 (Ch), [2011] 1 W.L.R. 366 at [16].

92 Section 13. See also *Crawford v Stirling* (1802) 2 Esp. 207, 209.

93 (1880) 5 Q.B.D. 569, 576. See also *Hanak v Green* [1958] 2 Q.B. 9, 23; *BICC Plc v Burndy Corp* [1985] Ch. 232, 248; *Aectra Refining and Manufacturing Inc v Exmar NV (The New Vanguard and The Pacifica)* [1994] 1 W.L.R. 1634, 1647.

94 *Howlet v Strickland* (1774) 1 Cowp. 56; *Freeman Hyett* (1762) 1 Wm. Bl. 394; *Weigall v Waters* (1795) 6 Term Rep. 488; *Morley v Inglis* (1837) 4 Bing. N.C. 58, 71; *Williams v Flight* (1842) 2 Dowl. (N.S.) 11; *Seeger v Duthie* (1860) 8 C.B. (N.S.) 45; *The Government of Newfoundland v The Newfoundland Ry Co* (1888) 13 App. Cas. 199, 213; *Aboussafy v Abacus Cities Ltd* (1981) 124 D.L.R. (3d) 150; *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 W.L.R. 270, 272; *B Hargreaves Ltd v Action 2000 Ltd* [1993] B.C.L.C. 1111.

95 *Stooke v Taylor* (1880) 5 Q.B.D. 569, 575; *Stein v Blake* [1996] A.C. 243, 251. See also *Morley v Inglis* (1837) 4 Bing. N.C. 58, 71; *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch. 93; *Henriksens Rederi A/S v T.H.Z. Rolimpex (The Brede)* [1974] Q.B. 233, 246; *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 W.L.R. 270, 274; *B Hargreaves Ltd v Action 2000 Ltd* [1993] B.C.L.C. 1111; *Aectra Refining and Manufacturing Inc v Exmar NV (The New Vanguard and The Pacifica)* [1994] 1 W.L.R. 1634, 1647, 1649; *Courage Ltd v Crehan* [1999] 2 E.G.L.R. 145, 155; *Fuller v Happy Shopper Markets Ltd* [2001] 1 W.L.R. 1681 at [21].

96 *Crawford v Stirling* (1802) 42 Esp. 207; *Morley v Inglis* (1837) 4 Bing. N.C. 58, 71; *Williams v Flight*

(3) At the time that the defence of set-off is filed, the sum sought to be set off must be due, payable and enforceable by action[97] and it must remain unsatisfied up to the date of trial.[98] The original rule was that no debt could be made the subject of a set-off at law unless it was in existence and was an actionable and enforceable debt at the time when the action was commenced.[99] However, as a result of changes made by the Rules of the Supreme Court,[100] and now the Civil Procedure Rules,[101] a set-off which has arisen after action brought can be included in the defence.[102]

(4) The claim which is the subject-matter of the set-off must be capable of being litigated in the court in which the set-off is pleaded.[103] So, for example, if the claim is one which the court would be bound to stay under section 9 of the Arbitration Act 1996,[104] or if it is a claim over which the court would have no jurisdiction under article 23 of the Brussels Regulation, or if the claim is one which the court would stay under its inherent jurisdiction, then it cannot be the subject-matter of a legal set-off.[105]

7-18 **Equitable set-off.**[106] Equitable set-off, as distinguished from set-off at law, did not derive from statute but from the desire of equity to assist a defendant who could show some equitable ground for being protected against his adversary's demand.[107] It is therefore not surprising that the boundaries of equitable set-off are less precisely delineated. Thus, although equitable set-off is in one sense procedural in that it must be invoked as a defence,[108] it can also be relied on outside the context of legal

(1842) 2 Dowl. (N.S.) 11; *Attwooll v Attwooll* (1853) 2 El. & Bl. 23; *E. Pellas & Co v The Neptune Marine Insurance Co* (1879) 5 C.P.D. 34; *Stooke v Taylor* (1880) 5 Q.B.D. 569, 575; *Henriksens Rederi A/S v T.H.Z. Rolimpex (The Brede)* [1974] Q.B. 233, 246; *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 W.L.R. 270; *Fuller v Happy Shopper Markets Ltd* [2001] 1 W.L.R. 1681 at [21]. But contrast *BICC Plc v Burndy Corp* [1985] Ch. 232 where a majority of the Court of Appeal (Kerr LJ dissenting) held that a legal set-off could be pleaded as a defence to an action for specific performance.

97 *Owens v Denton* (1835) 1 Cr. M. & R. 711, 712; *Aectra Refining and Manufacturing Inc v Exmar NV (The New Vanguard and The Pacifica)* [1994] 1 W.L.R. 1634, 1650; *Stein v Blake* [1996] A.C. 243, 251; *Fuller v Happy Shopper Markets Ltd* [2001] 1 W.L.R. 1681 at [21]. This will exclude debts that are contingent or future.

98 *Eyton v Littledale* (1849) 4 Ex. 159.

99 *Evans v Prosser* (1789) 3 Term Rep. 186; *Dendy v Powell* (1838) 3 M. & W. 442; *Pilgrim v Kinder* (1744) 7 Mod. 463; *Richards v James* (1848) 2 Ex. 471.

100 R.S.C. Ord 18, r. 17.

101 C.P.R., 16.6.

102 But see *Glencore Grain Ltd v Agros Trading Co* [1999] 2 Lloyd's Rep. 410, 416: "if [the debt] remains available to him when the plantiff brings his action".

103 *Aectra Refining and Manufacturing Inc v Exmar NV (The New Vanguard and The Pacifica)* [1994] 1 W.L.R. 1634; *Glencore Grain Ltd v Agros Trading Co* [1999] 2 Lloyd's Rep. 410; *Fearns v Anglo-Dutch Paint & Chemical Co Ltd* [2010] EWHC 2366 (Ch), [2011] 1 W.L.R. 366 at [15]. See also *Fuller v Happy Shopper Markets Ltd* [2001] 1 W.L.R. 1681 (legal set-off not available on levying a distress).

104 *Aectra Refining and Manufacturing Inc v Exmar NV (The New Vanguard and The Pacifica)* [1994] 1 W.L.R. 1634, 1651; *Glencore Grain Ltd v Agros Trading Co* [1999] 2 Lloyd's Rep. 410, 417.

105 But a sum found by an arbitrator to be due can be set-off: *Parkes v Smith* (1850) 15 Q.B. 297; *Murphy v Glass* (1869) L.R. 2 P.C. 408.

106 See Derham, "Equitable Set-off: A Critique of Muscat v Smith" (2006) 122 L.Q.R. 469; *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 5th edn (Australia: Butterworths Lexis Nexis, 2015), paras 39-045ff.

107 *Rawson v Samuel* (1841) Cr. & Ph. 161, 178.

108 See para.7-19.

proceedings and is a substantive defence.[109] It also seems that a cross-claim which must be pursued in a tribunal other than that in which the claim is brought, e.g. in arbitration, can be the subject of equitable set-off.[110] Again, although there must ordinarily be mutuality between the claim and the cross-claim,[111] this requirement is more generously interpreted in equity than at common law.[112] But a major difference between equitable and legal set-off is that, for equitable set-off,[113] either the claim or the cross-claim, or both, can be unliquidated as well as liquidated, so that a claim for unliquidated damages can be the subject-matter of an equitable set-off whereas it cannot be set off at law. On the other hand, equity imposes its own requirements before it will intervene: the cross-claim sought to be set off must arise out of the same transaction as the claim or out of a transaction which is closely connected with the claim.[114] A stricter test was, however, at one time advocated, deriv-

109 *Stooke v Taylor* (1880) 5 Q.B.D. 569; *Hanak v Green* [1958] 2 Q.B. 9, 17; *Henriksens Rederi A/S v T.H.Z. Rolimpex (The Brede)* [1974] Q.B. 233, 248; *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri)* [1978] Q.B. 927, [1979] A.C. 757; *Benford Ltd v Lopecan SL* [2004] EWHC 1897 (Comm), [2004] 2 Lloyd's Rep. 618 at [10]. Cf. *Mellham Ltd v Burton* [2003] EWCA Civ 173, [2003] S.T.C. 441 (reversed [2006] UKHL 6, [2006] 1 W.L.R. 2820); *Muscat v Smith* [2003] EWCA Civ 962, [2003] 1 W.L.R. 2853 (criticised by Derham (2006) 122 L.Q.R. 469, 470).

110 *Aectra Refining and Manufacturing Inc v Exmar NV (The New Vanguard and The Pacifica)* [1994] 1 W.L.R. 1634, 1648, citing *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] A.C. 689; *Guidance Investments Ltd v Guidance Hotel Investment Co BSC (Closed)* [2013] EWHC 3413 (Comm). See also *Ronly Holdings v JSC Zestafoni G Nikoladze Ferroalloy Plant* [2004] EWHC 1354 (Comm), [2004] 1 C.L.C. 1168 at [33]; *Metal Distributors (UK) Ltd v ZCCM Investment Holdings Plc* [2005] EWHC 156 (Comm), [2005] 2 Lloyd's Rep. 37 at [18]; *Norscot Rig Management Pvt Ltd v Essar Oldfields Services Ltd* [2010] EWHC 195 (Comm), [2010] 2 Lloyd's Rep. 209 at [16] (arbitration).

111 *Middleton v Pollock* (1875) L.R. 20 Eq. 29; *Re Willis Percival & Co, Ex p. Morier* (1879) 12 Ch. D. 491; *First National City Bank of Chicago v West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg) (The Evelpidis Era)* [1981] 1 Lloyd's Rep. 54; *Bank of Credit and Commerce International SA v Al Saud* [1997] 1 B.C.L.C. 457; *Muscat v Smith* [2003] EWCA Civ 962, [2003] 1 W.L.R. 2853; *Edlington Properties Ltd v J.H. Fenner & Co Ltd* [2006] EWCA Civ 403, [2006] 1 W.L.R. 1583. See also *Bhogal v Punjab National Bank* [1988] 2 All E.R. 296 (bank accounts). But see *Bankes v Jarvis* [1903] 1 K.B. 549 (claim by trustee); *Walker v Department of Social Security* (1995) 56 F.C.R. 354, 367 (no necessity for mutuality) and Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security*, 6th edn (London: Sweet & Maxwell, 2017), para.7-56.

112 *Ex p. Stephens* (1805) 11 Ves. 24; *Re Whitehouse & Co* (1878) 9 Ch. D. 595, 597; *Bankes v Jarvis* [1903] 1 K.B. 549. See also *Hett, Maylor and Co Ltd* (1894) 10 T.L.R. 412 (nominee account) and Derham, "Equitable Set-off: A Critique of Muscat v Smith" (2006) 122 L.Q.R. 469, 477.

113 *Young v Kitchin* (1878) 3 Ex. D. 127; *The Government of Newfoundland v The Newfoundland Ry Co* (1888) 13 App. Cas. 199; *Hanak v Green* [1958] 2 Q.B. 9; *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] Q.B. 137; *Dole Dried Fruit and Nut Co v Trustin Kerwood Ltd* [1990] 2 Lloyd's Rep. 309; *TSB Bank Plc v Platts* [1998] 2 B.C.L.C. 1; *Bim Kemi AB v Blackburn Chemicals Ltd* [2001] EWCA Civ 457, [2001] 2 Lloyd's Rep. 93.

114 *The Government of Newfoundland v The Newfoundland Ry Co* (1888) 13 App. Cas. 199, 213; *Hanak v Green* [1958] 2 Q.B. 9, 24; *Henriksens Rederi A/S v T.H.Z. Rolimpex (The Brede)* [1974] Q.B. 233, 248; *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri)* [1978] Q.B. 927, 974–5 (affirmed on different grounds [1979] A.C. 757); *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] Q.B. 137, 154; *Banco Central SA v Lingoss & Falce Ltd (The Raven)* [1980] 2 Lloyd's Rep. 266, 272; *Bank of Boston Connecticut v European Grain and Shipping Ltd (The Dominique)* [1989] 1 A.C. 1056, 1102; *Dole Dried Fruit and Nut Co v Trustin Kerwood Ltd* [1990] 2 Lloyd's Rep. 309, 311; *Grant v NZMC Ltd* [1989] 1 N.Z.L.R. 8, 12; *Commercial Factors Ltd v Maxwell Printing Ltd* [1994] 1 N.Z.L.R. 724, 739; *Esso Petroleum Co Ltd v Milton* [1997] 1 W.L.R. 938, 950; *Bim Kemi AB v Blackburn Chemicals Ltd* [2001] EWCA Civ 457, [2001] 2 Lloyd's Rep. 93.