THE CONTRACTUAL BASIS OF THE ASSIGNMENT OF CONTRACTUAL RIGHTS

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There exist two popular conceptions of the assignment of contractual rights in common law jurisdictions. On the first view, the assignment operates as a conveyance of contractual rights from the assignor to the assignee. Under the second, the assignment is analogized to a trust. The original parties to the contract remain the same, but the assignee acquires an equitable or beneficial interest in the contract. This article examines the limits of these two conceptualizations, and proposes that assignments should instead be viewed as a separate contract to assign the rights owed under the initial contract. This approach provides both a normative grounding for the law of assignment in the principles governing the enforcement of contracts, and accounts for the unique effects generated by this type of transaction.

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I. INTRODUCTION

It is a generally accepted feature of English law, and of the law of those jurisdictions that have followed the English common law tradition, that the benefits of a contract may be "assigned" by the promisee to a third party assignee without undermining the privity relationship between the original contracting parties.[1] However, the precise nature of this

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1 *Portuguese-American Bank v Welles*, 242 US 7 at 11 (1916) [*Portuguese-American Bank*]; *National Trust Co v Mead*, [1990] 2 SCR 410 at 426–27 [*National Trust Co*]; *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd*, [2006] FCAFC 40 at para 32 (Austl) [*Pacific Brands*]; *Barbados Trust Company Ltd v Bank of Zambia*, [2007] EWCA Civ 148 at para 99. *Cf Collins Co v Carboline Co*, 125 Ill (2d) 498 at 512 (Ill Sup Ct 1988). In light of this, assignment is generally considered to be an exception or work-around to the doctrine of privity of contract. See e.g. Manitoba Law Reform Commission, *Privity of Contract*, Report No 80 (Winnipeg: Manitoba Law Reform Commission, 1993) at 9; The Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, Consultation Paper No 121 (London, UK: The Law Commission, 1991) at 15; Law Reform Commission of Nova Scotia, *Final Report: Privity of Contract (Third Party Rights)* (Halifax: Law Commission of Nova Scotia, 2004) at 3; John D McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 339–40; HG Beale, ed, *Chitty on Contracts*, 33rd ed (London, UK: Sweet & Maxwell, 2018) vol 1 at 1467. *Cf* GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 645.

operation has remained controversial. One view, which is perhaps particularly prominent in the United States, is that an assignment involves a true conveyance or "transfer" of contractual rights as though they amount to a form of property like any other.[2] An assignment is thus conceived as substituting the third party assignee for the original promisee as the person to whom the promisor owes performance, while somehow leaving the initial privity relationship between promisor and promisee intact.[3] Another view, popular primarily in Commonwealth jurisdictions, instead emphasizes the equitable origins of assignment in the common law tradition.[4] It holds that the assignment of contractual rights, or at least the equitable assignment of such rights, can be understood to rest on an anomalous form of trust. The assignee acquires an equitable or beneficial interest in the contract, while performance remains owed to the promisee at law.[5]

In what follows, I defend an alternative to these two views. I suggest that what is typically termed an "assignment" of contractual rights in common law jurisdictions is best understood to rest upon a contract by which an assignor undertakes to provide the assignee with the benefits due under another contractual transaction *at some future point in time* — a transaction sometimes called a contract to assign rights.[6] This argument has a certain

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2 See e.g. *Portuguese-American Bank*, *supra* note 1 at 11–12; The American Law Institute, *Restatement of the Law Second: Contracts*, vol 3 (St. Paul, Minn: American Law Institute, 1981) at 14–18 [American Law Institute, *Restatement*, vol 3]; E Allan Farnsworth, *Farnsworth on Contracts*, vol 3 (Boston: Little, Brown, 1990) at 58–59, 67–69. See also Gregory John Tolhurst, *The Assignment of Contractual Rights*, 2nd ed (Oxford, UK: Hart, 2016) at 34–42; Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Cambridge, Mass: Belknap Press, 2019) at 84, 85 [Benson, *Justice in Transactions*], citing *Norman v Federal Commissioner of Taxation* (1963), CLR 9 at 26, Windeyer J (HC Austl). This view of assignment is largely consistent with the orthodox view in civil law jurisdictions (see e.g. Art 1637 CCQ; Didier Lluelles & Benoît Moore, *Droit des obligations*, 3rd ed (Montreal: Thémis, 2018) at 2031; Jean Pineau et al, *Théorie des obligations*, 5th ed by Catherine Valcke (Montreal: Thémis, 2023) vol 2 at 1065.

3 Such, at least, is how Chee Ho Tham characterizes this view: CH Tham, *Understanding the Law of Assignment* (Cambridge: Cambridge University Press, 2019) at 67–68 [Tham, *Understanding Assignment*]. *Cf* Tolhurst, *supra* note 2 at 38–41; Benson, *Justice in Transactions*, *ibid* at 86–91.

4 To a large extent, the differences between these two views mirror the positions respectively staked out by the participants in a well-known early twentieth-century American debate. For arguments in favour of the view that assignments of choses in action are effective only to transfer an equitable interest: James Barr Ames, "The Inalienability of Choses in Action" in James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Cambridge, Mass: Harvard University Press, 1913) 210 at 214; Samuel Williston, "Is the Right of an Assignee of a Chose in Action Legal or Equitable?" (1916) 30:2 Harv L Rev 97 [Williston, "Legal or Equitable?"]; Samuel Williston, "The Word 'Equitable' and its Application to the Assignment of Choses in Action" (1918) 31:6 Harv L Rev 822. For arguments in favour of the view that an assignment transfers a full legal (not just equitable) interest: Walter Wheeler Cook, "The Alienability of Choses in Action" (1916) 29:8 Harv L Rev 816; Walter Wheeler Cook, "The Alienability of Choses in Action: A Reply to Professor Williston" (1917) 30:5 Harv L Rev 449.

5 William Blackstone, *Commentaries on the Laws of England: Book II: Of the Rights of Things*, 1st ed by Simon Stern (New York: Oxford University Press, 2016) at 299; *Gorringe v Irwell India Rubber and Gutta Percha Works*, (1886) 34 Ch D 128 at 136 (CA (Eng)), Fry LJ [*Gorringe*]; John McGhee & Steven Elliott, eds, *Snell's Equity*, 34th ed (London: Sweet & Maxwell, 2020) at 40; Marcus Smith & Nico Leslie, *The Law of Assignment*, 2nd ed (Oxford: Oxford University Press, 2013) at 219, 224–25; Y K Liew, *Guest on the Law of Assignment*, 3rd ed (London: Sweet & Maxwell, 2018) at 67–68; Tham, *Understanding Assignment*, *supra* note 3; Ben McFarlane & Robert Stevens, "What's Special About Equity? Rights about Rights" in Dennis Klimchuk, Irit Samet & Henry E Smith, eds, *Philosophical Foundations of the Law of Equity* (Oxford: Oxford University Press, 2020) 191 at 206–208. *Cf* Andrew Tettenborn, "Assignments, Trusts, Property and Obligations" in Jason W Neyers, Richard Bronaugh & Stephen GA Pitel, eds, *Exploring Contract Law* (Oxford, UK: Hart, 2009) 267.

6 For cases recognizing the existence of a contract to assign rights, see e.g. *Collyer v Isaacs* (1881), 19 Ch D 342 at 351 (CA (Eng)), Jessel MR [*Collyer*]; *Fraser v Imperial Bank of Canada* (1912), 47 SCR 313 at 356–57, Duff J [*Fraser*], citing *Tailby v Official Receiver* (1888), [1886–90] All ER Rep 486 at 497, MacNaghten LJ (HL) [*Tailby*]; *Gannon v Graham*, 211 Iowa 516 at 526 (Iowa Sup Ct 1930) [*Gannon*]; *Palette Shoes Pty Ltd v Krohn* (1937), 58 CLR 1 at 27, Dixon J (HC Austl) [*Palette Shoes*]; *Holt v Heatherfield Trust Ltd* (1942), 2 KB 1 at 5 (KBD (Eng)) [*Holt*]; *Canada Trust Co v Toronto-Dominion Bank* (1963), 37 DLR (2d) 654 at 655–56 (BCCA) [*Canada Trust*]; *Bibby Factors Northwest Ltd v HFD Ltd* (2015), [2016] 2 BCLC 303 at para 29 (CA (Eng)) [*Bibby Factors*]. See also Liew, *ibid* at 76–82. On the contractual reading of the law of assignment, see also Tolhurst, *supra* note 2 at 64–66;

historical basis, though it has tended to be discounted by contemporary commentators.[7] On this account, the apparent "assignment" that occurs between assignor and assignee proceeds from the way in which equity's intervention allows for the specific enforcement of a contract to assign rights. Rather than simply ordering the promisor to perform the contract to assign rights, the object of that contract — that is, the conferral of the benefit due under another contract — means that equitable relief will take a somewhat unusual form. It requires that third parties with notice of the contract to assign rights, including the original promisor, treat the assignee as the party to whom performance of original contract is properly owed.

I present my argument in three parts. In Part II, I set out the essential features and main arguments in support of the two prevailing views of assignment just mentioned. Although they differ in important respects, I argue that both share the same fundamental limitation, in that they merely assert, rather than truly justify, the very possibility of assigning contractual rights. In Part III, I outline my proposed alternative understanding of the assignment of contractual rights, which rests not in a straightforward conveyance of rights or an anomalous trust but on a contract to assign rights that equity then "treats as done" for the purpose of protecting the assignee's right to receive the promised benefit.[8] Finally, in Part IV, I relate this understanding of the assignment of contractual rights to the three main forms of assignment recognized in jurisdictions that follow the broader common law tradition — that is, to equitable assignments for consideration, legal assignments, and gratuitous equitable assignments.

II. TWO ACCOUNTS OF ASSIGNMENT

As is well known, English law historically followed the Roman law in holding that a contractual bond is strictly personal to its parties. Contractual rights were therefore incapable of being conveyed in the manner of a right to property save in exceptional cases.[9] This remains the formal position at common law, as is reflected most notably in the doctrine of privity of contract, and, on some accounts at least, the basic doctrines of offer, acceptance, and consideration.[10] Nonetheless, the possibility of assigning (or "assigning") a contractual

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7 CH Tham, "The Nature of Equitable Assignment and Anti-Assignment Clauses" in Neyers, Bronaugh & Pitel, *ibid* at 290–91 [Tham, "Anti-Assignment Clauses"]. *Contra* Farnsworth, *supra* note 2 at 67–69. Farnsworth, *ibid*; Tolhurst, *ibid*. See also Liew, *supra* note 5 at 67–68. *Cf* Tettenborn, *supra* note 5 at 271–72; Tham, "Anti-Assignment Clauses," *ibid* at 290–91.

8 In accordance with the traditional maxim that "equity treats as done that which ought to be done." For a list of conventionally accepted equitable maxims: JE Penner, "Equity, Justice, and Conscience: Suitors Behaving Badly?" in Dennis Klimchuk, Irit Samet & Henry E Smith, eds, *Philosophical Foundations of the Law of Equity* (Oxford: Oxford University Press, 2020) 52 at 61–62.

9 WS Holdsworth, "The History of the Treatment of Choses in Action by the Common Law" (1920) 33:8 Harv L Rev 997 at 1002–1003; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (New York: Oxford University Press, 1996) at 66–67. See also *Fitzroy v Cave*, [1905] 2 KB 364 at 372 (CA (Eng)), Cozens-Hardy LJ; *Gaumont v Luz*, 1980 ABCA 155 at para 22 [*Gaumont*]. *Cf Torkington v Magee*, [1902] 2 KB 427 at 430 (KBD (Eng)), Channell J [*Torkington*]. To this first objection, the common law added another, founded on the public policy rationale that an assignment of a chose in action "savours" of maintenance and champerty. On the emergence and eventual relaxation of this second objection: Holdsworth, *ibid* at 1019–21.

10 *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*, [1915] AC 847 at 853 (HL) [*Dunlop Pneumatic Tyre*] (the classic statement is by Viscount Haldane: "[O]nly a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam" at 853). On the view that privity is grounded in the doctrines of offer and acceptance, and that the question of consideration is distinct from the

right has been admitted in equity since at least the eighteenth century.[11] From there, statutory enactments led American law to recognize the possibility of an assignment that is effective at law, and not just in equity, provided only that the assignor intends to assign the rights at issue.[12] English law achieved a similar result through a comparatively much more onerous provision included in the *Judicature Act, 1873*, which has since been replicated in most other common law jurisdictions.[13]

In this part of my argument, I begin by outlining the two prevailing ways of understanding this state of affairs that I respectively term the "conveyance" and "trust" conceptions of assignment. For the conveyance view, an assignment is understood as something approaching a straightforward transfer of property rights, with the third party assignee being said to gain rights under the original contract which are divested from the promisee-assignor.[14] For the trust view, the assignee is instead understood to gain only an equitable or beneficial interest in the performance of the original contract, with the legal right to that performance remaining in the promisee-assignor.[15] I argue that both of these conceptions of assignment ultimately suffer from the same underlying difficulty, in that they merely assert, rather than justify, the possibility of concluding a transaction that purports to assign rights arising out of another contract.

A. ASSIGNMENT AS CONVEYANCE

The conveyance view of the assignment of contractual rights presents this transaction as a straightforward transfer or conveyance of the rights at issue from the promisee-assignor to a third party assignee, in a manner akin to the conveyance of rights to tangible property. This characterization is now widely assumed in American jurisprudence and scholarship, likely on account of the somewhat idiosyncratic development of the American law of assignment,

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doctrine of privity: Stephen A Smith, "Contracts for the Benefit of Third Parties: In Defence of the Third-Party Rule" (1997) 17:4 Oxford J Legal Stud 643 at 644–49 [Smith, "Third-Party Rule"]. *Cf* *Dunlop Pneumatic Tyre*, *ibid* at 855, Dunedin LJ.

11 This possibility is readily admitted in Blackstone, *supra* note 5 at 299. See also Holdsworth, *supra* note 9 at 1020–21.

12 The evolution of American law on this point appears to have occurred in two stages. First, some (but not all) American states adopted statutes permitting (or even requiring) the equitable assignee of a chose in action to sue in the equitable assignee's name in certain cases, transforming these kinds of equitable assignment into assignments at law from a procedural standpoint: Williston, "Legal or Equitable?" *supra* note 4 at 105. This change then spurred American law to conceive of choses in action as generally assignable, though potentially revokable where the assignment is not made in writing: American Law Institute, *Restatement*, vol 3, *supra* note 2 at 55–61. See also Legal Information Institute, "§ 2-210: Delegation of Performance; Assignment of Rights," online: [perma.cc/38S7-7JRA].

13 *Supreme Court of Judicature Act, 1873*, SC 1873, c 66, s 25(6). For modern statutes copying the language of this original provision, see e.g. *Law of Property Act, 1925* (UK), 15 Geo V, c 20, s 136(1); *Conveyancing and Law of Property Act*, RSO 1990, c C.34, s 53(1) [*Conveyancing Act* Ont]; *Conveyancing Act 1919* (New South Wales), 1919/6, s 12 (Austl) [*Conveyancing Act* NSW].

14 See e.g. *Portuguese-American Bank*, *supra* note 1 at 11–12; American Law Institute, *Restatement*, vol 3, *supra* note 2 at 14–18; Farnsworth, *supra* note 2 at 58–59, 67–69; Tham, *Understanding Assignment*, *supra* note 3 at 67–68. *Cf* Tolhurst, *supra* note 2 at 38–41; Benson, *Justice in Transactions*, *supra* note 2 at 86–91.

15 See e.g. *Gorringe*, *supra* note 5 at 136, Fry LJ; Tham, *Understanding Assignment*, *ibid* at 20. *Cf* McGhee & Elliott, *supra* note 5 at 40; Smith & Leslie, *supra* note 5 at 219, 224–25; Liew, *supra* note 5 at 67–68; McFarlane & Stevens, *supra* note 5 at 206–208; Tettenborn, *supra* note 5.

in which the possibility of an assignment effective at law was eventually conceived to operate independently from statute.[16] To quote Allan Farnsworth's restatement of this view:

> To make an effective assignment of a contract right, the owner of that right must manifest an intention to make a present transfer of the right without further action by the owner or by the obligor…. To transfer a contract right is, in essence, to take from the assignor (B) and to give to the assignee (C) the right to performance by the obligor (A). Put in another way, the transfer of a contract right extinguishes the assignor's right to performance by the obligor and gives the assignee a right to that performance.[17]

As this excerpt makes clear, the conveyance view of assignment conceives of an assignment as divesting the promisee-assignor of rights owed by the promisor under a contract, and vesting those rights in the third party assignee. No distinction is drawn between legal and equitable assignments, as is also typical of this type of account.[18] Implicitly, it takes the legal assignment — more typically called a "statutory assignment" in England and elsewhere in the common law world — as the central case of assignment writ large.

This view has the virtue of simplicity. As per the excerpt just quoted, it effectively understands a legal chose in action, such as the promisee's right under a contract, as a species of property that is capable of being freely alienated to another person.[19] Such a view can also be inferred from the language of the relevant English provision, now part of the *Law of Property Act, 1925*: "Any absolute assignment by writing … of any debt or other legal thing in action, of which express notice in writing has been given to the debtor … is effectual in law … to pass and transfer … (a) the legal right to such debt or thing in action."[20] Here too, it appears that an assignment is understood as a proper *transfer* of a contractual right (a "debt") that is effective at law, not just in equity, as might be accomplished with respect to any other form of property through a standard conveyance.[21] Here too, the contractual right appears to be conceived as a species of property, the ownership of which includes the faculty of alienation.[22]

The difficulty with this perspective as an account of assignment writ large, however, is twofold. The first, and perhaps most important, is that it can at best circumvent, rather than truly resolve, the tension between the possibility of assigning contractual rights, on the one hand, and common law doctrines that emphasize the personal nature of a contractual obligation, on the other. If an assignment involves a proper *transfer* of the contractual rights held by the promisee under the contract to a third party assignee, such that the right to the

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16 See e.g. Williston, "Legal or Equitable?," *supra* note 4 at 105; American Law Institute, *Restatement*, vol 3, *supra* note 2 at 55–61; *Uniform Commercial Code*, *supra* note 12, § 2-210. See also the text accompanying note 12.

17 Farnsworth, *supra* note 2 at 67–68. *Cf Portuguese-American Bank*, *supra* note 1 at 11:

> When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt that would be applied to a horse. It is not illogical to say that the debt is as liable to sale as it is to the acquisition of a lien.

18 An exception is Tolhurst, who engages with both forms of assignment separately. Nonetheless, even his account assimilates the effects of an equitable assignment with those of a "transfer" in terms that are difficult to distinguish from those of a legal assignment: Tolhurst, *supra* note 2 at 68–69.

19 See also *Portuguese-American Bank*, *supra* note 1 at 11.

20 *Supra* note 13, s 136(1). See also *Conveyancing Act* Ont, *supra* note 13, s 53(1); *Conveyancing Act* NSW, *supra* note 13, s 12.

21 *Law of Property Act, 1925*, *ibid*, s 136(1).

22 *South Branch Lumber Company v Ott* (1892), 142 US 622 at 628 [*South Branch Lumber*].

promisor's performance is now held by the third party assignee, then should the assignee now be regarded as the true and proper promisee under that contract? Should the original promisee, who as assignor has assigned the rights under the contract to a third party assignee, no longer be considered a party to that contract at all?

Such conclusions are at odds with established doctrine. Indeed, not only was the promise underlying the original contract made to the promisee, and not to the third party assignee, but the assignee has further provided no consideration to the original promisor in exchange for the contractual rights being assigned.[23] Moreover, as the law of assignment itself attests, the original promisee retains a role of some kind — that is, the promisee is not fully divested of the contractual rights being assigned — notwithstanding the completion of an assignment, even where that assignment is effective at law.[24] Notably, whatever defences the original promisor could assert against the promisee prior to the assignment can be asserted against the assignee once the assignment is complete.[25] These include defences borne out of the fact that the promisee's own performance may have conditioned — and may still condition — the performance that is now owed by the promisor to the assignee.[26]

To see this difficulty in practice, consider Peter Benson's treatment of the law of assignment in his recent book on contract law, *Justice in Transactions: A Theory of Contract Law*.[27] This account is typical of the conveyance view insofar as Benson does not distinguish between statutory and equitable assignments.[28] Usefully, however, he recognizes and attempts to resolve the tension between the conveyance view of assignment and the personal nature of contractual obligations. He does so by positing the effect of an assignment as what we might term a "partial" transfer of the rights acquired by the promise-assignor at the

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23 Thus, both prongs of the privity doctrine — that is, the prong relating to offer and acceptance, and the prong relating to consideration — appear to be contravened if an assignment is understood in these terms. On the two prongs in question: Smith, "Third-Party Rule," *supra* note 10 at 644–49. *Cf Dunlop Pneumatic Tyre*, *supra* note 10 at 855, Dunedin LJ.

24 As Tham's demonstration makes clear, there is a fundamental distinction between the novation of a contract — in which the original contract is extinguished and a new contract is concluded between one of the original parties and a third party — and an assignment of contractual rights. Only the former entails a complete withdrawal of the original contracting party: Tham, *Understanding Assignment*, *supra* note 3 at 20. See also *Re United Railways of Havana and Regla Warehouses Ltd* (1958), [1960] Ch D 52 at 87–88 (CA (Eng)), aff'd (1960), [1961] AC 1007 (HL (Eng)); *411076 BC Ltd v McCullagh* (1992), 72 BCLR (2d) 252 (SC); *Weyerhaeuser Company Limited v Hayes Forest Services Limited*, 2008 BCCA 69 at paras 25–26; *Fuller v Callister* (2011), 150 Idaho 848 at 855 (Sup Ct).

25 *Roxburghe v Cox* (1881), 17 ChD 520 at 526 (CA (Eng)), James LJ [*Roxburghe*]; *London & Western Canada Investment Co v Dolph* (1918), 43 OLR 449 at 450–51 (Ont HC) [*Dolph*]; *First City Capital Ltd v Petrosar Ltd* (1987), 42 DLR (4th) 738 at 746–47 (Ont HCJ) [*Petrosar*]; *Creative Ventures, LLC v Jim Ward & Associates* (2011), 195 Cal App 4th 1430 at 1447; *Bibby Factors*, *supra* note 6 at paras 30–31.

26 *Dolph*, *ibid* at 450–51. *Cf Petrosar*, *ibid* at 746–47; *Bibby Factors*, *ibid* at paras 30–31. The assignment of rights subject to a contractual or "internal" condition precedent raises interesting questions relating to the assumption of contractual "burdens" by the assignee. On the one hand, the prohibition on the assignment of contractual burdens means that original promisor has no power to compel the assignee to perform any duties that condition the assigned rights (these burdens remaining personal to the assignor): *National Trust Co*, *supra* note 1 at 426; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*, [1994] 1 AC 85 at 103 (HL(Eng)), Browne-Wilkinson LJ [*Linden Gardens*]. But on the other, if the performance of the assignor's right is not too personal to prevent assignment, then the voluntary performance by the assignee of the corresponding duties borne by the assignor should in principle serve to lift the condition: *Rhone v Stevens*, [1994] 2 AC 310 at 322–23 (HL); *Canada Southern Petroleum Ltd v Amoco Canadian Petroleum Company Ltd*, 2001 ABQB 803 at para 131. *Cf Durham Condominium Corporation No 123 v Amberwood Investments Limited*, 2002 CanLII 44913 at paras 83–86 (ONCA), Charron J; *The Owners, Strata Plan BCS 4006 v Jameson House Ventures Ltd*, 2019 BCCA 144 at para 6.

27 Benson, *Justice in Transactions*, *supra* note 2.

28 Although he appears to reference the existence of distinct classes of assignment in passing: *ibid* at 98.

formation of the initial contract. Per Benson, "[w]hat the promisee owns or has title to," and thus alienates by means of an assignment, "is her right as a chose in action. This involves looking at a contracting party's rights from a different angle."[29] Where there is an assignment of contractual rights, the promisee-assignor is thus understood to divest only the "ownership" dimension of the contractual rights acquired under the contract, corresponding to what Benson characterizes as a "chose in action."[30] Meanwhile, the purely personal dimension of the contract remains untouched by this operation, such that the promisee-assignor can be said to remain a party to the contract notwithstanding the assignment.[31]

This solution resolves the most obvious tensions between the possibility of assigning contractual rights and the personal nature of contractual obligations. It does so, however, in a manner that merely assumes, rather than truly justifies, the law of assignment. Since Benson conceives of assignments as distinct from contracts, with only the latter giving rise to a proper privity relationship, his explanation for the binding force of contractual obligations is, strictly speaking, inapplicable to assignments.[32] What we are left with, instead, is an explanation of assignment that operates by analogy to his account of the executed gift, based on the possibility that the promisee's rights under the contract be treated as a kind of property or asset that is capable of alienation without the promisor's consent.[33] But to affirm that such a conveyance of contractual rights is not only possible, but further does not offend doctrines like privity of contract, because the promisee-assignor merely divests the "ownership" dimension of the contractual rights being assigned, begs the question of why the law should distinguish this "ownership" dimension from the personal bond that the contract creates between promisor and promisee. It is to assume that such a distinction can be sustained, without any real argument as to why this distinction should be admitted in the first place.[34]

This difficulty with the conveyance view of assignment is compounded by its apparent inability to account for the continued relevance of assignments in equity, notwithstanding the general availability of assignments effective at law. By treating legal assignments as the central case of assignment, these accounts offer no basis on which to account for the important role still played by equitable assignments in virtually all legal systems that follow the common law tradition. The problem is especially apparent in those jurisdictions, including a majority of the Canadian common law provinces, that have copied the English provision quoted above. In these jurisdictions, equitable assignments are taken to operate *inter alia* where the parties have failed to comply with one of the statute's relatively stringent requirements. That is, the assignee may still have recourse to the principles of equity to enforce the attempted legal assignment where the assignment is not absolute, is not in writing, has not been completed by notice to the original promisor, or is otherwise ineffective

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29 *Ibid* at 87. *Cf* Tolhurst, *supra* note 2 at 36–37.

30 Benson, *Justice in Transactions*, *ibid* at 87–90. See also *South Branch Lumber*, *supra* note 22 at 628.

31 Benson, *Justice in Transactions*, *ibid* at 86–87, 90, 99–100. *Cf* Tolhurst, *supra* note 2 at 37–38.

32 I note that Benson conceives of a contract as resting on a "transfer" of rights as well, though that transfer is of a transactional type that he sees as specific to the contractual form: Benson, *Justice in Transactions*, *ibid* at 8, 322–23. See also Peter Benson, "Contract as a Transfer of Ownership" (2007) 48:5 Wm & Mary L Rev 1673.

33 For Benson's account of gifts: Benson, *Justice in Transactions*, *ibid* at 58–64. See also Peter Benson, "The Idea of Consideration" (2011) 61:2 UTLJ 241 at 261.

34 For a more sustained critique of Benson's account of assignment: Stéphane Sérafin, "Transfer Theory and the Assignment of Contractual Rights" (2023) 60:2 Osgoode Hall LJ 251.

for one of the myriad other reasons that may bar an assignment under the statute.[35] In practice, equitable assignments may well remain the most important form of assignment in these jurisdictions.

The conveyance view's implicit elevation of legal assignments also presents problems from the standpoint of those jurisdictions that have followed the more flexible American approach. Even in the US, courts still recognize the distinction between legal and equitable assignments, and accept that equity may intervene where a legal assignment is not strictly possible, as for instance where an assignment pertains to part rather than the whole of a debt.[36] The same is true in those jurisdictions, like Manitoba, that have adopted an approach similar to the American one through statute: "Every debt and any chose in action is assignable at law by any form of writing that contains apt words in that behalf."[37] No formalities are required to complete a legal assignment under this provision, besides the bare requirement of a written instrument.[38] Yet it is nonetheless accepted that the assignee must appeal to equity to enforce the assignment where the bare requirement of writing has not been made out, where the assignment is not absolute, or where the rights purportedly being assigned are otherwise incapable of immediate assignment at law, for example, because the rights at issue are indeterminate or future rights.[39]

In addition to the continued relevance of equitable assignments, legal assignments are also generally recognized to remain subject to the same rules developed for assignments in equity.[40] So, for example, the rule affirmed by the English statute, according to which a statutory assignee takes "subject to the equities," directly tracks the rule applicable to assignments in equity.[41] This means that the original promisor can oppose to the assignee any defences and limitations that the promisor could have opposed to the promisee-assignor, just as is the case with an equitable assignment.[42] The same is true of the effects of notice, which in equity is required to oppose the assignment to third parties, including the original

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35 See e.g. *William Brandt's Sons & Co v Dunlop Rubber Company Ltd*, [1905] AC 454 at 461 (HL (Eng)), MacNaghten LJ [*William Brandt's Sons*]; *Gaumont*, *supra* note 9 at paras 23–25; *Watson v CF Hart Ltd* (1986), 59 Nfld & PEIR 308 (Dist Ct) [*Watson*].

36 *P, C, C & St L Ry Co v Volkert* (1898), 58 Ohio St 362 at 371 (Sup Ct); *Graham v Southern R Co* (1931), 173 Ga 573 at 577–78 (Sup Ct); *D'Orazi v Bank of Canton* (1967), 254 Cal App 2d 901 at 905.

37 *Law of Property Act*, RSM 1987, CCSM c L90, s 31(1) [*LPA* Man]. See also *The Choses in Action Act*, RSS 1978, c C-11, s 2 [*CAA* Sask]; *Choses in Actions Act*, RSY 2002, c 33, s 1(1) [*CAA* Yukon]; *Choses in Action Act*, RSNWT 1988, c C-7, s 1(2) [*CAA* NWT]; *Choses in Action Act*, RSNWT 1988, c C-7, s 1(2), as enacted for Nunavut, pursuant to the *Nunavut Act*, SC 1993, c 28 [*CAA* Nunavut].

38 *LPA* Man, *ibid*, ss 31(2), 31(3); *CAA* Sask, *ibid*, s 6; *CAA* Yukon, *ibid*, s 3; *CAA* NWT, *ibid*, ss 3, 4; *CAA* Nunavut, *ibid*, ss 3, 4 (though these statutes contemplate that notice is required to oppose the assignment to the original promisor, in a manner that largely tracks the effects of notice under an equitable assignment).

39 *West v Lee Soon*, 1915 CanLII 194 (SKCA); *Black Hawk Mining Inc v Provincial Assessor (Man)*, 2002 MBCA 51 at paras 66–67; *Merchant Law Group v Compushare Ltd*, 2008 SKCA 173 at para 25, citing *Gordon v Gordon*, [1924] 2 DLR 74 at 83–84 (SKCA). I note that Saskatchewan courts have interpreted their statute to admit the possibility of a legal assignment of a part debt, which suggests that the ambit of this statute is wider than that granted by American courts to a legal assignment of legal rights.

40 *Torkington*, *supra* note 9 at 431–32, Channell J; *Gaumont*, *supra* note 9 at para 24; *Simpson v Norfolk and Norwich University Hospital NHS Trust*, [2011] EWCA Civ 1149 at para 8 [*Simpson*]; *Pythe Navis Adjusters Corporation v Abakhan & Associates Inc*, 2014 BCCA 262 at para 23 [*Pythe*].

41 *Law of Property Act 1925*, *supra* note 13, s 136(1). A similar rule is endorsed by American *Restatement of the Law Second: Contracts*, without distinction between legal and equitable assignments of contractual rights: American Law Institute, *Restatement*, vol 3, *supra* note 2 at 67.

42 *Torkington*, *supra* note 9 at 431, Channell J; *Petrosar*, *supra* note 25 at 746–47; *Bibby Factors*, *supra* note 6 at para 29.

promisor.[43] Under the English statute, such notice is required to conclude the assignment, and not simply to make it opposable to third parties. But where such notice is not required to conclude a legal assignment, as under American law or the Manitoba statute, then even a completed legal assignment will not be opposable to the original promisor until that original promisor has been given notice of the assignment, in a manner that directly tracks the effects of notice under an equitable assignment.[44]

Put differently, a significant problem with the conveyance view of assignment is that it does not respond to, or indeed offer an explanation of, the bulk of the law of assignment as it actually exists in those jurisdictions that follow the broader common law tradition. At best, it explains the operation of a narrow subset of assignments that are taken to generate effects at law, and even here fails to offer reasons that can truly support the recognition of this class of transaction. This state of affairs calls for a different explanation of the law of assignment, which attempts to account for both assignments in equity and assignments effective at law. Such is precisely what an alternative advanced by some authors attempts to provide, by offering an explanation of the law of assignment that analogizes it not with a straightforward conveyance of property, but with the rules applicable to that most well-known of equitable institutions, the trust.

B. ASSIGNMENT AS TRUST

In contrast to the conveyance view of assignment, which is particularly prominent in the US, a number of authors writing primarily from England and Commonwealth jurisdictions have attempted to conceptualize the law of assignment as resting in an anomalous form of trust. In so doing, they usually affirm the centrality of equitable assignments over their "legal" or "statutory" counterparts. On this type of account, an equitable assignment of contractual rights serves to confer upon a third party assignee the equitable or beneficial interest in the performance of the contract being assigned, while the promisee-assignor remains a party to the original contract at law.[45] The possibility of a legal or statutory assignment, meanwhile, is taken by some (though not all) of these authors to rest on a reform of a narrow set of consequences ascribed to an assignment in equity.[46] In particular, whereas an equitable assignment of contractual rights requires the assignee to join the promisee-assignor as a party to the proceedings, for the purpose of enforcing the assigned contract against the original promisor, the introduction of legal or statutory assignments is said to

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43 *Roxburghe*, *supra* note 25 at 526, James LJ; *Cronkleton v Hastings Theatre & Realty Corp* (1938), 134 Neb 168 at 173–74 [*Cronkleton*]; *Warner Bros Records Inc v Rollgreen Ltd* (1974), [1976] 1 QB 430 at 442 (CA (Eng)), Denning MR [*Warner Bros Records*]; *Royal Bank of Canada v Canada (Attorney General)* (1977), 95 DLR (3d) 608 at 612 (ABQB) [*Royal Bank*]; *Bank of Nova Scotia v Newfoundland Rebar Company*, 1987 CanLII 5168 (NLSC) [*Newfoundland Rebar*].

44 This much is explicitly contemplated by the relevant statutes in the Canadian jurisdictions that follow this approach: *LPA* Man, *supra* note 37, ss 31(2), 31(3); *CAA* Sask, *supra* note 37, s 6; *CAA* Yukon, *supra* note 37, s 3; *CAA* NWT, *supra* note 37, ss 3, 4; *CAA* Nunavut, *supra* note 37, ss 3, 4. The wording used in these sections is similar that of the American *Restatement of the Law Second: Contracts*, which does not distinguish legal from equitable assignments for the purpose of the notice rule: American Law Institute, *Restatement*, vol 3, *supra* note 2 at 67 (section 336(2), (4)).

45 See e.g. Tham, *Understanding Assignment*, *supra* note 3 at 20, 85; McGhee & Elliott, *supra* note 5 at 40; Smith & Leslie, *supra* note 5 at 219, 224–25; Liew, *supra* note 5 at 67–68; McFarlane & Stevens, *supra* note 5 at 207–208.

46 Tham, *Understanding Assignment*, *ibid* at 386; McGhee & Elliott, *ibid*; Smith & Leslie, *ibid* at 341. *Cf* Liew, *ibid* at 437. *Contra* McFarlane & Stevens, *ibid*.

have effected a "procedural" modification that dispensed with the need to join the assignor to the proceedings where its requirements are met.[47]

A particularly well-developed version of the trust view of assignment is found in the work of Chee Ho Tham.[48] In Tham's estimation, it is clear that equitable assignments amount to the central case of assignment in English law, since he characterizes legal or statutory assignments as "additive," in the sense that "they build on the effects which would otherwise arise by reason of such assignment."[49] Equitable assignments, for their part, are explained as a peculiar form of bare trust with additional features normally found in an agency relationship. As Tham puts it:

> First, an equitable assignment operates in the manner of an express bare trust: that is, when a legal or equitable chose is equitably assigned, the assignor will be obligated to her assignee in just the same way as if she had expressly constituted herself a bare trustee of the chose for the benefit of her assignee. Second, an equitable assignment also entails the grant of authority to the assignee in an atypical manner: that is, having equitably assigned the chose to the assignee, the assignor will have authorized the assignee to invoke the assignor's powers in relation to the obligor to the chose as if he were the assignor, and will have further authorized the assignee to invoke those powers without regard to the assignor's interests.[50]

As Tham's argument makes clear, the effects of an equitable assignment (and by extension, of a legal assignment) cannot be fully assimilated with the typical trust relationship. On his telling, such an assignment gives rise to a (bare) "trust plus agency," which is to say that it results in a trust in which the assignor stands in the position of a trustee but lacks the powers typically ascribed to a trustee, while the assignee stands in the position of a trust beneficiary but has powers that are not typical of a beneficiary.[51] Nonetheless, the core of the operation effected by means of an equitable assignment shares the basic structure of the typical express trust. Rather than transferring the legal interest in the contractual rights being assigned to the assignee, the assignor's duties to the assignee arise through the

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47 This view has been sanctioned judicially in England and Canada: *DiGuilo v Boland* (1958), 13 DLR (2d) 510 at 515 (ONCA) [*DiGuilo*]; *Gaumont*, *supra* note 9 at para 24; *Simpson*, *supra* note 40 at para 8; *Pythe*, *supra* note 40 at para 23. The "procedural" view of legal assignments also held currency in the US until at least the early twentieth century. See e.g. Ames, *supra* note 4 at 214. I note that the joinder rule only applies to equitable assignments of legal choses in action, and therefore does not apply to the equitable assignment of rights under a trust (and ostensibly, of rights already assigned through a prior equitable assignment of contractual rights). See *Dell v Saunders* (1914), 17 DLR 279 at 281 (BCCA), Macdonald CJA [*Dell*]; *Performing Right Society Ltd v London Theatre of Varieties Ltd* (1923), [1924] AC 1 at 14, 18 (HL (Eng)), Cave, Finlay LJJ [*Performing Right*]; *Three Rivers District Council v Governor and Company of the Bank of England* (1994), [1996] QB 292 at 309 (CA (Eng)), Peter Gibson LJ [*Three Rivers*]. *Contra* the position in some American jurisdictions, where even an equitable assignee is deemed "the real party in interest" and entitled to claim in the assignee's own name: *Tornquist v Johnson* (1932), 124 Cal App 634 at 641 [*Tornquist*].

48 Tham, *Understanding Assignment*, *supra* note 3. *Cf* Tham, "Anti-Assignment Clauses," *supra* note 6. Tham distinguishes what he terms a "partial trust" view, on which a trust arises only from an equitable assignment of legal rights, from his own view that sees both equitable assignments of legal rights and equitable assignments of equitable rights as operating on a "trust" model: Tham, *Understanding Assignment*, *ibid* at 67, n 2. A further distinction should be drawn between Tham's view, which also understands legal assignments to operate on this model, and the views of some authors who conceive of legal assignments as operating on a conveyance principle even as they admit the trust-like basis of equitable assignments: see e.g. McFarlane & Stevens, *supra* note 5 at 206–208.

49 Tham, *Understanding Assignment*, *ibid* at 328. As Tham also puts the point later in his argument, "s. 136(1) does not create an independent mode of assignment. Rather, assignments are effected in such manner as common law or equity may otherwise permit, supplemented by the effects in s. 136(1), where applicable" (Tham, *Understanding Assignment*, *ibid* at 386).

50 *Ibid* at 85 [citations omitted].

51 *Ibid* at 85–87.

divesting of the assignor's beneficial interest in performance under the contract, which is now vested in the assignee.[52] It is for this reason that the assignor can be understood to stand in a position analogous to a trustee, and the assignee to that of a trust beneficiary.[53]

This argument has the advantage of resolving many of the difficulties with the conveyance view examined above, including the difficulty presented by the doctrine of privity of contract. If the effect of an assignment is merely to constitute the assignee as the equitable or beneficial owner of the assigned contractual rights, then the promisee-assignor can remain a party to the contract at law. No issues arise from the standpoint of privity of contract or related doctrines that emphasize the strictly personal nature of a contractual obligation.[54] There is therefore no need to have recourse to solutions like Benson's, which postulate the effect of an assignment as a partial conveyance affecting only the "ownership" dimension of the promise-assignor's entitlement.[55] What this view requires, instead, is that the importance of legal assignments be relativized, so that these transactions can be treated as a mere extension of equitable principles. But even this move is not particularly difficult, given both the continued importance of equitable assignments and the extent to which legal assignments remain dependant on the rules developed in equity, as discussed above.[56]

That said, the trust view of assignment does remain subject to the same fundamental problem that afflicts the conveyance view. That is, while the argument offers an explanation for the operation of equitable assignments, and by extension assignments writ large, it does not explain why the common law tradition has chosen to recognize (and should continue to recognize) the possibility of assigning an equitable or beneficial interest in the performance of a contract. If contracts are still understood to involve a personal bond between promisor and promisee — as the doctrine of privity, among others, suggests that it does — then the possibility of an appeal to equitable principles to circumvent this problem appears question-begging, at best.[57] The qualifications that authors such as Tham are compelled to add to the "trust" that arises from an assignment in order to make it fit with the positive law — that is, by suggesting that an equitable assignment amounts to a *bare trust* supplemented by certain effects of an *agency* relationship — only compound this difficulty. They require justification in their own right.[58]

On the one hand, Tham's characterization of equitable assignments as a form of *bare trust* is necessary to capture the largely passive role that the assignor plays once the assignment of contractual rights has been made. In the typical trust relationship, the trustee manages the trust property for the beneficiary and holds the legal powers necessary to discharge these duties. But under an assignment, the assignor has no authority over the contractual rights at issue once notice has been given to the original promisor. That power instead falls to the

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52 *Ibid* at 87.

53 *Ibid*.

54 Indeed, this explanation of assignment falls squarely within the exception noted by Viscount Haldane in *Dunlop Pneumatic Tyre*, *supra* note 10 at 853.

55 Benson, *Justice in Transactions*, *supra* note 2 at 87–90.

56 See the text accompanying notes 39–43.

57 *Contra* Tham, *Understanding Assignment*, *supra* note 3 at 20–21 (Tham's argument appears to proceed from the assumption that contractual rights ought to be assignable absent some reason to *deny* their assignment, perhaps out of deference to the commercial importance of these transactions). See also Tham, *Understanding Assignment*, *ibid* at 1. *Cf* Benson, *Justice in Transactions*, *supra* note 2 at 87–88.

58 Tham, *Understanding Assignment*, *ibid* at 104.

assignee — though the assignee must join the assignor to bring a claim against the initial promisor if the assignment is equitable and pertains to a legal chose in action, such as rights arising from a contract.[59] Conversely, an assignee has none of the claims against the assignor pertaining to the administration of the trust property that one can expect the typical beneficiary of a trust to hold against the typical trustee. The assignee has acquired only a *bare* beneficial right in the performance of the contract, concurrent with the assignor's continued legal interest in the contract, to demand the receipt of the benefit due under the contract. The assignor thus stands in a position analogous not to that of the typical trustee, but of the bare trustee whose only duty is to convey the trust property to the beneficiary.[60]

On the other hand, Tham's contention that an equitable assignment involves a unique hybrid bare trust *plus agency* relationship also serves to account for features of an assignment normally lacking in any trust arrangement, bare or otherwise. Specifically, it serves to account for the powers that, in his estimation, the assignee wields over the assigned contractual rights.[61] Such powers are absent from the typical trust relationship, in which the beneficiary is for the most part passive and must act through the trustee who administers the trust property.[62] Coupled with the analogy that Tham proposes between an equitable assignment and a bare trust, this additional element of agency suggests that it is the assignee, and not the assignor, who holds most, if not all, powers over the rights subject to the assignment. This conclusion appears entirely consistent with the positive law: once notice of an assignment has been given to the initial promisor, the promisor's performance is owed to the assignee, and only such performance can serve to discharge the promisor's duty.[63] Moreover, it is the assignee who holds the ultimate power to demand the performance of the contract, and to institute proceedings in the event the promisor fails to do so — though, again, if the assignment is equitable and pertains to a legal chose in action, such as contractual rights, the assignee must join the assignor as a party to bring a claim under the assignment before a court.[64]

Descriptively, then, there can be little issue with either of these qualifications upon the "trust" that arises from an equitable assignment. And yet, precisely why an assignment gives rise to a bare trust plus agency rather than another form of legal relationship is unclear from Tham's account. For one, the limited duties of a bare trustee are not typical of the kind of

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59 *Dell*, *supra* note 47 at 281, Macdonald CJA; *Performing Right*, *supra* note 47 at 14, 18, Cave, Finlay LJJ; *Three Rivers*, *supra* note 47 at 309, Peter Gibson LJ. *Cf Tornquist*, *supra* note 47 at 641.

60 *Target Holdings Ltd v Redferns* (1995), [1996] 1 AC 421 at 436 (HL (Eng)), Browne-Wilkinson LJ; *AIB Group (UK) Plc v Mark Redler & Co Solicitors*, [2014] UKSC 58 at para 70 [*AIB Group*]; *Valard Construction Ltd v Bird Construction Co*, 2018 SCC 8 at para 25. *Cf United States v Mitchell* (1983), 463 US 206 at 224. See also Donovan WM Waters, Mark R Gillen & Lionel D Smith, eds, *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters, 2021) at 33–36.

61 Tham, *Understanding Assignment*, *supra* note 3 at 85–86, 88.

62 Though there are exceptional cases in which equity will allow a beneficiary to claim directly against a third party: see e.g. *Barnes v Addy* (1874), 9 Ch App 244 at 251–52; *Air Canada v M & L Travel Ltd*, [1993] 3 SCR 787 at 808–10; *Williams v Central Bank of Nigeria*, [2014] UKSC 10 at paras 8–9, Sumption LJ. *Cf King v Johnston* (2009), 178 Cal App 4th 1488 at 1504–505.

63 Thus, where the original promisor has received notice and still performs in favour of the assignor, the original promisor may be compelled by the assignee to perform a second time: *William Brandt's Sons*, *supra* note 35 at 462, MacNaghten LJ; *James Tallcott Ltd v John Lewis & Co Ltd* (1940), 3 All ER 592 at 596–97 (CA (Eng)), Goddard LJ [*James Tallcott Ltd*]; *Royal Bank*, *supra* note 43 at 613; *Sayers and Sayers v Guaranty Trust Company of Canada*, 984 CanLII 2638 (SKKB) [*Sayers*]; *Quality Chiropractic PC v Farmers Ins Co* (2002), 132 NM 518 at 521 (CA) [*Quality Chiropractic*].

64 *Dell*, *supra* note 47 at 281, Macdonald CJA; *Performing Right*, *supra* note 47 at 14, 18, Cave, Finlay LJJ; *Three Rivers*, *supra* note 47 at 309, Peter Gibson LJ. *Cf Tornquist*, *supra* note 47 at 641.

voluntary arrangement that the equitable assignment ostensibly represents. It is more typical of the constructive trust imposed by law for reasons other than the parties' intentions, in which the trustee's duty is to typically either convey the trust property directly to the beneficiary, or else to another trustee properly charged with its administration.[65] Likewise, the mere assertion that an equitable assignment involves some features more typical of an agency relationship does not tell us why the law of assignment confers such powers upon the assignee. It does not tell us why the law of assignment is structured in such a way as to confer upon the assignee, conceived as the beneficiary of a trust, the power to affect the rights subject to the assignment as though the assignee were, in effect, the trustee.

In each of these respects, the trust conception of assignment exemplified by Tham's argument offers a plausible description of the operation of equitable assignments, and by extension of assignments operative at law. However, the trouble with Tham's account, and with similar accounts that conceive of the assignment of contractual rights as resting on a form of trust, is that it does not yet tell us *why* equity intervenes in the precise manner that it does. Indeed, although Tham specifically claims a normative dimension for his analysis, it does not even tell us why the transaction typically called an "assignment" of contractual rights is and should continue to be recognized in the first place.[66] What is needed, therefore, is an account of the law of assignment that anchors it in deeper principles. What is needed is an account that does not merely purport to explain the operation of the rules applicable to the law of assignment, but explicates its normative foundations as well. Such is precisely what I attempt to offer in the remainder of this article.

III. AN ALTERNATIVE ACCOUNT OF ASSIGNMENT

As I have argued above, the "conveyance" and "trust" conceptions of assignment both offer compelling explanations for the operation, or at least part of the operation, of the law of assignment as it exists in common law jurisdictions. These accounts differ primarily in terms of whether they take legal or equitable assignments as the central case of assignment in the jurisdictions at issue. As I have also suggested, however, they both lack the ability to account for the reasons why an assignment of contractual rights should be permitted, particularly in light of the rules and doctrines of contract law, such as the doctrine of privity of contract, which suggest that such an operation should perhaps not be possible at all.

In this part of my argument, I now turn to an alternative contractual account of the law of assignment that I suggest is capable of justifying the possibility of assigning contractual rights. In a nutshell, this account holds that the law of assignment is ultimately explicable *and* justifiable on contractual grounds, as an effect of equity's intervention upon a contractual obligation undertaken by an assignor to an assignee to confer the benefit due from another contract that the assignor has concluded with a third party. As this explanation draws on equity, it shares with the trust conception of assignment just examined the assumption that equitable assignments correspond to the central case of assignment in English law and related

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[65] On the relationship between the notion of "bare trust" and constructive and resulting trusts: Waters, Gillen & Smith, *supra* note 60 at 1252, n 1. *Cf AIB Group*, *supra* note 60 at para 70; *Rubner v Bistricer*, 2019 ONCA 733 at 78–80.

[66] *Contra* Tham, *Understanding Assignment*, *supra* note 3 at 20–21, 104.

legal systems.[67] Nonetheless it goes further than the trust view in seeking to explicate the normative grounding of equity's intervention in this area of law as a facet of contractual obligations.

A. THE CONTRACT TO ASSIGN RIGHTS

I begin my argument with the contractual obligation or similar promissory relationship that I claim undergirds the law of assignment as a whole. That such a thing as a "contract to assign rights" exists is generally recognized within the broader common law tradition. It is encountered with particular frequency in the context of equitable assignments pertaining to future rights — that is, to rights which the equitable assignor has not yet acquired, as promisee or otherwise, and is therefore incapable of immediately assigning pursuant to the fundamental rules that govern equitable intervention.[68] As Lord Jessel, Master of the Rolls, put the point in *Collyer v. Isaacs*, a seminal case involving a general chattel mortgage that purported to include as of yet to be acquired chattels:

> The creditor had a mortgage security on existing chattels and also the benefit of what was in form an assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment, in fact, constituted only a contract to give him the after-acquired chattels. A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment.[69]

Cases such as *Collyer v. Isaacs* confirm that a promise to assign rights is cognizable as a valid and enforceable contract at common law, and can operate in those cases where the assignment is impossible in equity because the rights to be assigned have yet to be acquired by the assignor.[70] The argument defended here goes further still, however, in that it contends that a contractual obligation or similar form of voluntary undertaking underlies the whole of the law of assignment in common law legal systems. It claims that the fundamental source, the normative grounding, of the possibility of assigning contractual rights is to be found in the assignor's obligation to provide the benefit due under another contract to the assignee *at some point in the future*.

This account of the law of assignment has two principal advantages. The first is that it simultaneously serves to justify the operation of the law of assignment, at least to the extent that the promise to assign rights corresponds to a proper contract or other recognized form of voluntary obligation.[71] True, the ultimate justification of contractual obligations has been

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67 In particular, this account builds upon the analysis of the equitable assignment for consideration found, for example, in *Collyer*, *supra* note 6.

68 Specifically, the rule embodied in the maxim *nemo dat quod non habet*, according to which one can confer no greater rights in or to a thing than one presently holds. For discussion of the effects of this doctrine in relation to the assignment of contractual rights, see e.g. Tolhurst, *supra* note 2 at 4–7, 41–42; Benson, *Justice in Transactions*, *supra* note 2 at 86–88. *Contra* Tham, *Understanding Assignment*, *supra* note 3 at 213, 215–16. See also Sérafin, *supra* note 34.

69 *Collyer*, *supra* note 6 at 351, Jessel MR.

70 See also *Performing Right*, *supra* note 47 at 17, Finlay LJ; *Gannon*, *supra* note 6 at 526; *Palette Shoes*, *supra* note 6 at 27, Dixon J; *Canada Trust*, *supra* note 6 at 655–56; *Bibby Factors*, *supra* note 6 at para 29. *Cf Fraser*, *supra* note 6 at 356–57, Duff J.

71 The claim is somewhat more complicated where the promise to assign rights does not meet the requirements of a valid contract at common law, as discussed in Part III.B, below.

the subject of persistent controversy in the English-speaking world going back at least as far as the publication of Lon Fuller and William Perdue's infamous article, "The Reliance Interest in Contract Damages."[72] Notably, there is a longstanding debate over the extent to which promissory morality can or should serve to justify contractual obligations, at least without more.[73] Nonetheless, contract law is a generally recognized and central part of any developed legal system. It is therefore unsurprising that there is no dearth of justifications available for this institution, in contrast with the comparatively much more marginal treatment afforded to the law of assignment.[74] To cast the law of assignment as a part of contract law is to subsume its ultimate justification in any one of the many justifications offered for the enforcement of voluntary obligations *tout court*. If the law of assignment has a fundamentally contractual basis, then any one of these justifications may at least potentially provide a justification for the law of assignment as well.

The second advantage of this contractual account of assignment, meanwhile, is that it operates to resolve the problem of privity without having to tailor an assignment-specific exception or by appealing to equity without providing a justification for equity's intervention. In this respect, the contractual explanation differs from Benson's more nuanced version of the conveyance view, according to which an assignment operates a transfer of an "ownership" interest in the contract, while the contractual right to performance as such remains owed to the promisee.[75] It also differs from Tham's developed version of the trust conception of assignment, which frames an assignment as giving rise to a bare trust with agency features.[76] The explanation offered by the contractual argument instead rests on a straightforward application of contractual principles: a promise by the assignor to the assignee, enforceable as a contract or similar form of voluntary obligation provided that the requirements of a valid contract or such other form of obligation have been met by the parties.

In contrast to these competing accounts, the solution offered by the contractual perspective to the problem of privity is one that is widely recognized within broader contract law doctrine, and so cannot be said to rest upon a form of special pleading. A contract in which the purchaser of some future property — whether personal or real — promises to resell that property to a third party before the purchaser acquires that property is a commonplace and widely accepted transaction.[77] The only difference between this type of transaction, often

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72 LL Fuller & William R Perdue Jr, "The Reliance Interest in Contract Damages: 1" (1936) 46:1 Yale LJ 52 at 59–60.

73 See e.g. Seana Valentine Shiffrin, "The Divergence of Contract and Promise" (2007) 120:3 Harv L Rev 708; Michael G Pratt, "Contract: Not Promise" (2008) 35:4 Fla St U L Rev 801.

74 As Peter Benson has put it:

> In common law jurisdictions at least, there is at present no generally accepted theory or even family of theories of contract. To the contrary, there exist only a multiplicity of competing theoretical approaches, each of which, by its very terms, purports to provide a comprehensive yet distinctive understanding of contract but which, precisely for this reason, is incompatible with the others.

(Peter Benson, "The Unity of Contract Law" in Peter Benson, ed, *The Theory of Contract Law: New Essays* (Cambridge, Cambridge University Press, 2001) 118 at 118).

75 Benson, *Justice in Transactions*, *supra* note 2 at 87–90.

76 Tham, *Understanding Assignment*, *supra* note 3 at 85–87.

77 For cases involving a sub-sale of goods, see e.g. *Mordaunt Brothers v The British Oil and Cake Mills Ltd*, [1910] 2 KBD 502 (Eng); *Hardy & Co v Hillerns and Fowler*, [1923] 2 KB 490 (CA (Eng)); *In re Wait* (1926), [1927] 1 Ch D 606 (CA (Eng)) [*In re Wait*]; *R v Carling Export Brewing and Malting Company* (1931), 2 DLR 545 (JCPC); *Atlantic Potato Distributors Ltd v Meersseman*, 2010 NBCA 50. For cases involving a sub-sale of land, see e.g. *Wilson v Land Security Co*, 1896 CanLII 8 (SCC);

termed a "sub-sale," and the contract to assign rights lies in the precise content of the promise made by the promisor (that is, by the assignor) to the promisee (that is, to the assignee). Rather than promising to convey rights to tangible property once the promisor acquires the rights in question, the promisor is promising to confer upon the promisee the benefit due to the promisor under another contract — whatever that benefit may be. There is no need to even contemplate this transaction as involving a promise to "transfer" or "assign" rights in the strict sense: what the promisor is doing, in such a contract, is making a promise along the lines of "I promise to give you whatever benefit is promised to me from a contract with so-and-so other party, whatever the benefit I am promised by so-and-so other party may turn out to be."

Put differently, the contract to assign rights remains compatible with the privity relation between the original promisor and promisee because the contract to assign rights amounts to an entirely separate contractual arrangement between one of the original parties — the promisee, now acting as promisor — and a third party to whom the benefit due to the promisee under the original contract has been promised. This contract to assign rights in no way alters the contractual relationship between the parties to the original contract, and so raises no privity concerns whatsoever. The contract to assign rights instead imposes an entirely separate obligation on the promisee, now acting as promisor, that happens to reference, and is thus qualified by, the terms of the original contract.[78] In this respect, the contract to assign rights is no different from a contract to sell after-acquired property, or even property that the promisor is almost certain to never acquire. Such a contract is entirely permissible according to the fundamental rules of contract law.[79]

A similar conclusion can be drawn with respect to the concern for maintenance and champerty, which is a second consideration that has historically weighed against the assignment of contractual rights at common law, in addition to the view that contractual rights are too personal to be assigned in a manner equivalent to property.[80] Following this historical concern, it might be thought that the promisee under a contract to assign rights gains a pecuniary interest in that contract being performed, despite not being a party to the transaction as such, and therefore gains an interest in improperly meddling in the relationship between promisor and promisee under the original contract. Can it not be said, then, that the contract to assign rights raises the same public policy concerns as the completed assignment,

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Hoover v Baugh (1908), 108 Va 695 (Sup Ct); *Plainview Farming Co Ltd v Transcontinental Townsite Co Ltd* (1915), 25 Man R 677 (MBKB); *Pittack v Naviede*, [2010] EWHC 1509 (Ch D).

78 This view of the nature of assignment similarly accounts for the possibility of two competing assignments relating to the same contractual rights, as contemplated in the classic case of *Dearle v Hall*, (1828) 38 All ER 475 [*Dearle*]. See also *Snyder's Ltd v Furniture Finance Corp Ltd* (1930), 1 DLR 398 at 407 (ONCA) [*Snyder's Ltd*]; *Shubenacadie Band v Francis* (1995), 144 NSR (2d) 241 (CA) [*Shubenacadie Band*]. *Cf BS Lyle Ltd v Rosher*, [1959] 1 WLR 8 at 14 (HL (Eng)), Cave LJ, Kilmuir LC [*BS Lyle Ltd*]. These cases can be analogized with those in which the same vendor concludes two separate contracts pertaining to the same land or chattels, but with two different respective purchasers. Both contracts are valid and enforceable (provided they comply with the requirements of a valid and enforceable contract) but the party ultimately entitled to claim the property at issue will depend upon the application of the relevant priority rules.

79 As Lewison LJ put it in one English case, "There is no legal impediment to my contracting to sell you Buckingham Palace. If (inevitably) I fail to honour my contract then I can be sued for damages": *Vehicle Control Services Ltd v Revenue and Customs Commissioners*, [2013] EWCA Civ 186 at para 22.

80 See *Torkington*, *supra* note 9 at 433–35, Channell J; *DiGuilo*, *supra* note 47 at 513; *Fredrickson v ICBC*, 1986 CanLII 1066 at paras 46–47 (BCCA) [*Fredrickson*], aff'd 1988 CanLII 38 (SCC). On the history of this second objection, see also Holdsworth, *supra* note 9 at 1019–21.

at least where it "savours" of maintenance or champerty? Does this consideration weighing against the assignment of contractual rights undermine even the possibility of *promising* to assign such rights by way of contract, even if the contract in no way affects the personal bond between the original contracting parties?

This argument ought to be rejected, for two reasons. First, while it is generally recognized that an executory contract can be set aside on public policy grounds, including on account of its being a champertous agreement, a promise to assign the benefits due under another contract falls squarely outside the ambit of this rule, at least as it is now conceived.[81] The legal relationship created by a contract to assign rights is again no different from a contract providing for the sub-sale of goods or land. Although the sub-purchaser under such a contract gains a material advantage from the performance of the initial sale to the sub-vendor, the mere existence of such an advantage does not implicate a form of maintenance or champerty. What is absent, under such a contract, is the conferral of a bare right upon the sub-purchaser, intended to allow the sub-purchaser to intervene directly in the contractual relationship between vendor and initial purchaser, without more. Similarly, a contract to assign rights does not in and of itself allow the promisee to intervene in any eventual litigation between the promisor and promisee under the original contract. True, the promisee has an "interest" or "advantage," conceived in the purely material sense, in the favourable performance of the original contract. But that interest or advantage can hardly be said to "savour" of maintenance or champerty, as the contract to assign rights involves a promise to confer the benefit of another contract upon the promisee, and not a mere promise to grant the promisee a right of action, without more.[82]

Second, even assuming that the public policy exception in question can be taken to apply in some cases to a proper contract to assign rights, this objection is not fatal to the argument advanced here. In contrast to the objection to assignment rooted in the personal nature of a contractual obligation, the effect of such an objection is contingent, rather than strictly required by the concept of a contractual obligation. It does not strictly pertain to the possibility of concluding a contract to assign rights, assuming that an objection based on maintenance and champerty can be formulated against such a contract. A public policy objection of this sort operates at a different level, having to do with the specific arrangements that the parties have concluded and the willingness of courts and other public institutions to recognize and enforce those arrangements. This objection assumes that it is conceptually possible to promise to confer the benefit of another contract, but that the courts should not recognize and enforce such an arrangement where it provides a means by which a stranger to the original contract can unduly influence any eventual litigation between its parties.[83]

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81 *Glegg v Bromley*, [1912] 3 KB 474 at 484 (CA (Eng)), Williams LJ [*Glegg*]; *Trendex Trading Corporation v Credit Suisse* (1981), [1982] AC 679 at 703 (HL (Eng)), Roskill LJ [*Trendex*]; *Fredrickson*, *ibid* at paras 21–24. *Cf Dougherty v Carlisle Transportation Products Inc* (2015), 610 Fed Appx 91 at 93 (Cir Ct) [*Dougherty*].

82 Compare what has been termed an "assignment of a bare cause of action," which is generally considered void for public policy reasons: *Glegg*, *ibid* at 488–89, Fletcher Moulton LJ; *Trendex*, *ibid* at 703, Roskill LJ; *Fredrickson*, *ibid* at paras 21–28. See also *A Unruh Chiropractic Clinic v De Smet Ins Co* (2010), 2010 SD 36 at paras 11, 14 (Sup Ct); *Dougherty*, *ibid* at 93. But see *Margetts v Timmer*, 1999 ABCA 268 at para 12.

83 Such, at least, is the most typical way of conceiving the common law doctrines of illegality and public policy, through which the objections of maintenance and champerty are usually taken to operate: see e.g. Beale, *supra* note 1 at 1244; Farnsworth, *supra* note 2 at 69–70; Fridman, *supra* note 1 at 338; McCamus, *supra* note 1 at 500. I note however that some authors conceive of illegality and public policy

Such, then, is the basis that the contractual argument defended here claims for the assignment of contractual rights in common law legal systems: it is first and foremost a contract or similar form of voluntary obligation by which one person, the promisor, undertakes to confer the benefit of another contract upon the promisee, when the promisor is in receipt of that benefit.[84] This explanation avoids entirely the problems presented by the two accounts canvassed above, while simultaneously providing a normative grounding for the transaction in the well-established principles of contract law. It does not however yet account for the fact that an assignment of contractual rights at least appears to operate as a true and proper *assignment* — which is to say that the assignee appears to hold rights directly in or to the performance of the original contract being assigned. This feature of the law of assignment, I now want to suggest, can be explained through the effects of an order of specific performance as it pertains to this peculiar type of contract.

B. THE EFFECT OF SPECIFIC PERFORMANCE

The argument defended thus far is that the transaction typically styled as an "assignment" of contractual rights in common law legal systems is grounded in a contract to assign rights, by which the assignor promises to confer the benefit of another contract upon the assignee. However, there is more to the legal transaction in question than a mere promise of future performance. As both the legal doctrine and the functional uses to which assignments are put attest, this transaction presents an undeniable proprietary dimension. Some explanation must therefore be given as to why an arrangement that begins as a mere promise to confer the benefit of another contract upon a promisee becomes tantamount to a completed transfer or conveyance of contractual rights. The answer to this problem, I now want to suggest, lies in appealing to the principles underlying equitable remedies, and particularly those underlying the decree of specific performance.

To understand what these principles entail, it is perhaps easiest to begin by drawing an analogy between the promise to assign rights and the "trust" that arises from equity's enforcement of an executory contract for the sale of land, sometimes termed "equitable conversion."[85] With respect to such a contract, a decree of specific performance of course

as operating internally to contract law: see especially Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 249–50.

84 See e.g. *Collyer*, *supra* note 6 at 351, Jessel MR; *Fraser*, *supra* note 6 at 356–57, Duff J, citing *Tailby*, *supra* note 6 at 497, MacNaghten LJ; *Gannon*, *supra* note 6 at 526; *Palette Shoes*, *supra* note 6 at 27, Dixon J; *Canada Trust*, *supra* note 6 at 655–56; *Bibby Factors*, *supra* note 6 at para 29.

85 The usual starting point in English and Commonwealth law is *Lysaght v Edwards* (1876), 2 Ch D 499 (Eng) [*Lysaght*]. But the principle is conceivably much older: see e.g. *Taylor v Stibbert* (1794), 30 ER 713 at 714 [*Taylor*]. It may at one time have applied to the sale of chattels as well, though it is now generally accepted that such contracts do not give rise to a constructive trust, perhaps due to the effects of sale of goods legislation: see e.g. *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd*, [1986] AC 785 at 812–13 (HL (Eng)), Brandon of Oakbrook LJ. But see *Kremikovtzi Trade v Phoenix Bulk Carriers Limited*, 2007 FCA 381 at para 61. *Contra LA Micro Group (UK) Ltd v LA Micro Group Inc*, [2023] EWCA Civ at para 100 (Eng) [*LA Micro Group*]. This principle should generally be distinguished from the true trust that equity will sometimes impose upon the vendor of land or other property in cases where the purchaser has partly or fully paid the promised purchase price: see e.g. *Oughtred v Inland Revenue Commissioners*, [1960] AC 206 at 227–28 (HL (Eng)), Radcliffe LJ; *Chinn v Collins*, [1981] AC 533 at 548 (HL (Eng)), Wilberforce LJ; *Lloyds Bank plc v Carrick*, [1996] 4 All ER 630 at 637–38 (CA (Eng)), Morritt LJ. See also Waters, Gillen & Smith, *supra* note 60 at 282–84.

forces the vendor to perform the promised conveyance of property, on pain of contempt.[86] But more than this, equity's intervention also protects the purchaser's right to that conveyance by constituting the vendor as a bare trustee of the promised property for the purchaser's benefit.[87] The purchaser is taken to hold bare rights to the promised property in equity, even as the full legal title remains vested in the vendor at law until such time as a legal transfer takes place.[88] The result is that the purchaser's right to obtain the promised property from the vendor is protected from third parties even prior to the vendor's performance by means of a formal legal conveyance, save and except from bona fide purchasers for value without notice, who can acquire the property without being affected by the purchaser's equitable right.[89]

As with the decree of specific performance in respect of a contract for the sale of land, the decree of specific performance of a contract to assign rights also involves, above all else, an order compelling the assignor to perform the promise. But equity's intervention to protect the assignee's right to performance can conceivably involve more than simply compelling the assignor to provide the promised benefit to the assignee. In particular, the example provided by the sale of land suggests that equity can and does intervene to treat some classes of executory contract as though these contracts are already performed, in accordance with the fundamental maxim that "equity treats as done that which ought to be done."[90] Applied to the contract to assign rights, such intervention means treating the assignee not as a mere promisee entitled to claim the benefit due under another contract, but *as though* the promisee were a proper assignee of the contractual rights at issue (and thus entitled to bring a suit for damages, among other things, where the original contract has been breached).[91] That the assignor has merely promised to confer the benefit upon the assignee is immaterial from the standpoint of equity, which acts as though a conveyance of that benefit has occurred for the

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86 *Beswick v Beswick*, [1966] Ch D 538 at 566 (CA (Eng)), Salmon LJ, aff'd [1968] AC 58 (HL); *SG & S Investments (1972) Ltd v Golden Boy Foods Inc*, 1991 CanLII 5735 at paras 23–24 (BCCA); *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* (1997), [1998] AC 1 at 12 (HL (Eng)), Hoffman LJ [*Argyll Stores*]; *Stein v Paradigm Mirasol, LLC* (2009), 586 F (3d) 849 at 855–56 (Cir). See also *Despot v Registrar General of NSW*, [2014] NSWSC 1002 at para 48 (Austl).

87 This principle is historically connected to the availability of specific performance: *Cornwall v Henson* (1899), 2 Ch D 710 at 714, Cozens-Hardy J [*Cornwall*], rev'd on other grounds 2 Ch D 298 (CA (Eng)); *Church v Hill*, 1923 CanLII 22 at 647 (SCC), Mignault J [*Church*]; *Buchanan v Oliver Plumbing & Heating Ltd* (1959), 18 DLR (2d) 575 at 579 (ONCA) [*Buchanan*]; *Chang v Registrar of Titles* (1976), 137 CLR 177 at 184 (HC Aust), Mason J [*Chang*]; *Berkley v Poulett*, [1977] 1 EGLR 86 at 93 (CA (Eng)), Stamp LJ [*Berkley*]. See also *LA Micro Group*, *supra* note 85 at para 100.

88 *Lysaght*, *supra* note 85 at 507; *Smith v Ernst* (1912), 22 Man R 363 at 366 (CA), Howell CJM [*Smith*]; *Buchanan*, *ibid* at 579; *Payne v Clark* (1963), 409 Pa 557 at 561 (Sup Ct). See also *Church*, *ibid* at 647–48, Mignault J. *Cf Chang*, *ibid at* 189–90, Jacobs J; *Berkley*, *ibid* at 93, Stamp LJ; *Southern Pacific Mortgages Ltd v Scott*, [2014] UKSC 52 at para 62 [*Southern Pacific Mortgages*].

89 *Taylor*, *supra* note 85 at 714; *Jellett v Wilkie*, 1896 CanLII 49 at 291 (SCC); *Smith*, *ibid* at 369, 375, Perdue JA, Haggart JA; *Gray v Paxton* (1983), 662 P (2d) 1105 at 1107 (Col CA); *Martin Commercial Fueling Inc v Virtanen* (1997), 1997 CanLII 3118 at para 10 (BCCA). *Cf Lake v Bayliss*, [1974] 1 WLR 1073 at 1076 (Ch D). See also *Lysaght*, *ibid* at 508; *Church*, *ibid* at 648–49, Mignault J (such, at least, is the rule normally applicable to equitable interests in property absent statutory modification, which has occurred in many jurisdictions). *Cf Southern Pacific Mortgages*, *ibid* at para 65. On the notice principle and its statutory modification, see also *Pilcher v Rawlins* (1871), 7 Ch App 259 at 268–69 (CA (Eng)), Sir WM James LJ; *Midland Bank Trust Co Ltd v Green* (1981), [1982] AC 513 at 527–28 (HL (Eng)).

90 For an application of the maxim in relation to a decree of specific performance: *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* (1985), [1986] AC 207 at 227 (HL (Eng)), Diplock LJ. *Cf No 151 Cathedral Ventures Ltd v Gartrell*, 2004 BCSC 1232 at paras 22–23. See also *Attorney-General for Hong Kong v Reid* (1993), [1994] 1 AC 324 at 331 (PC).

91 For applications of the same maxim in relation to the assignment of contractual rights: *Tailby*, *supra* note 6 at 497, MacNaghten LJ; *TD Bank v Hayworth Equipment Sales Ltd*, 1985 CanLII 1503 (ABQB), rev'd on other grounds 1987 ABCA 28 [*Hayworth Equipment*]; *Coulter v Chief Constable of Dorset Police*, [2003] EWHC 3391 at para 15 (Ch (Eng)).

purpose of protecting the assignee's right to performance. Where the assignment pertains to a legal chose, such as contractual rights, it does so by allowing the assignee to compel the performance of the original contract by prosecuting a suit in the assignor's name directly against the original promisor.[92]

This justificatory structure accounts for the two peculiar features of the trust that Tham suggests arises from an equitable assignment of contractual rights — that is, for the "bare" nature of the trust that he sees as constituted by an equitable assignment, and the apparent conferral of agency powers upon the assignee in relation to the contractual rights being assigned.[93] As to the "bare" nature of the trust, this is consistent with the view that the trust in question is parasitic upon, and thus exists as a mere accessory to, the contract. Indeed, the trust that arises from a contract for the sale of land has been said to make of the vendor "something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee."[94] The trust in question exists only to protect the purchaser's right to receive performance under the contract of sale.[95] Likewise, on the contractual view of assignment, the "trust" recognized by equity in respect of a contract to assign rights exists to protect the assignee's right to receive the promised performance. It stands to reason that it imposes no administrative obligations on the assignor beyond the bare obligation to confer the promised benefit upon the assignee, because it exists to protect the assignee's right to receive performance under the contract to assign rights, and nothing more.[96]

A similar conclusion can be drawn with respect to Tham's suggestion that an assignment grants agency powers to the assignee. On the account proposed here, no such conferral is strictly necessary for the assignee to have the power to directly compel the enforcement of the original contract *or* to affect the contractual relationship between the original promisor and assignor. Since the effect of equity's intervention is to protect the assignee's right to receive performance under the contract to assign rights, the assignee's power to enforce the original contract or claim damages for its breach is one that arises as a consequence of equity's ability to specifically enforce the contract to assign rights.[97] Where the original promisor has received notice of the assignment, equity allows the assignee to compel the assignor to bring a suit directly against the original promisor, whether by bringing a claim in the name of the assignor (where the assignment is equitable) or in the assignee's own

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92 Thus, the rule, recognized in some cases, that the assignor must necessarily be made a party to a claim enforcing the equitable assignment of a legal chose: *Dell*, *supra* note 47 at 281, Macdonald CJA; *DiGuilo*, *supra* note 47 at 521; *Buhecha v Impact Imaging Ltd*, 2019 BCSC 663 at paras 16–17 [*Buhecha*]. *Cf Three Rivers*, *supra* note 47 at 309, Peter Gibson LJ, citing *Performing Right*, *supra* note 47 at 14, Cave LJ. *Contra Tornquist*, *supra* note 47 at 641. See also the text accompanying notes 45–46.

93 Tham, *Understanding Assignment*, *supra* note 3 at 85–87.

94 *Lysaght*, *supra* note 85 at 506.

95 *Chang*, *supra* note 87 at 189–90, Jacobs J; *Berkley*, *supra* note 87 at 93, Stamp LJ; *Southern Pacific Mortgages*, *supra* note 88 at para 64. See also *Buchanan*, *supra* note 87 at 579, citing *Shaw v Foster* (1872), 5 LRHL 321 at 338, Cairns LJ (contrast the true trust recognized where a purchaser has paid all or part of the purchase price). See also the text accompanying note 84.

96 *Robson v Smith* (1895), 2 Ch D 118 at 124 (Ch (Eng)) [*Robson*]; *Savin Canada Inc v Protech Office Electronics Ltd*, 1984 CanLII 447 at paras 9–11 (BCCA) [*Savin Canada*]; *Hayworth Equipment*, *supra* note 91 at paras 24–31; *Canadian Imperial Bank of Commerce v John Deere Ltd*, 2004 NLCA 47 at paras 17–21 [*John Deere*].

97 *Hayworth Equipment*, *ibid* at para 25, citing *Holroyd v Marshall* (1862), 11 ER 999 at 1007, Westbury LJ. See also *LA Micro Group*, *supra* note 85 at para 100.

name (where the assignment recognized in law).[98] Conversely, the original promisor with notice is bound in equity to confer the benefit of the contract assigned directly to the assignee, and may be compelled to pay a second time where performance is wrongly made to the assignor.[99] Any further defences accrued under the contract against the assignor will also not be opposable to the assignee, once notice has occurred.[100] The effect of notice, in other words, is to effectively place the assignee in the shoes of the assignor, in order to protect the assignee's right to the performance of the contract to assign rights against third parties — whether the original promisor or subsequent assignees of the same rights.[101]

The main difficulty with this line of argument concerns the availability of specific performance, which is generally understood as a subsidiary to the award of damages as a remedy for breach of contract, at least in its equitable form.[102] If the contractual view of assignment is correct, and what is generally termed an assignment of contractual rights results from the effect of equity's intervention to protect the performance due under a contract to assign rights, then why is such protection ostensibly available in most cases? Should the possibility of assigning contractual rights not be "subsidiary," such that the parties attempting to assign rights are unable to do so as a matter of course? In other words, if the assignment of contractual rights arises from equity's intervention to order the specific performance of a contract, should the assignment of contractual rights arise only in *exceptional* cases, and the assignee left to claim against the assignor under common law contract principles (that is, by bringing a contractual claim for damages against the assignor) in all others?[103]

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98 *Bank of Nova Scotia v The Queen* (1961), 27 DLR (2d) 120 at 138 (Exchequer Court of Canada) [*Bank of Nova Scotia*]; *Aldercrest Developments Ltd v Hamilton Co-Axial (1958) Ltd* (1970), 13 DLR (3d) 425 at 429–30 (ONCA) [*Aldercrest Developments*], aff'd 1973 CanLII 28 (SCC); *Morris v Ford Motor Co Ltd*, [1973] 1 QB 792 at 801 (CA (Eng)), Denning MR [*Morris*]. See also *Springfield Fire & Marine Ins Co v Richmond & D R Co* (1891), 48 F 360 at 362 (Cir Ct (SC)) [*Springfield*]; *Vujicic v Estate of Leona Donna MacEachern*, 2022 ABCA 263 at para 80, n 59 [*Vujicic*].

99 *William Brandt's Sons*, *supra* note 35 at 462, MacNaghten LJ; *James Tallcott Ltd*, *supra* note 63 at 596–97, Goddard LJ; *Royal Bank*, *supra* note 43 at 613; *Sayers*, *supra* note 63; *Quality Chiropractic*, *supra* note 63 at 521.

100 *Roxburghe*, *supra* note 25 at 526, James LJ; *Cronkleton*, *supra* note 43 at 173–74; *Warner Bros Records*, *supra* note 43 at 442, Denning MR; *Royal Bank*, *ibid* at 612; *Newfoundland Rebar*, *supra* note 43. See also *LPA* Man, *supra* note 37, ss 31(2), 31(3); *CAA* Sask, *supra* note 37, s 6; *CAA* Yukon, *supra* note 37, s 3; *CAA* NWT, *supra* note 37, ss 3, 4; *CAA* Nunavut, *supra* note 37, ss 3, 4; American Law Institute, *Restatement*, vol 3, *supra* note 2 at 67 (sections 336(2), (4)).

101 On the effect of notice against subsequent assignees: *Dearle*, *supra* note 78; *Snyder's Ltd*, *supra* note 78 at 407; *Warner Bros Records*, *ibid* at 442, Denning MR; *Shubenacadie Band*, *supra* note 78. *Cf BS Lyle Ltd*, *supra* note 78 at 14, Kilmuir LC.

102 *Major v Shepherd* (1909), 18 Man R 504 at 512 (KB); *Argyll Stores*, *supra* note 86 at 9, Hoffman LJ; *Jiro Enterprises Ltd v Spencer*, 2008 ABCA 87 at para 9; *JNS Power & Control Systems Inc v 350 Green LLC* (2014), 624 Fed Appx 439 at 445 (Cir Ct); *Cavendish Square Holding BV v Makdessi*, [2015] UKSC 67 at para 30 (Eng), Neuberger of Abbotsbury, Sumption LJ [*Cavendish Square*]. These limitations do not apply to the common law order mandating the payment of a monetary obligation, which some have regarded as a form of specific performance: see e.g. Stephen A Smith, *Rights Wrongs, and Injustices: The Structure of Remedial Law* (Oxford: Oxford University Press, 2019) at 136.

103 Such a conclusion would of course make many forms of assignment much less useful, if not completely useless, in practice. In particular, the use of the device to provide a security over a person's assets, now expressly contemplated by legislation in most Canadian provinces, would no longer be tenable: see e.g. *Personal Property Security Act*, RSO 1990, c P.10, s 2(a)(ii) [*PPSA* Ont].

This objection is far from fatal, however. On traditional principles, a contract for the sale of land also gives rise to equitable relief in the form of an order of specific performance as a matter of course.[104] This view was, and still is, typically justified by the contention that every individual piece of land is unique, and therefore incapable of being adequately compensated by an order requiring the payment of monetary damages.[105] In other words, while equity will only intervene to require the specific performance of a contract in exceptional cases, where the remedies available at common law are inadequate to truly compensate the purchaser, the nature of the contract for the sale of land is such that equitable intervention will normally, if not almost always, be warranted.

A similar and perhaps even more compelling argument for the general availability of specific performance can be made in respect of the contract to assign rights, for two reasons. First, just as every piece of land is traditionally regarded as unique, so is the particular contract that has been made the object of a contract to assign rights. Under conventional principles, an order of money damages is intended to place the promisee in such a position as to be able to purchase a substitute for the thing or performance due under the contract on the market.[106] While a market for a particular class of contractual rights may well exist, every contract involves a personal bond owed by a *particular* promisor to a *particular* promisee. Even supposing the use of a standard-form contract, that contractual relationship is not fully fungible in the same way as the average chattel, and perhaps not even in the same way as land. Where the assignor promises to confer the benefit of another contract upon the assignee, it therefore matters that the contract subject to the assignment is one that has been concluded by the assignor with *this* original promisor, rather than another.[107]

Second, the assignee's dependence upon the original promisor's performance to receive the promised benefit means that the assignee may not obtain the promised benefit at all, absent a decree compelling the original promisor to give the promised performance directly to the assignee (or allowing the assignee to bring a claim for damages for breach directly against the original promisor). To understand the true extent of the assignee's vulnerability, and the concomitant necessity of equitable protection, it should be recalled that the nature of the promise made by the assignor is one that is along the lines of "I promise to give you whatever benefit is promised to me from a contract with so-and-so other party, whatever the benefit I am promised by so-and-so other party may turn out to be." That last phrase, "whatever the benefit I am promised by so-and-so other party may turn out to be," is crucial, as it signals a qualification on the extent of the assignor's obligation by reference to the

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104 *AMEC Properties Ltd v Planning Research and Systems plc*, [1992] BCLC 1149 at 1156 (CA (Eng)), Mann LJ. *Cf Jerome v Kelly (Her Majesty's Inspector of Taxes)*, [2004] UKHL 25 at para 32, Hoffman LJ [*Jerome*]. *Contra Semelhago v Paramadevan*, 1996 CanLII 209 at paras 20–21 (SCC) [*Semelhago*].

105 *Masai Minerals Limited v Heritage Resources Ltd*, 1979 CanLII 2240 at para 34 (SKQB), aff'd 1981 CanLII 2024 (SKCA); *Semelhago*, *ibid* at 429; *Crafts v Pitts* (2007), 161 Wn (2d) 16 at 25–26 (Sup Ct); *Mungalsingh v Juman*, [2015] UKPC 38 at para 33; *Cavendish Square*, *supra* note 102 at para 30, Neuberger of Abbotsbury, Sumption LJ.

106 *Hinde v Liddell* (1875), 10 QBD 265 at 269 (Eng), Blackburn J; *Caswell v Matthew Moody & Sons, Co*, 1925 CanLII 137 (SKCA); *Jones v Lee* (1998), 126 NM 467 at 471 (CA); *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha*, [2007] UKHL 12 at para 10, Bingham LJ; *SRG Takamiya Co Ltd v 58376 Alberta Ltd*, 2020 ABCA 217 at para 31. See also American Law Institute, *Restatement*, vol 3, *supra* note 2 at 171 (section 360(b)).

107 *Cf Cundy v Lindsay* (1878), [1874–80] All ER Rep 1149 at 1149, Cairns LJ; *Gelhorn Motors Ltd v Yee and Wilcox* (1969), 68 WWR (ns) 259 at 264; *Grand River Enterprises v Burnham*, 2005 CanLII 18848 at para 13 (ONSC); *Shogun Finance Ltd v Hudson*, [2003] UKHL 62 at para 2, Nicholls LJ; *Jans Estate v Jans*, 2020 SKCA 61 at para 35.

performance owed under the original contract. In the language of the English statute, the assignee "takes subject to the equities."[108] As such, the assignee may have no recourse against the assignor where that benefit turns out to be less than it might have been, owing to some action taken, or not taken, by the assignor.[109] Moreover, the absence of equitable intervention would mean, in effect, that the original promisor might discharge the original contractual obligation through performance to the assignor, rather than the assignee.[110] Rather than obtaining the full benefit due under the original contract, the assignee would then be forced to bring a claim against the assignor — a claim that would, in any event, also be constrained by the terms of their own contractual arrangement.

In light of these considerations, it is entirely reasonable, even warranted, to conclude that an award of damages made only against the assignor will not ordinarily be "adequate" to compensate an assignee of contractual rights. To require that the assignee accept an order of damages against the assignor, rather than obtaining performance or redress for breach directly from the original promisor, does not reasonably allow the assignee to obtain substitute performance given the uniqueness of every contractual relationship, even supposing that the measure of damages awarded against the assignor is equivalent to the market value of the assigned contract. Moreover, the extent to which the assignee will be able to claim damages equivalent to the market value of the assigned contract against the assignor is at least partly dependent upon factors that are outside the assignee's control, because under the control of the assignor. Both considerations, though resting on somewhat different rationales, combine to support the conclusion that the assignee should be entitled to equity's assistance for the purpose of enforcing the contract to assign rights.

That said, there remains some sense in which the protection that equity affords to the assignee is discretionary, notwithstanding the uniqueness of every individual contract and the assignee's particular vulnerability under a contract to assign rights. Other limitations on the availability of specific relief, including most notably equity's general refusal to specifically enforce contracts that are *in substance* too personal, are relevant to the relief granted to the assignee.[111] Thus, just as a promise to perform a service or to provide employment is not usually amenable to specific enforcement in equity, so too will a promise to *assign* such a contract generally be unassignable, despite equity's refusal to countenance

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108 *Law of Property Act, 1925*, *supra* note 13, s 136(1). See also *Conveyancing Act* Ont, *supra* note 13, s 53(1); *Conveyancing Act* NSW, *supra* note 13, s 12.

109 Though the assignee may have some recourse where the assignor has warranted that the debts to be assigned exist or are not subject to a prior assignment: *Thurgar v Clarke* (1844), 4 NBR 370 (QB) [*Thurgar*]; *Orion Finance Ltd v Crown Financial Management Ltd* (1994), 2 BCLC 607 at 620 (ChD) [*Orion Finance*]; *Anderson (Re)*, 2012 BCSC 956 at para 5 [*Anderson*].

110 *Cf William Brandt's Sons*, *supra* note 35 at 462, MacNaghten LJ; *James Tallcott Ltd*, *supra* note 63 at 596–97, Goddard LJ; *Royal Bank*, *supra* note 43 at 613; *Sayers*, *supra* note 63; *Quality Chiropractic*, *supra* note 63 at 521.

111 *Whitwood Chemical Company v Hardman* (1891), 2 Ch D 416 at 426–27 (CA (Eng)), Lindley LJ; *Dowsley v British Canadian Trust Company* (1932), 26 Alta LR 393 at 399–400 (CA), Clarke JA; *Garnett v Armstrong* (1977), 83 DLR (3d) 717 at 720 (NBCA); *Price v Strange* (1977), 1 Ch D 337 at 369 (CA (Eng)), Buckley LJ; *Montaner v Big Show Prod, SA* (1993), 620 So 2d 246 at 248; *Hemingway v Desire2Learn*, 2011 ONSC 1286 at para 44. *Cf Hill v CA Parsons & Co Ltd* (1971), 1 Ch 305 at 314 (CA (Eng)), Denning LJ; *Michaels v Red Deer College* (1974), 44 DLR (3d) 447 at 456–57 (ABSC (AD)), aff'd 1975 CanLII 15 (SCC).

the common law's own blanket prohibition on the assignment of contractual rights.[112] The rationale that underlies this prohibition is in fact the mirror image of the rationale that can be seen to underlie the general availability of specific relief in this context: that is, while it matters to the assignee that the contract assigned is one that was concluded with *this* original promisor, rather than another, it also matters in some cases to the original promisor that the contract was made with *this* promisee, and not the assignee. In other words, equity's refusal to enforce an assignment of a contract deemed "too personal" is that doing so would in effect amount to forcing the original promisor to perform in favour of a party to whom the original promisor would have never made the promise at issue.[113] This rationale, too, can be seen as an extension of the general principles applicable to the specific enforcement of contracts. It involves a particular application of equity's general refusal to specifically enforce certain kinds of contractual obligations on the grounds that it would be inequitable to do so.

IV. CONTRACT AND THE LAW OF ASSIGNMENT

Taken together, the arguments just outlined support the conclusion that the law of assignment in common law legal systems can be understood, and is perhaps best understood, as grounded in the effects of equity's intervention to ensure the performance of a contract or similar voluntary obligation to assign rights. On this account, an assignment of contractual rights does not amount to a straightforward conveyance of contractual rights, in the manner suggested by the conveyance view, nor is it a proper trust relationship, as suggested by the trust conception of assignment. Rather, an assignment rests on a future undertaking to assign the benefit of another contract, which equity "treats as done" for the purpose of protecting the promisee's right to performance. To the extent that this intervention can be said to give rise to a "trust," then the trust in question is parasitic upon, and therefore amounts to a mere accessory to, the underlying contract to assign rights. It exists for the sake of the contract, and not as a stand-alone trust obligation.

The question that remains to be answered now, in the last part of my argument, is whether this account of the law of assignment is compatible with the particular instances in which contemporary common law legal systems will recognize a valid assignment (or, if my argument is correct, an "assignment") of contractual rights. I begin with the easiest case, which on some accounts was the only form of assignment traditionally recognized in equity, effective where the assignee has provided consideration to the assignor for the assignor's

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112 See *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*, [1902] 2 KB 660 at 669–70 (CA (Eng)), Colins MR [*Portland Cement*], aff'd [1903] AC 414 (HL (Eng)); *Royal Financial Insurance Limited (in Liquidation) v National Biscuit and Confection Company Limited*, [1933] 1 WWR 43 (BCSC) [*Royal Financial*]; *Nokes v Doncaster Amalgamated Collieries Ltd*, [1940] AC 1014 at 1018–19 (HL (Eng)), Simon LC [*Nokes*]; *Fisher v Rosenberg* (1960), 67 Man R 336 at 338 (QB); *Fredrickson*, *supra* note 80 at 43–47; *Pacific Brands*, *supra* note 1 at para 67. *Cf Symphony Diagnostic Services No 1 v Greenbaum*, 828 F (3d) 643 at 646–48 (Cir Ct).

113 *Portland Cement*, *ibid* at 669–70, Colins MR; *Royal Financial*, *ibid*; *Nokes*, *ibid* at 1018–19, Simon LC; *Pacific Brands*, *ibid* at paras 32, 67. *Cf Goode v Buro*, 1913 CanLII 168 at para 4 (SKKB). This rationale can also be seen to account for the refusal to enforce an assignment in the presence of an anti-assignment clause: *Linden Gardens*, *supra* note 26 at 103, Browne-Wilkinson LJ; *Brio Beverages (BC) Inc v Koala Beverages Ltd*, 1998 CanLII 6495 (BCCA). But see e.g. *PPSA* Ont, *supra* note 103, s 40(4) (on the contractual view defended here, the presence of such a clause ought to be treated as an indication that the original promise was made to the promisee, personally, and would not have been made to a third party). *Cf* Benson, *Justice in Transactions*, *supra* note 2 at 88.

assignment of contractual rights or similar legal chose in action.[114] I then turn to the more difficult part of my demonstration, which concerns the two other forms of assignment recognized in most contemporary common law legal systems, namely the legal assignment of contractual rights, and the gratuitous assignment in equity.[115] Whereas the equitable assignment for consideration can be seen to arise from a straightforward contractual relationship, the "contractual" nature of the latter two classes of assignment is less obvious, and therefore warrants closer scrutiny.

A. EQUITABLE ASSIGNMENTS FOR CONSIDERATION

As just noted, the only form of assignment that may have been traditionally recognized in equity was the assignment arising from the assignee's provision of consideration to the assignor in exchange for the assignment of contractual rights or a similar legal chose in action. Given the provision of consideration, this form of assignment can easily be seen to overlap with a proper, legally binding contractual relationship between the same parties. Equity will then treat this contract as "done" once such intervention becomes possible.[116] As Justice Dixon put it in *Palette Shoes Pty. Ltd. v. Krohn*, an Australian High Court decision that pertained to a purported assignment of future rights:

> As the subject to be made over does not exist, the matter primarily rests in contract. Because value has been given on the one side, the conscience of the other party is bound when the subject comes into existence, that is, when, as is generally the case, the legal property vests in him. Because his conscience is bound in respect of a subject of property, equity fastens upon the property itself and makes him a trustee of the legal rights of ownership for the assignee.[117]

As this excerpt suggests, equity's intervention in these cases can be understood to proceed directly from the assignee's provision of value (that is, valuable consideration in the form of a promise) to the assignor in exchange for the assignment. It is "[b]ecause value has been given on the one side" that "the conscience of the other party is bound."[118] This principle is entirely in line with those that traditionally underlie equitable relief in contract law more generally. For instance, the acquisition by a purchaser of land of an equitable interest in the land from the moment of formation has historically been tied to the availability of specific

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114 *Glegg*, *supra* note 81 at 486, Fletcher-Moulton LJ; *Curtis v Langrock* (1922), 17 Alta LR 160 at 167 (CA), Stuart JA (Justice Hyndman's opinion appears at 185–86; Justice Clarke's opinion appears at 190–91) [*Curtis*]; *Holt*, *supra* note 6 at 12; *Morton v Rogers* (1973), 514 P (2d) 752 at 756–57 (Ariz CA) [*Morton*]; *Gee v Gee* (1973), 37 DLR (3d) 155 at 158–60 (SKQB) [*Gee*]. *Cf In re Westerton*, [1919] 2 Ch D 104 at 111 (Ch (Eng)) [*In re Westerton*]; *Grant v Morgan*, 1924 CanLII 86 at paras 6–12 (SKCA), Lamont JA [*Grant*]. On the historical controversy concerning the extent to which equity would recognize an assignment without the provision of consideration: see also LA Sheridan, "Informal Gifts of Choses in Action" (1955) 33:3 Can Bar Rev 284.

115 For legal assignments recognized through statute, see e.g. *Law of Property Act, 1925*, *supra* note 13, s 136(1); *Conveyancing Act* Ont, *supra* note 13, s 53(1); *Conveyancing Act* NSW, *supra* note 13, s 12; *LPA* Man, *supra* note 37, s 31(1). For gratuitous assignments in equity: *Holt*, *supra* note 6 at 12–13; *Sanderson v Halstead* (1968), 67 DLR (2d) 567 at 573–74 (ON H Ct J) [*Sanderson*]; *Law Society of Upper Canada v Mazzucco*, 2009 CanLII 30679 at paras 20–21 (ONSC) [*Mazzucco*]. *Cf In re Rose*, [1949] 1 Ch D 78 at 89 (Ch (Eng)) [*In re Rose*], aff'd [1952] Ch D 499 (CA (Eng)). See also *Dickson v Chamberland* (1927), 22 Alta LR 393 at 406–407 (CA), Beck JA, dissenting [*Dickson*].

116 *Collyer*, *supra* note 6 at 351, Jessel MR; *Fraser*, *supra* note 6 at 356–57, Duff J, citing *Tailby*, *supra* note 6 at 497, MacNaghten LJ; *Gannon*, *supra* note 6 at 526; *Palette Shoes*, *supra* note 6 at 27, Dixon J; *Holt*, *supra* note 6 at 5; *Canada Trust*, *supra* note 6 at 655–56; *Bibby Factors*, *supra* note 6 at para 29.

117 *Palette Shoes*, *ibid* at 27, Dixon J.

118 *Ibid*.

performance on the contract.[119] Conversely, the absence of value provided by the promisee is historically understood to disentitle the promisee to a decree of specific performance. On the traditional view, equity will even refuse to enforce a contract concluded under seal — which is to say, where the contract is concluded in a form that the common law recognizes as binding, but without valuable consideration moving from the promisee.[120]

Where the assignment is made for consideration, both the effects that equity can be seen to attribute to a contract to assign rights and the underlying structure and justification offered for equity's intervention thus mirror those of equity's intervention in respect of a contract to sell land. Equity intervenes in these cases because the assignee has provided value for the assignor's promise to assign rights under another contract, such that the assignor is bound in conscience to provide the promised performance, over and above the assignor's strictly legal obligation to do so.[121] *A contrario*, one might expect equity to withhold such relief where the assignee has *not* provided any value in exchange for the promise to assign rights. Certainly, this may have been the historical position of equity in respect of bare promises to assign rights, prior to the introduction of assignments effective at law.[122] While this position should now be qualified to some extent, the assignment made for value still represents the central case of assignment in equity and perhaps the central case of assignment recognized in common law legal systems writ large. Other forms of assignment operate by analogy to the equitable assignment enforced due to the assignee's provision of value to the assignor.

These qualifications aside, the equitable assignment for consideration also remains the only form of assignment that can operate in respect of future contractual rights, owing to its being grounded in a contract to assign rights that is enforceable at common law prior to the acquisition by the assignor of the contractual rights to be assigned to the assignee.[123] This too is consistent with the structure and justification of equity's intervention in respect of contracts of sale. In the context of a sale of goods, in particular, specific performance is generally unavailable until such time as the goods are acquired by the vendor and sufficiently ascertained to be capable of delivery and conveyance to the purchaser.[124] Until that time, the relationship between the parties remains exclusively contractual. Likewise, in the case of an equitable assignment for consideration, it is only once the assignor has "acquired" the rights that are to be assigned that equity "fastens upon the property itself," and the contract to

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119 *Cornwall*, *supra* note 87 at 714, Cozens-Hardy J; *Church*, *supra* note 87 at 647, Mignault J; *Buchanan*, *supra* note 87 at 579; *Chang*, *supra* note 87 at 184, Mason J; *Berkley*, *supra* note 87 at 93, Stamp LJ. See also *LA Micro Group*, *supra* note 85 at para 100.

120 *Wycherley v Wycherley* (1763), 28 Eden 864 (Ch (Eng)); *Groves v Groves* (1829), 148 ER 1136 (Exch (Eng)); *Re D'Angibau* (1880), 15 Ch D 228 (CA (Eng)); *Bank of British North America v Sturdee* (1894), 32 NBR 398 at 409 (KB); *Nevill v Pryce*, [1917] 1 Ch D 234 (Ch (Eng)); *Northland Drug Company Limited v Maguire*, [1933] 3 WWR 82 (MBKB); *Cravide v Nielsen*, [1998] OJ No 829 (Ct J (GD)) (a similar rule may have historically applied in respect of contracts concluded for nominal considerations as well). *Cf Mountford v Scott*, [1975] 1 Ch D 258 (CA (Eng)).

121 *Collyer*, *supra* note 6 at 351, Jessel MR; *Tailby*, *supra* note 6 at 497, MacNaghten LJ; *Palette Shoes*, *supra* note 6 at 27, Dixon J. See also *Performing Right*, *supra* note 47 at 17, Finlay LJ.

122 *Glegg*, *supra* note 81 at 486, Fletcher-Moulton LJ; *Curtis*, *supra* note 114 at 287, Stuart JA (Hyndman JA's opinion appears at 185–86; Clarke JA's opinion appears at 190–91); *Holt*, *supra* note 6 at 12; *Morton*, *supra* note 114 at 756–57; *Gee*, *supra* note 114 at 158–60.

123 *Holt*, *ibid* at 5; *Canada Trust*, *supra* note 6 at 655–56; *Rawlings, Sumner, Tilson Electric Ltd v Commercial Courts of London Ltd* (1980), 121 DLR (3d) 655 at 662–63 (ONSC) [*Commercial Courts of London*]; *Bibby Factors*, *supra* note 6 at para 29.

124 See e.g. *Sale of Goods Act*, RSO 1990, c S.1, s 50; *Sale of Goods Act 1979* (UK), 1979, c 54, s 52. See also *In re Wait*, *supra* note 77 at 630, Atkin LJ; *Newton v Manitoba Pulp and Paper Company Ltd* (1929), 38 Man R 378 at 382–83 (CA), Fullerton JA (Trueman JA's opinion is at 387, 390). *Cf Re BA Peters plc*, [2008] EWHC 2205 at paras 63–65 (Ch (Eng)).

assign can become a complete assignment.[125] But because the assignee has provided value to the assignor, in the form of consideration in exchange for the assignor's promise to assign, the parties' relationship nonetheless "rests in contract" until such time as "the legal property vests in him."[126] This contract, a contract by which the assignor promises to assign rights to the assignee in exchange for consideration on the part of the assignee, is the basis on which equity intervenes once the assignor's promised performance becomes possible. That is, the contract is the basis on which equity orders specific performance once the assignor has acquired the rights that the assignor has promised to assign to the assignee.[127]

In this way, equity's intervention in relation to an assignment of contractual rights remains fundamentally compatible with the maxim *nemo dat quod non habet*, according to which none may transfer greater rights than one holds at the moment the transfer is made.[128] The assignee's provision of value means that the assignor is bound in contract to assign the benefit of another contract to the assignee, even where equity's intervention is not yet forthcoming.[129] That obligation is potentially answerable in damages against the assignor, at least where the assignor has warranted the existence of the rights to be assigned or the absence of any prior assignment.[130] However, it cannot yet be enforced through a decree of specific performance, since the actual conferral of any benefit upon the assignee is impossible until the assignor has acquired rights under the contract to be assigned. Equity has not yet intervened, and indeed cannot intervene, to treat this promise as a completed assignment until such time as the assignor has acquired the rights at issue and an "assignment" of those rights becomes possible.

B. LEGAL AND GRATUITOUS EQUITABLE ASSIGNMENTS

In contrast with equitable assignments for consideration, both legal assignments and gratuitous assignments recognized in equity present a particular challenge for the contractual account of assignment developed in this article, for two interlocking reasons. First, and unlike equitable assignments for consideration, these transactions ostensibly involve an entirely gratuitous or at least unilateral assignment of contractual rights, under which the assignee is allowed to bring a claim against the original promisor without providing value in exchange. On the generally accepted view of what constitutes a contract at common law, there is simply no contract (or no legally enforceable contract) in these cases.[131] Where there

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125 *Palette Shoes*, *supra* note 6 at 27, Dixon J. See also *Collyer*, *supra* note 6 at 351, Jessel MR; *Holt*, *supra* note 6 at 5; *Canada Trust*, *supra* note 6 at 655–56; *Commercial Courts of London Ltd*, *supra* note 123 at 662–63; *Bibby Factors*, *supra* note 6 at para 29.

126 *Palette Shoes*, *supra* note 6 at 27, Dixon J.

127 *Ibid*; *Collyer*, *supra* note 6 at 351, Jessel MR; *Commercial Courts of London*, *supra* note 123 at 662–63.

128 *Coba Industries Ltd v Millie's Holdings (Canada) Ltd*, 1985 CanLII 144 at 18 (BCCA); *Petrosar*, *supra* note 25 at 740; *Libra Bank plc v Financiera De La Republica SA*, [2002] EWHC 821 at para 127 (Ch (Eng)); *Green v Green*, 2015 ONCA 541 at para 53; *Bibby Factors*, *supra* note 6 at para 36; *Bank of Montreal v Mason*, 2018 ABQB 161 at para 13. *Cf Jerome*, *supra* note 104 at paras 35–37, Walker LJ.

129 *Collyer*, *supra* note 6 at 351, Jessel MR; *Palette Shoes*, *supra* note 6 at 27, Dixon J; *Commercial Courts of London*, *supra* note 123 at 662–63.

130 *Collyer*, *ibid*. See also *Thurgar*, *supra* note 109; *Orion Finance*, *supra* note 109 at 620; *Anderson*, *supra* note 109 at para 5.

131 The generally accepted definition follows Blackstone's formulation, according to which a contract is "an agreement, *upon sufficient consideration*, to do or not to do a particular thing": Blackstone, *supra* note 5 at 299 [emphasis added]. There are of course several exceptions to the consideration requirement, perhaps the most important of which is the promise concluded under seal: *Friedmann Equity Developments Inc v Final Note Ltd*, 2000 SCC 34 at para 20; The American Law Institute, *Restatement of the Law Second: Contracts*, vol 2 (St. Paul, Minn: American Law Institute, 1981) at 260 (section

is a legal assignment of a legal chose in action, such as a right arising out of a prior contract, the assignee is simply and directly empowered to bring a claim against the original promisor, without having to provide consideration.[132] Where there is a gratuitous equitable assignment of a legal chose, such as a contractual right, the assignee can instead force the assignor to join the proceedings for the purpose of enforcing the assignment, again without providing consideration, just as is the case where an equitable assignment is made for consideration.[133]

Second, in addition to their unilateral nature, both legal and gratuitous equitable assignments present problems for the contractual account defended in this article because they appear to involve an immediate conveyance or transfer of contractual rights, rather than resting upon an executory promise of the kind implied by the notion of a "contract to assign rights." As Gregory Tolhurst puts it, "[t]here is nothing akin to the 'contract analysis' … appearing in the cases concerning statutory assignments to complicate the picture."[134] The same can just as easily be said of the cases involving gratuitous equitable assignments. As the cases pertaining to the assignment of future rights confirm, the absence of consideration means that there is no underlying contract between the parties, and thus no basis on which equity can intervene once the rights to be assigned are acquired by the assignor. There is no executory contract, or at least no enforceable executory contract, that underlies a gratuitous equitable assignment, and so such an assignment is strictly speaking impossible where the rights purportedly assigned are future rather than present rights.[135]

In each of these respects, legal assignments and gratuitous equitable assignments thus appear to mirror the structure of the executed gift of tangible property completed by delivery, rather than the structure of a contract.[136] Indeed, these forms of assignment have frequently been treated as a kind of gift.[137] Both legal and gratuitous equitable assignments thus appear at odds with the claim defended in this article, according to which the normative grounding of the law of assignment is to be found in a contract to assign rights concluded between an assignor and an assignee. This contractual account assumes that the transaction known as an "assignment" of contractual rights in common law jurisdictions is an executory one, not an immediate conveyance of rights.[138] It also assumes that the assignee's provision of value serves not only to justify the validity of the underlying contract, but also equity's intervention to treat the executory promise to assign the benefit of another contract as a completed

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95(1)) [American Law Institute, *Restatement*, vol 2].

132 *In re Westerton*, *supra* note 114 at 111–12; *Holt*, *supra* note 6 at 12–13.

133 *William Brandt's Sons*, *supra* note 35 at 461, MacNaghten LJ; *Dell*, *supra* note 47 at 281, Macdonald CJA; *Sanderson*, *supra* note 115 at 573–74; *Gaumont*, *supra* note 9 at paras 23–25; *Watson*, *supra* note 35; *Mazzucco*, *supra* note 115 at paras 20–21; *Buhecha*, *supra* note 92 at paras 16–17.

134 Tolhurst, *supra* note 2 at 99.

135 See *Collyer*, *supra* note 6 at 351, Jessel MR; *Palette Shoes*, *supra* note 6 at 27, Dixon J; *Holt*, *supra* note 6 at 5; *Canada Trust*, *supra* note 6 at 655–56; *Commercial Courts of London Ltd*, *supra* note 123 at 662–63; *Bibby Factors*, *supra* note 6 at para 29.

136 *Cochrane v Moore* (1890), 25 QBD 57 at 76 (CA (Eng)): As Lord Escher put the point in a still-leading case, a gift is:

> [A] transaction begun and completed at once. It is a transaction consisting of two contemporaneous acts, which at once complete the transaction, so that there is nothing more to be done by either party. The act done by the one is that he gives; the act done by the other is that he accepts. These contemporaneous acts being done, neither party has anything more to do.

See also Blackstone, *supra* note 5 at 299.

137 *Glegg*, *supra* note 81 at 486, Fletcher-Moulton LJ; *In re Westerton*, *supra* note 114 at 109–10; *Dickson*, *supra* note 115 at 406–407, Beck JA, dissenting; *Sanderson*, *supra* note 115 at 570; Sheridan, *supra* note 114.

138 *Contra* Farnsworth, *supra* note 2 at 67–69.

assignment.[139] Neither of these features appears to be present in a legal or gratuitous equitable assignment.

Two potential compromise solutions are conceivable in light of this difficulty, though both are ultimately unsatisfactory for similar reasons. The first involves treating the contractual account of assignment as a proper account of equitable assignments for consideration, while holding that legal and gratuitous equitable assignments should be explained on the basis of a distinct principle, whether drawn from the conveyance or trust views considered above.[140] The second potential compromise solution instead involves an appeal to the effects of statute, which is conceivable at least in those jurisdictions that have come to recognize legal and gratuitous equitable assignments through this avenue.[141]

The first compromise solution, involving the recognition of a differing normative grounding for equitable assignments for consideration, on the one hand, and legal and gratuitous equitable assignments, on the other, requires that we discount the problems with both the conveyance and trust conceptions of assignment already highlighted in the first part of this article.[142] In particular, the various doctrines that highlight the personal nature of a contractual obligation undermine the possibility of treating contractual rights as a mere "thing" to be assigned like any other form of property. This objection applies to legal and gratuitous equitable assignments just as much as it does to the more traditional equitable assignment for consideration. Likewise, the solutions proposed by proponents of both the conveyance and trust views of assignment are just as unsatisfactory in respect of these forms of assignment as they are in respect of equitable assignments for consideration.[143]

The second possible compromise solution, which rests on an appeal to the bare authority of statute, is also unsatisfactory. Indeed, it involves yet another instance of special pleading: instead of offering a justification for the possibility of assigning contractual rights, it merely appeals to the authority of the relevant lawmaker to account for a transaction that otherwise appears entirely at odds with established principle.[144] Evidently, it is possible for legislators to intervene in private law, including to alter the conditions under which the law will recognize an effective assignment of contractual rights.[145] Yet any such intervention ought to be supported by, or capable of being supported by, reasons.[146] These reasons should ideally be coherent with, because a reasonable modification of, the basic principles of the

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139 *Collyer*, *supra* note 6 at 351, Jessel MR; *Tailby*, *supra* note 6 at 497, MacNaghten LJ; *Palette Shoes*, *supra* note 6 at 27, Dixon J. See also *Performing Right*, *supra* note 47 at 17, Finlay LJ.

140 An approach that Andrew Tettenborn appears to adopt: Tettenborn, *supra* note 5 at 271–72.

141 Although all jurisdictions appear to have originally recognized legal assignments through this avenue, American law now tends to view contractual rights as assignable in law without reference to any particular statutory enactment: see the text accompanying note 11.

142 Parts I.A and I.B, above, respectively.

143 See the text accompanying notes 33, 56.

144 *Contra* McFarlane & Stevens, *supra* note 5 at 207–208; Alan Beever, "Policy in Private Law: An Admission of Failure" (2006) 25:2 UQLJ 287 at 287.

145 Other well-known examples are: *Statute of Uses* (UK), 27 Hen VIII, c 10; *Statute of Frauds* (UK), 1677, 29 Car II, c 3; *Sale of Goods Act, 1893* (UK), 56 & 57 Vict, c 71.

146 For an argument regarding the reasoned nature of legislative activity: Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012).

common law that serve as the background against which the statute is intended to operate.[147] The assertion that an assignment is possible because the legislature has made it so on pragmatic grounds hardly satisfies these criteria, at least without more.

These conclusions bring us back to the contractual account of assignment as a potential explanation and justification for the operation of legal and gratuitous equitable assignments, notwithstanding the difficulties already highlighted. In reality, these difficulties are not insurmountable, provided that one conceives of both types of assignment as resting upon a promise to which equity — and only equity — can serve to give effect. The proper analogy here is thus not to the bare trust imposed by equity upon a legally binding contract of sale, as it was in the case of equitable assignments for consideration. Rather, the proper analogy is to another equitable doctrine that can be seen to apply specifically to legally unenforceable promises to convey land: proprietary estoppel.[148] Under that doctrine, equity will intervene to treat a promise (or representation, or assurance) pertaining to a conveyance of property as though it were a completed conveyance, provided that the transferee has reasonably relied upon the promise to the transferee's detriment.[149] That the promise made in these cases is not legally enforceable as a contract does not prevent equity from intervening most notably to treat a promise to convey land as a completed conveyance.[150]

As with the doctrine of proprietary estoppel, according to which equity enforces a gratuitous promise to convey property, a gratuitous equitable assignment can also be understood to rest upon a promise to confer the benefit of a legally enforceable contract upon an assignee. Following the principles just outlined, it is not entirely aberrant that equity can enforce such a promise, even where the promise does not amount to a legally enforceable contract. The key question is whether "conscience" mandates such an intervention, which in this context is usually taken to mean that the assignor did all that was possible to complete the assignment, and the assignee would therefore suffer some inequity if the attempted assignment were not given effect.[151]

A similar argument can be made in respect of legal assignments, which, as mentioned above, have often been cast as a mere "procedural" modification of the rules applicable to equitable assignments.[152] The idea here is that the recognition of legal assignments has not derogated in any meaningful way from the rules applicable to equitable assignments. These rules continue to apply, and to govern, legal assignments as well.[153] It is thus possible to

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147 As reflected in the interpretive presumption that statute does not alter the common law: see e.g. *Attorney-General v De Keyser's Royal Hotel Ltd*, [1920] AC 508 at 542 (HL (Eng)); *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42 at paras 38–40; *Heritage Capital Corp v Equitable Trust Co*, 2016 SCC 19 at para 29; *Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp*, 2020 SCC 29 at paras 39, 44.

148 *Thorner v Major*, [2009] UKHL 18 at para 29 [*Thorner*]; *Cowper Smith v Morgan*, 2017 SCC 61 at paras 15–16 [*Cowper-Smith*]. *Cf Walton Stores (Interstate) Ltd v Maher* (1988), 164 CLR 387 (HCA) [*Walton Stores*]; American Law Institute, *Restatement*, vol 2, *supra* note 131 at 242 (section 90(1)).

149 *Thorner*, *ibid*; *Cowper Smith*, *ibid*. See also *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 at paras 15–16. *Cf Walton Stores*, *ibid*; American Law Institute, *Restatement*, vol 2, *ibid*.

150 *Cowper Smith*, *ibid* at para 17. *Cf Walton Stores*, *ibid*; American Law Institute, *Restatement*, vol 2, *ibid*.

151 *Donaldson v Donaldson* (1854) 69 ER 303 at 306–307 (Ch); *In re Rose*, *supra* note 115 at 89. *Cf Grant*, *supra* note 114 at 1166–67, Lamont JA; *Gaumont*, *supra* note 9 at para 24; *Watson*, *supra* note 35. See also American Law Institute, *Restatement*, vol 3, *supra* note 2 at 55 (section 332(4)).

152 See the text accompanying notes 46–47.

153 *Gaumont*, *supra* note 9 at para 24; *Simpson*, *supra* note 40 at para 8; *Pythe*, *supra* note 40 at para 23.

conceive of legal assignments as operating on the basis of the same principles as gratuitous equitable assignments. That is, they too can be seen to involve a promise to confer the benefit of a contract upon the assignee, which equity will enforce where "conscience" demands it.[154] The only difference is that compliance with the full requirements applicable to a legal assignment means that the assignee can bring a claim against the original promisor without joining the assignor as a party to the proceedings, even where the purported assignment pertains to a legal chose in action such as the rights arising out of a contract.[155]

Put differently, the contractual account of assignment defended in this article provides a normative grounding for the possibility of assigning contractual rights through a gratuitous equitable assignment or a legal assignment provided that the "contractual" basis claimed for these transactions is not construed in a way that is strictly limited to those types of contract recognized at common law. Admittedly, this grounding is somewhat tenuous. Proprietary estoppel is a highly controversial doctrine in its own right.[156] But the analogy proposed here still offers a justification of some kind for the possibility of completing an assignment in this way, notwithstanding the apparent bar presented by such doctrines as privity of contract. This justification has the added virtue of cohering with the manner in which equity intervenes in the real property context, and, perhaps, in relation to promises to convey goods as well.[157] It is also a justification that appears to be consistent with the *resistance* that continues to arise with respect to gratuitous assignments in some jurisdictions.[158] Indeed, on this account, the real difficulty with gratuitous equitable assignments is that they are but one set of cases where equity controversially enforces promises that are not recognized as contracts at common law. Perhaps the better position is that equity should simply not enforce gratuitous promises to assign rights, for the same reason that it should refrain from enforcing such promises in relation to land, or indeed refrain from enforcing gratuitous promises generally.[159] But that is not the present state of the doctrine in most jurisdictions.

Finally, it should also be noted that this account of legal and gratuitous equitable assignments has the advantage of explaining the doctrinal particularities of these classes of

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154 Compare Tham's view that the effect of the English statute is to complete a proper transfer of only those entitlements which the statute specifically references (that is, "(a) the legal right to such debt or thing in action; (b) all legal and other remedies for the same; and (c) the power to give a good discharge for the same without the concurrence of the assignor") while leaving the underlying trust intact: Tham, *Understanding Assignment*, *supra* note 3 at 327.

155 See *Dell*, *supra* note 47 at 281, Macdonald CJA. *Cf Performing Right*, *supra* note 47 at 14, Cave LJ (Finlay LJ's opinion is at 18); *Three Rivers*, *supra* note 47 at 309, Gibson LJ. *Contra Tornquist*, *supra* note 47 at 641.

156 For a recent critique of "proprietary estoppel" as a stand-alone cause of action: Robert Stevens, *The Laws of Restitution* (Oxford: Oxford University Press, 2023) at 276–87.

157 On the potential application of proprietary estoppel to promises pertaining to chattels as well as land, see e.g. *In re Goldcorp Exchange* (1994), [1995] 1 AC 74 at 92 (PC Austl); *Thorner*, *supra* note 148 at paras 48, 66, Walker LJ; *Cowper Smith*, *supra* note 148 at paras 21–22.

158 A controversy acknowledged in *Mazzucco*, *supra* note 115 at paras 20–21. See also *Glegg*, *supra* note 81 at 486, Fletcher-Moulton LJ; *Curtis*, *supra* note 114 at 167, Stuart JA (Hyndman JA's opinion appears at 185–86; Clarke JA's opinion appears at 190–91); *Holt*, *supra* note 6 at 12; *Morton*, *supra* note 114 at 756–57; *Gee*, *supra* note 114 at 158–60. *Cf In re Westerton*, *supra* note 114 at 113–14; *Grant*, *supra* note 114 at 1166–67, Lamont JA; Sheridan, *supra* note 114.

159 In this respect, the recognition of gratuitous assignments is subject to the same critique that Robert Stevens directs to the doctrine of proprietary estoppel as a stand-alone cause of action: Stevens, *supra* note 156 at 276–87. See also the differing approaches adopted in different jurisdictions in respect of equity's enforcement of promises made other than in relation to the transfer of land (namely, in respect of the use of promissory estoppel as a stand-alone cause of action): *Cowper Smith*, *supra* note 148 at para 17; *Walton Stores*, *supra* note 148; American Law Institute, *Restatement*, vol 2, *supra* note 131 at 242 (section 90(1)); *Rosas v Toca*, 2018 BCCA 191 at paras 40–48.

transaction, over and above the provision of a normative grounding for their operation. Like the equitable assignment for consideration, both legal and gratuitous equitable assignments effectively constitute the assignor as a "bare" trustee of legal rights, such as contractual rights, that form the object of the assignment.[160] Both also confer upon the assignee the sole power to compel the enforcement of the assignment, at least once notice has been given.[161] The only substantial difference between equitable assignments for consideration, on the one hand, and legal and gratuitous equitable assignments, on the other, is that the assignee has not provided any value in exchange for the assignment in the latter two cases. This difference is important, as it means that there is no binding contract that might ground equity's intervention in respect of legal and gratuitous equitable assignments, and thus obligate the parties until such time as equity's intervention becomes possible.[162] But this difference is not fatal to the contractual account of these transactions, for the reasons just mentioned.

Taken together, these arguments suggest that both legal and gratuitous equitable assignments of legal choses in action, such as contractual rights, are best understood as resting in promises that equity will enforce once the requirements of equitable intervention are met. That equity intervenes in such cases is by no means exceptional, nor does the lack of a legally enforceable contract undergirding this intervention hamper the essentially contractual (or "contractual") reading of these transactions. After all, the same limitations identified with respect to the conveyance and trust views of assignment apply to legal and gratuitous equitable assignments, including most notably the limits arising out of their failure to truly account for the exceptional nature of an assignment relative to the doctrine of privity of contract.[163] So long as the relationship between the original promisor, the assignor and the assignee remains consistent with the model provided by the equitable assignment for consideration, then the same essentially contractual reading of these transactions offers the best possible explanation and justification for their operation.

V. CONCLUSION

As I have argued above, conventional accounts of what the common law legal tradition terms an "assignment" of contractual rights fail to advance a plausible normative grounding for this class of transaction. While these accounts purport to respond to the traditional objections to the possibility of assigning contractual rights, they do so in a manner that merely posits the existence of exceptions to the personal nature of contractual obligations, without accounting for why the apparent exception that is the law of assignment should be admitted. In the case of the conveyance view, this difficulty is further compounded by its apparent inability to account for the bulk of the rules that govern the assignment of contractual rights, which continue to operate according to equitable rather than legal principles.[164]

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160 *Robson*, *supra* note 96 at 124; *Savin Canada*, *supra* note 96 at 227–38; *Hayworth Equipment*, *supra* note 91 at paras 24–31; *John Deere*, *supra* note 96.

161 *Bank of Nova Scotia*, *supra* note 98 at 138; *Aldercrest Developments*, *supra* note 98 at 429–30; *Morris*, *supra* note 98 at 801, Denning LJ. See also *Springfield*, *supra* note 98 at 362; *Vujicic*, *supra* note 98 at para 80, n 59.

162 *Collyer*, *supra* note 6 at 351, Jessel MR; *Palette Shoes*, *supra* note 6 at 27, Dixon J; *Commercial Courts of London Ltd*, *supra* note 123 at 662–63.

163 See the text accompanying notes 1–10.

164 *Torkington*, *supra* note 9 at 431–32, Channell J; *Gaumont*, *supra* note 9 at para 24; *Simpson*, *supra* note 40 at para 8; *Pythe*, *supra* note 40 at para 23.

These same difficulties do not afflict the alternative reading proposed in this article, according to which the assignment of contractual rights rests in neither a straightforward conveyance of contractual rights nor in an anomalous trust, but in the effects of equity's intervention upon a contract or similar voluntary obligation by an assignor to assign rights under another contract to an assignee. This contractual conception of assignment not only provides a normative grounding for the law of assignment in the principles governing the enforcement of contracts and similar undertakings, but also serves to account for the peculiar effects generated by this type of transaction. Even legal and gratuitous equitable assignments, which fit the contractual account of assignment defended here less straightforwardly than the equitable assignment for consideration, can be explicated by these principles. Indeed, if my argument above is correct, then these principles offer the only way of justifying their operation that remains consistent with the personal nature of contractual obligations.

This argument, of course, supposes that contracts and similar promissory obligations ought to be legally enforceable in the first place, and that equity ought to intervene to support their enforcement in the particular ways outlined above. Both conclusions are controversial in their own right, for reasons already referenced: the first, because the reasons for which the law ought to recognize and enforce contracts are subject to a longstanding controversy; the second, because equity's intervention in this domain continues to be resisted, particularly in respect of promises concluded without consideration moving from the promisee.[165] However, these concerns only arise once the account of assignment defended in this article has served to draw this class of transaction out of the margins and into the mainstream of private law doctrine. They only arise once assignment has been recognized as a peculiar species of contract that, though different in some respects from other contractual arrangements, is still answerable to the same well-known principles that govern contract law.

[165] See the text accompanying notes 72, 73, 155.

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