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Transfer Theory and the Assignment of Contractual Rights

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Transfer Theory and the Assignment of Contractual Rights

Abstract

The possibility of assigning contractual rights to third parties has often been taken to suggest that they amount to a form of “property” or “asset.” This point has been seized upon by proponents of transfer-based accounts of contract law, which understand contract as a means of transferring existing rights instead of creating new rights and duties between its parties. In this article, I set out to critically examine the extent to which this assumed compatibility between transfer theories of contract and the assignment of contractual rights can truly be sustained. As I argue, only one version of transfer theory is able to properly account for the way in which assignment actually operates within the common law tradition, corresponding to the version that most closely resembles more orthodox promise theories of contract law by understanding contract as a transfer of rights directly against the person of the promisor. By contrast, I suggest that the dominant version of transfer theory, according to which contract amounts to a transfer of rights over external things, is unable to draw a full distinction between contract and a completed assignment of contractual rights and so is unable to explain the rules that govern the latter class of transaction at common law and in equity.

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Transfer Theory and the Assignment of Contractual Rights

STÉPHANE SÉRAFIN*

The possibility of assigning contractual rights to third parties has often been taken to suggest that they amount to a form of “property” or “asset.” This point has been seized upon by proponents of transfer-based accounts of contract law, which understand contract as a means of transferring existing rights instead of creating new rights and duties between its parties. In this article, I set out to critically examine the extent to which this assumed compatibility between transfer theories of contract and the assignment of contractual rights can truly be sustained. As I argue, only one version of transfer theory is able to properly account for the way in which assignment actually operates within the common law tradition, corresponding to the version that most closely resembles more orthodox promise theories of contract law by understanding contract as a transfer of rights directly against the person of the promisor. By contrast, I suggest that the dominant version of transfer theory, according to which contract amounts to a transfer of rights over external things, is unable to draw a full distinction between contract and a completed assignment of contractual rights and so is unable to explain the rules that govern the latter class of transaction at common law and in equity.

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TRANSFER THEORIES CAN BE distinguished from competing theoretical accounts of contract law by their understanding of contract as a transfer of existing rights rather than as a source of new rights and duties between its parties.¹ This difference has potentially profound consequences for a number of core areas of contract doctrine.² But it also presents special implications for related topics, including, perhaps most notably, the assignment of contractual rights to third parties. As one leading theorist put it, transfer theories of contract “regard contracts in the way lawyers typically regard assignments of contractual rights.”³ More orthodox theories, such as promise theories, distinguish a contract from an assignment on the basis that the former creates rights, and the latter then transfers the rights created by contract. Transfer theories, by contrast, understand a contract by which a promisor undertakes to perform some future act to immediately transfer existing rights to the promisee, in much the same way

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1. Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) at 98.
 2. The most important advantage of transfer theories may be in accounting for contractual “gaps,” since the idea that a contract transfers existing rights implies that its content need not be completely determined by the intentions of its parties. This is an area of doctrine that the leading proponent of promise theory has suggested cannot be accounted for through his own framework. See Charles Fried, *Contract as Promise* (Harvard University Press, 1981) at 57-58. *Cf* Smith, *supra* note 1 at 314. Another key advantage, at least from an interpretive standpoint, is that transfer theories appear to offer a plausible rationale for the doctrine of consideration. Compare most notably Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Belknap Press, 2019) at 41-47 [Benson, *Justice in Transactions*]; Fried (*ibid* at 37-38). See also Brian Bix, Book Review of *Justice in Transactions: A Theory of Contract Law* by Peter Benson, (2020) 79 Cambridge LJ at 364.
 3. Smith, *supra* note 1 at 98. See also Benson, *Justice in Transactions*, *supra* note 2 at 85; Alan Brudner with Jennifer M Nadler, *The Unity of the Common Law*, 2nd ed (Oxford University Press, 2013) at 188; Andrew S Gold, “A Property Theory of Contract” (2009) 103 NWU L Rev 1 at 19, n 84.

that a subsequent assignment then serves to transfer these same contractual rights from an assignor to an assignee.⁴

Like the conceptions of contract law that they reflect, these different understandings of the relationship between contract and assignment are not without deeper theoretical interest. This is particularly true from the perspective of transfer theories, which, owing to their assumption that contract serves to transfer existing rights, have generally sought to place it within a broader system of private law that includes notions more typically associated with the domain of property.⁵ In fact, many proponents of transfer theory have concluded that the very possibility of assigning contractual rights lends support to their transfer-based conception of contract law since an assignment appears to require that we understand the right conferred upon a promisee at the conclusion of a contract to amount to a form of “property” or “asset” that is capable of transfer in the first place.⁶

At the same time, however, proponents of transfer theory have thus far engaged with the law of assignment in a largely superficial manner, thereby mostly assuming, rather than demonstrating, the support that this particular class of transaction lends to their view of contracting.⁷ In this article, my aim is to engage directly with this issue in order to determine the extent to which assignment can truly be taken to support a transfer-based understanding of contract. As I argue, the preliminary assumption that the law of assignment supports transfer theories

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4. I assume here, and in the remainder of this article, that the assignment of contractual rights can be understood to involve a transfer of the contractual rights in question. This is both the dominant understanding of transaction and the understanding implicit in the accounts given by proponents of transfer theory. See *e.g.* Benson, *Justice in Transactions*, *supra* note 2 at 354-55; Brudner & Nadler, *supra* note 3 at 188; Gold, *supra* note 3 at 19, n 84. See also Smith, *supra* note 1 at 98; Greg Tolhurst, *The Assignment of Contractual Rights*, 2nd ed (Hart, 2016) at 34-35. However, I note that readings that challenge or at least qualify this understanding do exist. See *e.g.* Chee Ho Tham, *Understanding the Law of Assignment* (Cambridge University Press, 2019) at 67-73, 85-86.
 5. See Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012) at 13 [Weinrib, *Corrective Justice*]. See also Brudner & Nadler, *supra* note 3 at 2-3; Gold, *supra* note 3 at 2-3. This perspective implies an “interpretive” approach to legal scholarship, which aims primarily to explicate extant legal doctrine rather than being merely descriptive or proposing outright reforms. See Alan Beever & Charles Rickett, “Interpretive Legal Theory and the Academic Lawyer” (2005) 68 Mod L Rev 320. See also Smith, *supra* note 1 at 4-6.
 6. Benson, *Justice in Transactions*, *supra* note 2 at 354-55; Brudner & Nadler, *supra* note 3 at 188; Gold, *supra* note 3 at 19, n 84. See also Tolhurst, *supra* note 4 at 41, n 68.
 7. Of the authors canvassed in this article, the only proponent of transfer theory who has engaged at some length with this area of doctrine is Peter Benson. See *Justice in Transactions*, *supra* note 2 at 84-91.

is undermined by their basic premise that contract serves to transfer existing rights. This makes it difficult to account for fundamental doctrinal differences that exist between contract and assignment in most common law jurisdictions. The resulting problems are especially apparent for the most well-developed version of transfer theory, according to which a contract amounts to a transfer of rights to external things, which I suggest is only capable of accounting for the most straightforward form of assignment operating at law, and not assignments arising out of the intervention of equity.⁸ It is only a second, less developed version of transfer theory, which most closely resembles the aforementioned promise theories, insofar as it understands contract to amount to a transfer of rights directly against the promisor, that I argue is capable of grappling with the distinctive features of contract and assignment in their entirety.⁹

I present my argument in three parts, beginning in Part I with the two different versions of transfer theory that are canvassed in this article. Although both versions conceive of contract as a transfer of existing rights, I suggest that they both nonetheless insist upon a distinction between contracts and conveyances, the latter encompassing consensual transactions, like gifts, that also involve a transfer of rights of some sort.¹⁰ The main difference between these two versions lies in the precise way in which each draws the line between contract, conceived as a transfer of rights, and non-contractual conveyances. According to the first version of transfer theory, a contract is a transfer of rights to external things. However, this transfer differs from a conveyance in that it remains

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8. This view is represented below primarily by Peter Benson, with some consideration of Alan Brudner and Randy Barnett in subsequent footnotes. Authors whose views are not directly considered here but who may plausibly be taken to adhere to this version of transfer theory include Margaret Jane Radin and John Gardner. See Margaret Jane Radin, "Response: Boilerplate in Theory and Practice" (2013) 54 Can Bus LJ 292 at 296; John Gardner, "The Contractualisation of Labour Law" in Hugh Collins et al, eds, *Philosophical Foundations of Labour Law* (Oxford University Press, 2018) 33 at 47.
 9. This version of transfer theory is endorsed by Andrew Gold and Ernest Weinrib, though primary consideration will be given below to the legal philosophy of Immanuel Kant, from which they both draw their accounts of contract law. See Immanuel Kant, *The Metaphysics of Morals*, translated by Mary J Gregor, 2d ed (Cambridge University Press, 1996). That leading proponents of promise theory such as Charles Fried consciously draw on Kant's work can be taken as a further sign of its affinity with this perspective. See Fried, *supra* note 2 at 8, 139-40.
 10. The distinction between contract and conveyance is widely recognized within the common law tradition, even in the case of the sale of goods where both operations are often combined within a single overarching transaction. See MG Bridge, *The Sale of Goods*, 3rd ed (Oxford University Press, 2014) at 79; G Battersby & AD Preston, "The Concepts of Property, Title and Owner Used in the Sale of Goods Act 1893" (1972) 35 Mod L Rev 268 at 272.

“relational” between the parties until the contract is performed. For the second version, a contract instead involves a transfer of rights against the person of the promisor and so can be distinguished from a conveyance by the nature of the rights subject to a transfer.

Then, in Part II, I examine the doctrinal features of the law of assignment as it operates within the common law tradition, with a particular emphasis on Commonwealth and especially English sources.¹¹ As I suggest here, both the statutory and equitable forms of assignment recognized in these jurisdictions amount to a special type of conveyance that involves a transfer of specifically *contractual* rights rather than rights to tangible things.¹² This means that both forms of assignment present the same potential problem from the perspective of transfer theories writ large, since these theories appear to require that we understand an assignment to amount to a transfer of the same type of right—whether a relational right to a thing, or a right against a person—that they claim is transferred upon the conclusion of a contract. If transfer theories generally confront a challenge when distinguishing contracts from conveyances, this challenge is thus made even more difficult in the case of an assignment, owing to the fact that the usual basis on which each version draws this distinction is not available.

Finally, I conclude in Part III by engaging with the distinctive features of the two versions of transfer theory canvassed in Part I as they relate to the assignment of contractual rights. As I argue, it is only the second version of transfer theory, according to which contract amounts to a transfer of rights against persons, that ultimately provides us with a way of fully distinguishing both statutory and equitable assignments from contracts in a way that accounts for the doctrinal

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11. The rules applicable to assignments of contractual rights are similar but not identical in American and Commonwealth law, and there is of course further variation among individual Commonwealth jurisdictions and individual American states. I will be focusing below primarily on English law, which continues to supply the basic principles of the law of assignment in Canada and elsewhere in the Commonwealth, with some references to American law in footnotes.
 12. The distinction between legal and equitable assignment is particularly well recognized in Commonwealth jurisprudence and scholarship, likely owing to the relatively strenuous formalities still required to complete a legal assignment in those jurisdictions. See *e.g.* *Law of Property Act 1925* (UK), 15 & 16 Geo V, c 20, s 136 (1) [*UK Law of Property Act*]; *Conveyancing and Law of Property Act*, RSO 1990, c 34, s 53(1) [*Ontario Law of Property Act*]. It has, however, historically been recognized in at least some US jurisdictions. See *National Bank of the Republic v United Security Life Insurance & Trust Company of Pennsylvania*, 17 App DC 112 (App Ct 1900). *Cf Restatement (Second) of Contracts*, §§ 317, 321 (1981) [*Restatement*].

operation of each class of transaction. This version of transfer theory, being a true transfer theory and not a mere variation on promise theory, does not understand a contract to create new rights where none existed before. However, it still understands a contractual transfer to give rise to a new duty that directly binds the promisor in a way that does not occur when a contractual right is conveyed by means of an assignment. In this way, it is capable of distinguishing an assignment of contractual rights—whether legal or in equity—from a contract, in much the same way that promise theories do.

I. TWO VERSIONS OF TRANSFER THEORY

Although transfer theories of contract share a number of common features, beyond their use of the “transfer” metaphor, they are far from monolithic.¹³ Among other things, the use of the label tends to obscure the fact that there are at least two competing ways of understanding even the transfer of rights that these theories claim is accomplished by contract. According to one view, again, probably corresponding to that of a majority of transfer theorists, a contract can be understood as a means of immediately transferring rights to particular, externalized things. Therefore, in this version, a promise to transfer a thing or even to render a service is understood to transfer a right to that thing or service from the very moment that the contract is concluded, before delivery or performance has occurred, in a way that justifies the future enforcement of the contractual bargain.¹⁴ According to the other view, again probably in the minority, it is not a right to an external thing that is transferred by contract, but a right directly against the person of the promisor. On this second version of transfer theory, a true transfer of a right to a thing must wait for a separate act

13. As Smith puts it, “[E]ven more than reliance theories, the category of transfer theories must be understood as representing a model or broad approach rather than a comprehensive position that can be ascribed to any individual or group of scholars.” *Supra* note 1 at 97-98.

14. For Benson and Brudner at least, this approach thus appears sufficient to answer the “challenge” raised by Lon Fuller and William Perdue’s infamous article. For the original article, see LL Fuller & William R Perdue Jr, “The Reliance Interest in Contract Damages: 1” (1936-1937) 46 *Yale LJ* 52 at 59-60. For Benson and Brudner’s respective arguments to this effect, see Benson, *Justice in Transactions*, *supra* note 2 at 11-12; Brudner & Nadler, *supra* note 3 at 190-91. *Cf.* Weinrib, *Corrective Justice*, *supra* note 5 at 154-55. Although Benson and Brudner’s particular solution appears to present a further problem for service contracts, I do not consider this issue here. On this last point, see Smith, *supra* note 1 at 101-102.

of conveyance, typically understood to involve an additional, separate agreement between the same parties.¹⁵

In the first part of this article, I now engage directly with the differences between these two versions of transfer theory, with a particular focus on the way they each distinguish contracts from conveyances, within a broader framework that views both types of transactions as a transfer of rights. As I argue below, this is a distinction that, contrary to first appearances, is in fact fundamental to both versions of transfer theory.¹⁶ However, while the version that conceives of contract as a transfer of rights to external things must resort to ideas such as a “relational” transfer of ownership to explain the distinctiveness of properly contractual arrangements, the version that understands contract as a transfer of rights against persons draws the line with comparative ease, in a way that can perhaps already be taken to suggest certain conclusions for its compatibility with the law of assignment.

A. CONTRACT AS A TRANSFER OF RIGHTS TO THINGS

Beginning with the first version of transfer theory, which presents contract as a transfer of rights to things, the most developed account of such an approach is undoubtedly found in Peter Benson’s recent, voluminous book, *Justice in Transactions: A Theory of Contract Law*. Accordingly, this account will be taken to exemplify the first version of transfer theory throughout the remainder of this article.¹⁷ As Benson explains from the outset, his intention is to provide a theoretical account of the common law of contract that does not draw on policy and other extra-judicial values, while also demonstrating a high degree of

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15. The need for a second agreement is explicit in Kant. See *supra* note 9 at 59-60. It represents an approach to the relationship between contract and conveyance that is largely reminiscent of modern German law. See arts 873, 929 Civil Code (Germany). For a comparative overview of the different approaches taken on this issue in different legal systems, and the position of English law and other common law systems relative to it, see Birke Häcker, “Contract and Conveyance: The Further Repercussions of Different Transfer Systems” in John Cartwright & Ángel M López y López, eds, *Property and Contract: Comparative Reflections on English Law and Spanish Law* (Hart, 2021) 89. See also Stéphane Sérafin, “Transfer by Contract at Common Law and in Equity” (2019) 45 *Queen’s LJ* 81.
16. Although their acceptance of this distinction should not entirely surprise us, as it also follows from the interpretivist commitments already referenced. See *supra* note 5 and accompanying text.
17. See *supra* note 2. I will also refer to Alan Brudner and Randy Barnett’s accounts in subsequent footnotes where relevant.

fidelity to black-letter doctrine.¹⁸ To this end, Benson proposes that contract be understood as a bilateral relationship, anchored in consideration given by each contracting party, that involves an immediate transfer of ownership between them at the moment that the contract is concluded:

If expectation damages and specific performance are to qualify as compensatory in the way assumed by contract law, it must be possible to understand contract formation as itself effectuating between the parties a kind of transactional acquisition that vests in them exclusive entitlements with respect to what they have promised one another. And since the acquisition of each party is from the other, it is constituted by a transfer between them. This acquisition must be juridically complete and effective just on the basis of their mutual assents alone, prior to and independent from actual performance and irrespective of whether either party detrimentally relies on the other's promise.¹⁹

The role that Benson understands consideration to play within his account of contract law—here emphasized by the idea that contract serves to vest in each party “exclusive entitlements with respect to what they have promised each other”—makes it clear that he intends to distinguish contracts from other types of consensual transactions within a framework that understands both to involve a transfer of rights to things in at least some sense. This second class of consensual arrangement includes gifts, which, according to the common law at least, are not enforceable unless completed by delivery.²⁰ Benson, who here as elsewhere attempts to closely adhere to black-letter common law rules, similarly frames the distinction between the two types of arrangement primarily as a matter of form.

Thus, while Benson understands both contract and gift to transfer rights to external things, the former corresponds in his estimation to a necessarily bilateral, consideration-based arrangement, while the latter instead amounts to a unilateral transaction.²¹ This distinction presents immense implications, since the unilateral form of a gift accounts, in his version of transfer theory, for the continued necessity of delivery as a precondition of concluding a valid gift. Indeed, a gift remains tied, in his estimation, to the requirement of delivery precisely because

18. *Justice in Transactions*, *supra* note 2 at 1-2. See also Brudner & Nadler, *supra* note 3 at 2-7, 322-23.

19. Benson, *Justice in Transactions*, *supra* note 2 at 8.

20. *Ibid* at 58-65. See also Brudner & Nadler, *supra* note 3 at 186-89. Cf. Randy E. Barnett, “A Consent Theory of Contract” (1986) 86 Colum L Rev 269 at 292 [Barnett, “Consent Theory of Contract”]. The still-leading case on this point across the common law world is *Cochrane v Moore*. See (1890), 25 QBD (CA) 57 at 72-73 [Cochrane].

21. Benson, *Justice in Transactions*, *supra* note 2 at 60-61. See also Peter Benson, “The Idea of Consideration” (2011) UTLJ 241 at 261; Brudner & Nadler, *supra* note 3 at 186-87.

it lacks the proper reciprocity between giving and receiving until the moment a physical change in the control of the thing at issue occurs.²² The bilateral form of the consideration-based contract, by contrast, implicates a properly reciprocal relationship that is prior to, and exists even in the absence of, physical delivery. On Benson's account, it accordingly allows the parties to transcend the physical limits of ownership altogether by concluding a transfer of ownership without the need for a change in physical possession at all.²³

Although this view of the role played by consideration is not unique to Benson, or even to this version of transfer theory, it also allows him to address further issues that are directly relevant to the subject of the present article and that arise because of his contention that contracts specifically transfer rights to *things*.²⁴ Such is the case with key rules that are applicable to all conveyances but not to contracts, the most notable being the rule expressed in the maxim "*nemo dat quod non habet*," according to which no person may transfer greater rights to a thing than are held by that person at the moment that the transfer is completed.²⁵ As Benson himself has recognized, this state of affairs requires that he be able to account for the possibility, recognized at common law, of a contract by which a promisor undertakes to transfer future property—which is to say, to transfer property over which the transferor does *not* yet hold rights—or property that is otherwise incapable of immediate alienation because its identity has not yet been sufficiently determined.²⁶ This he must do while still understanding contracts to

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22. Benson, *Justice in Transactions*, *supra* note 2 at 63. See also Brudner & Nadler, *supra* note 3 at 186.
 23. Benson, *Justice in Transactions*, *supra* note 2 at 62-63, 338-39. See also Brudner & Nadler, *supra* note 3 at 188-89.
 24. For similar perspectives on the role of consideration, see *ibid* at 198-203; Ernest J Weinrib, *The Idea of Private Law*, 2nd ed (Oxford University Press, 2012) at 137-40 [Weinrib, *Idea*]; Gold, *supra* note 3 at 43-46. Cf Barnett, "Consent Theory of Contract," *supra* note 20 at 292; Randy E Barnett, "Contract is Not Promise; Contract is Consent" (2012) 45 Suffolk U L Rev 647 at 657-59.
 25. As one English judge has put it, "There is no legal impediment to my contracting to sell you Buckingham Palace. If (inevitably) I fail to honour my contract [*i.e.*, because one cannot convey what one does not own] then I can be sued for damages." See *Vehicle Control Services Ltd v Revenue and Customs Commissioners*, [2013] EWCA Civ 186 at para 22, Lewison LJ [*Vehicle Control Services Ltd*].
 26. See Peter Benson, "Contract as a Transfer of Ownership" (2006-2007) 48 Wm & Mary L Rev 1673 at 1727-28 [Benson, "Transfer"]; Benson, *Justice in Transactions*, *supra* note 2 at 352-53. The paradigmatic case of a contract pertaining to future property is the contract to sell future goods. See *e.g.* *Sale of Goods Act 1979* (UK), s 5 [UK *Sale of Goods Act*]; *Sale of Goods Act*, RSO 1990, c S.1, s 6 [Ontario *Sale of Goods Act*].

involve a transfer of rights to external things, just as is the case with conveyances that, for their part, *are* subject to these same limitations.

Benson's solution to these problems draws directly on his broader distinction between contracts and conveyances. As he explains, his understanding of contract as a transfer that occurs independently from a change of physical control means that it serves to complete what he variously terms a "relational," "transactional," or "representational" transfer of ownership, the effects of which are, for the most part, limited to the parties to the contractual transaction until performance actually takes place.²⁷ In his view, this limitation on the right transferred by contract allows it to avoid the application of the rules just outlined and so makes it possible to conclude a contract pertaining to future property or to property that is otherwise incapable of present alienation at the moment that a contract is concluded. A contract is still conceptualized as a transfer of existing rights, not a means of creating new rights. However, since the transfer that it effects is only directly opposable to the promisor—it is "insulated from exogenous claims of third parties as well as from the consequences of being tied to the material condition of things"—it does not directly implicate the rules of property law, including the *nemo dat* rule.²⁸ In the case of a conveyance, by contrast, the absence of such a limitation is precisely why the *nemo dat* rule and related rules of property law remain applicable. Since a conveyance involves a non-relational transfer of rights to things—which is to say that it involves a transfer of rights *in rem* in the full sense of that expression—the transfer in question produces immediate *erga omnes* effects and, therefore, cannot be completed until the actual, physical delivery of the thing at issue takes place.²⁹

Put somewhat differently, Benson's account of contract partially reintroduces something like the distinction, implicit most notably in promise theories, between contract as a source of *in personam* rights and property as a branch of private law

27. Benson, "Transfer," *supra* note 26 at 1723, 1729-30; Benson, *Justice in Transactions*, *supra* note 2 at 324. I note however that Benson still understands the relational transfer of rights that he associates with the initial formation of a contract to produce limited third-party effects, most notably by imposing a duty on third parties to refrain from interfering with the contractual relationship itself (*ibid* at 354-55). Compare the approach taken by Brudner, who instead distinguishes a contract from a conveyance on the basis that the former involves a transfer of the exchange value of a thing, abstracted from its physical control, while the latter involves a transfer of the tangible thing itself. See Brudner & Nadler, *supra* note 3 at 188-89.
28. Benson, *Justice in Transactions*, *supra* note 2 at 352. See also Benson, "Transfer," *supra* note 26 at 1727-28.
29. Benson, *Justice in Transactions*, *supra* note 2 at 352, 355-56.

more narrowly concerned with rights *in rem*.³⁰ The main difference, however, is that in Benson's view, both contracts and conveyances are understood to involve a transfer of already-existing rights to external things in a way that denies both the creative power of contract and the uniquely personal characterization of the rights involved in this type of transaction.³¹ What the promisee gains upon the conclusion of a contract, per Benson, is not a personal right enforceable specifically against the promisor, but it is not an exclusive right to a thing either, properly speaking. What the promisee gains is a form of ownership of the thing in question that can only be opposed to third parties in a *limited* manner, most notably through the tort of inducing breach of contract, and which is then transformed into a full right *in rem* opposable to the world at large once delivery of that thing occurs.³²

Understood in these terms, it becomes possible to distinguish a contract, conceived as a transfer of rights to external things, from a conveyance of property rights. We can, moreover, understand why a contract is not subject to the limitations applicable to the latter class of transaction, including those imposed by the *nemo dat* rule: Since a contract amounts to a *relational* transfer of ownership, it does not matter, for instance, whether the promisor presently holds rights in the thing concerned at the moment that the contract is concluded. All that is required at the conclusion of the contract is that the promisor's title to the thing be transferred to the promisee in a way that allows the promisee to claim from the promisor, and no one else, in the event that the promisor fails to deliver

30. Following Wesley Newcomb Hohfeld, the most common way of understanding this distinction in English-language scholarship has been between rights enforceable against one or more determinate parties (rights *in personam*) and rights enforceable against a potentially indeterminate class of persons (rights *in rem*). See "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 Yale LJ 710 at 718.

31. As Benson puts it, "[T]he *in rem*/*in personam* distinction should not be understood either as conceptually ultimate or as referring to two utterly separate and freestanding kinds of relations," since in his view "*both* original acquisition (property) and transactional acquisition (contract) have *in rem* and *in personam* dimensions... in qualitatively different ways." Benson, *Justice in Transactions*, *supra* note 2 at 344 [emphasis in original]. Cf. Brudner & Nadler, *supra* note 3 at 120-22.

32. Benson, *Justice in Transactions*, *supra* note 2 at 352-53, 358-59; Benson, "Transfer," *supra* note 26 at 1723, 1729-30. This solution is highly reminiscent of the treatment of the contractual transfer of property rights under the French *Code civil*, which is similarly understood to occur immediately at contract formation, on the basis of the parties' consent alone, but cannot be opposed to third parties until delivery of the thing (or registration of the transfer) occurs. See arts 1196, 1198 C Civ. See also arts 1454, 2941 CCQ.

the promised thing or otherwise render the promised performance.³³ On Benson's account, contract can thus be seen to transcend the limits of a conveyance precisely because it serves to transfer a more limited right—a relational property right—as opposed to the full right *in rem* opposable against an indeterminate class of persons.³⁴

B. CONTRACT AS A TRANSFER OF RIGHTS AGAINST PERSONS

Turning now to the second version of transfer theory under study, which instead equates contract with a transfer of rights against the person of the promisor, this version again probably corresponds to a minority view among contemporary transfer theorists. In fact, it appears to have only two explicit proponents, namely Andrew Gold and Ernest Weinrib, neither of whom offers a defence of this perspective that is nearly as developed as that offered by Benson in respect of contract as a transfer of rights to things.³⁵ Since both of these authors also draw much of their inspiration from the legal philosophy of Immanuel Kant, it is likely preferable to focus directly on this source material. In particular, attention should be paid to the following passage from Kant's *Doctrine of Right*, which both authors reproduce at length in their respective articles on the subject:

By contract I acquire something external. But what is it that I acquire? Since it is only the causality of another's choice with respect to a performance he has promised me, what I acquire directly by a contract is not an external thing but rather his deed, by which that thing is brought under my control so that I make it mine. – By a contract I therefore acquire another's promise (not what he promised), and yet something is added to my external belongings; I have become *enriched (locupletior)* by acquiring an active obligation on the freedom and means of the other.³⁶

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33. Compare Brudner's solution to these problems, which instead draws on traditional common law exceptions to the *nemo dat* rule, most notably the sale of goods made "market overt." See e.g. Brudner & Nadler, *supra* note 3 at 127-30. Cf. *Westcoast Leasing Ltd v Westcoast Communications Ltd* (1980), 22 BCLR 285 at paras 14-23 (Sup Ct). This exception has, however, been abolished in most Canadian common law jurisdictions. See e.g. Ontario *Sale of Goods Act*, *supra* note 26, s 23.
34. For Benson, as for Brudner, a contractually derived right of ownership is understood to be more "complete" than a right gained by original acquisition because it better expresses what they understand to be the relational character of ownership itself. See Benson, *Justice in Transactions*, *supra* note 2 at 341; Brudner & Nadler, *supra* note 3 at 187, 189.
35. See Gold, *supra* note 3; Weinrib, *Corrective Justice*, *supra* note 5 at 148-84. See also Sharon Byrd, "Kant's Theory of Contract" (1998) 36 Southern J Phil 131; Helge Dedek, "A Particle of Freedom: Natural Law Thought and the Kantian Theory of Transfer by Contract" (2012) 25 Can JL & Juris 313 at 338.
36. Kant, *supra* note 9 at 59, cited in Gold, *supra* note 3 at 1; Weinrib, *Corrective Justice*, *supra* note 5 at 153.

When compared with the version of transfer theory espoused most notably by Benson, which frames contract as a transfer of rights to things, the approach outlined in this excerpt provides us with a much more straightforward basis for distinguishing a contract, conceived as a transfer, from other arrangements that also transfer rights. Indeed, the very idea that underlies this version of the theory, according to which a contract transfers a right against a person—“his deed,” which Kant elsewhere terms a “*ius personale*”—but not yet a right to a tangible thing—what he calls a “*ius reale*”—presupposes that a distinction between contract and conveyance is both possible and conceptually necessary.³⁷ As Kant goes on to explain, what is required to transfer rights to things according to this framework is nothing less than a second, separate agreement concluded when the performance due under the initial contract is tendered.³⁸ The right transferred at contract formation, for its part, is only a right against a person and, specifically, a right to obtain performance from the promisor at a *future* point in time.³⁹

If the version of transfer theory that conceives contract as a transfer of rights to things encounters problems when confronted with the black-letter rules respecting the transfer of property rights, the Kantian approach also circumvents these issues with relative ease. The right that the promisor transfers to the promisee at the conclusion of a contract—*i.e.*, a right against the promisor’s own person—can be understood on this view to amount to nothing less than a portion of what Kant understands as a person’s innate, non-acquired right to freedom, held by each and every individual simply by virtue of being a person.⁴⁰ Since this right is not acquired from external sources, but is necessarily held by the promisor by virtue of personhood, the promisor does not need to acquire this right before the transfer can take place: It is a right that the promisor already holds. Such is not

37. See Kant, *supra* note 9 at 48. Like Hohfeld, Kant appears to understand both types of rights to be rights ultimately opposable to persons. See *ibid* at 50. Cf. Hohfeld, *supra* note 30 at 718. However, Kant’s approach remains different from Hohfeld’s insofar as he nonetheless insists on a difference between personal and real rights that is tied to the nature of their object, instead of the mere number of persons against which a right can be enforced.

38. An exception is recognized where the initial agreement or contract is immediately performed, as for example through delivery of the thing at issue at the very moment in which that agreement is first concluded. See Kant, *supra* note 9 at 60. For an argument in favour of a historical relationship between Kant’s views on this issue and the *Abstraktionsprinzip* recognized by modern German law, see Byrd, *supra* note 35.

39. Kant, *supra* note 9 at 38, 60-61.

40. As Kant puts it, “Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.” *Ibid* at 30. See also Weinrib, *Corrective Justice*, *supra* note 5 at 222-23; Gold, *supra* note 3 at 52.

the case, however, with the right transferred by conveyance—that is, with the *ius reale*. Rather, the *ius reale* amounts to a right over an external thing and so must be acquired either in an unowned state or derivatively, through a prior transfer, before it can be opposed and transferred to others.⁴¹

What the Kantian version of transfer theory suggests, in other words, is a view of contract as transfer that completely circumvents the problems presented by the *nemo dat* rule and other similar rules of property law. Since the right transferred by the promisor is an innate right and not a right that must first be acquired over external things, these rules simply have no relevance to the conclusion of a contract at all.⁴² Even if the contract happens to involve a promise to transfer rights to external things at some point in the future—as in a contract to sell goods, for example—the promisor transfers only a right against the promisor’s own person upon the initial conclusion of the contract.⁴³ Only the conveyance that is later concluded in performance of the original contract pertains, strictly speaking, to a transfer of acquired rights over external things, and only it, not the original contract, is subject to the rules of property law. If the promisor under a contract of sale fails to acquire the rights over external things that the promisor has promised to convey, then the contract nonetheless remains valid as a transfer of rights against the promisor’s person, though the promisor will breach contractual duties owed to the promisee because the promisor has failed to convey those rights over external things, and therefore failed to tender the promised performance.⁴⁴

This view of contract law is reminiscent of the civilian understanding of an “obligation,” which corresponds, in its technical sense, to a legal bond between two or more persons by which one, a debtor, owes another, a creditor,

41. As Kant puts it, the possession of an external thing is “contingent,” because it is not necessarily the case that it will be acquired by any one particular person. See *supra* note 9 at 45.
42. A possible objection arises here due to the possibility of concluding two contracts pertaining to the same particular thing (as in a classic problem of double sale, for example). However, this objection is easily rebutted once we recall that the object of the right that is transferred by contract on Kant’s account is the promisor’s deed, not the object itself. Since the deed owed under two different contracts will never be entirely identical, being owed to different persons, at different times and subject to different modalities, each contract does not, in fact, have the same object. See Weinrib, *Corrective Justice*, *supra* note 5 at 164-65.
43. But see *supra* note 38 and accompanying text.
44. See Weinrib, *Corrective Justice*, *supra* note 5 at 163-64. This conclusion is consistent with Lord Justice Lewison’s remarks in *Vehicle Control Services Ltd*. See *supra* note 25 at para 22.

the performance of or abstention from a particular act.⁴⁵ Within the civil law tradition, this type of arrangement is generally distinguished from a property right on the basis that it does not involve a direct, unmediated relationship between person and thing, but requires that the creditor enlist the cooperation of the debtor to claim the thing to which the obligation pertains.⁴⁶ A similar distinction can be seen when comparing the Kantian version of transfer theory to that set out in Benson's work; instead of a contract serving to confer a greater right to a thing upon the promisee, thereby subjecting the promisor to a relational duty of non-interference with respect to the object of the transfer, the promisor is instead understood to directly assume a correlative duty, which entitles the promisee to demand performance from the promisor at the promised time.⁴⁷ As Kant also puts it, the right that correlates to the promisor's duty does not pertain directly to anything the promisor may have undertaken to convey, which is to say to "substance," but is only a claim against the promisor's "causality."⁴⁸

And yet, the Kantian account of contract also remains a proper *transfer* theory of contract, rather than simply presenting another vocabulary in which to express the basic features of a promise theory.⁴⁹ Far from being superfluous, Kant's use of the transfer metaphor is what serves to connect his account of contract with his broader jurisprudential system, with the consequence that the Kantian transfer theory, like the version espoused by Benson, understands contract law to form part of a unitary framework that also includes other branches of private law. For Kant, "I cannot acquire a right against another through a deed of his that is *contrary to right*."⁵⁰ In contrast to promise theories, the Kantian transfer theory thus does not affirm, in contract, an absolute power to create rights from nothing, subject only to the dictates of external public policy concerns.⁵¹ Instead,

45. See Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962) at 158; Didier Lluellas & Benoît Moore, *Droit des obligations*, 3rd ed (Éditions Thémis, 2018) at 13. Kant's particular framing is in fact reminiscent of the origins of the *obligatio* in Roman law, as a much more literal bond by which the debtor's own person was at the mercy of the creditor. See Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1996) at 1-3.

46. *Ibid* at 26. This distinction has been criticized. Most notably, see François Gény, *Méthode d'interprétation et sources en droit positif: essai critique*, t I (LGDJ, 1919) at 139.

47. Cf Benson, *Justice in Transactions*, *supra* note 2 at 255-57.

48. Kant, *supra* note 9 at 37-38, 48. See also Weinrib, *Corrective Justice*, *supra* note 5 at 152-53; Gold, *supra* note 3 at 53; Dedek, *supra* note 35 at 344.

49. But see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009) at 113.

50. Kant, *supra* note 9 at 57.

51. Cf Fried, *supra* note 2 at 8, 16-17; Smith, *supra* note 1 at 65.

the rights transferred by contract, like those transferred by conveyance, are rights that already exist elsewhere within the broader system of Kantian right and which accordingly serve to set limits on both types of transactions that are *internal* to that system.⁵² This is why the Kantian transfer theory, like Benson's, finds it necessary to grapple with the relationship between contract and conveyance.⁵³ It is also why both versions of transfer theory might be taken to draw support from the very possibility of assigning contractual rights—assuming, of course, that they are actually able to account for the rules that govern its operation.

II. TRANSFER THEORY AND THE LAW OF ASSIGNMENT

As I have argued above, both the version of transfer theory that conceives of contract as a transfer of rights to things and the version that understands it as a transfer of rights against persons must ultimately draw a distinction between contracts and conveyances, if only to account for the inapplicability of property law rules such as the *nemo dat* rule to contractual transfers of rights. However, each version draws this distinction on a somewhat different basis. For the former, this is achieved by framing contract as a specifically relational transfer of rights to things, as opposed to a transfer of rights to things that is potentially opposable against the world at large. For the latter version, the distinction is instead drawn on the grounds that a contract does not amount to a transfer of rights to things at all, as is the case with a conveyance, but to a transfer of rights directly against the person of the promisor.

Having set out these features of both versions of transfer theory, the question addressed in the remainder of this article is whether the way in which they each distinguish between contracts and conveyances is capable of accounting specifically for the law of assignment. Since proponents of transfer theory have to date largely avoided a direct engagement with the rules that actually govern this area of law, I must accordingly begin by examining the problems that these rules present for transfer theories of contract before turning in Part III to the solutions potentially offered by each version of transfer theory. As I first argue, both the statutory and equitable forms of assignment present a particular challenge because they ostensibly amount to conveyances subject to all of the rules applicable to

52. See Kant, *supra* note 9 at 57. See also Weinrib, *Corrective Justice*, *supra* note 5 at 110.

53. By contrast, promise theory arguably requires that we understand enforceable gifts to amount to nothing more than promises that are enforceable on account of their compliance with a particular formality (*i.e.*, delivery). See Fried, *supra* note 2 at 36-37. But see Smith, *supra* note 1 at 62-63.

that class of transactions, including the *nemo dat* rule. This is so even as both forms appear to involve a transfer of precisely the same type of right that transfer theories associate with the conclusion of a contract. Accordingly, any explanation for the law of assignment precludes recourse to the basis on which either version of transfer theory generally draws a distinction between contracts and conveyances. The issue becomes particularly acute when engaging with assignments in equity, which are closely related to the contract by which a promisor undertakes to assign contractual rights in the future.⁵⁴ However, the problem is also evident when engaging with legal assignments, which correspond to the most straightforward form of assignment recognized in most jurisdictions.

A. TRANSFER THEORY AND LEGAL ASSIGNMENT

To begin with legal assignment, also known as statutory assignment, the first thing to note is that this transaction is legislative in origin. The historical common law simply did not recognize the possibility of assigning contractual rights and other choses in action, such that the possibility of completing an assignment that would be effective at law, not just in equity, did not arise until the fusion of law and equity in the late nineteenth century.⁵⁵ Nonetheless, this type of assignment is now well-established, and its essential features are also conveniently set out by the relevant enactments.⁵⁶ As the applicable English statute provides, for example:

Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action,

54. Such a contract involves a promise to assign contractual rights, by contrast to both a completed assignment of contractual rights and a promise to convey rights to tangible things. See *Collyer v Isaacs* (1881), 19 ChD (CA) 342 at 351, Jessel MR [*Collyer*]; *Restatement, supra* note 12, § 321(2).

55. *Supreme Court of Judicature Act* (UK), 1873, 36 & 37 Vict, c 66, s 25(6). The historical common law thus denied the possibility of an assignment of contractual rights without recourse to novation—which is to say, without recourse to an entirely new contract supplanting the old agreement. See *Fitzroy v Cave*, [1905] 2 KB (CA) 364 at 373, Cozens-Hardy LJ.

56. As will be seen below, many of the features most relevant to legal assignments also track those of assignments in equity, such that the legislative origin of these transactions should not be seen to discount their relevance for theoretical accounts of private law. In fact, there is a compelling case to be made that the effect of the statutory regime is largely procedural, meaning that a legal assignment simply amounts to a special case of an assignment made in equity.

is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—

- (a) the legal right to such debt or thing in action;
- (b) all legal and other remedies for the same; and
- (c) the power to give a good discharge for the same without the concurrence of the assignor.⁵⁷

As this provision makes clear, a legal assignment should be understood to properly “pass and transfer” rights under a prior contract—which is to say that it serves to transfer the benefit due to the initial promisee under that contract to a third-party assignee.⁵⁸ This feature is shared on most accounts with its equitable counterpart.⁵⁹ This feature also amounts to a source of fundamental difficulties for transfer theories of contract, owing to the fact that these theories must accordingly understand an assignment to involve a transfer of precisely the *same* rights already transferred at least once before, from a promisor to a promisee, by means of a prior contract.⁶⁰ As this provision also strongly suggests, at least the statutory form of assignment follows the general rules applicable to conveyances, not contracts, in a way that undermines the possibility of a neat distinction

57. UK *Law of Property Act*, *supra* note 12, s 136(1). This provision is duplicated with only slight changes in Canadian common law jurisdictions. See *e.g.* Ontario *Law of Property Act*, *supra* note 12, s 53(1). Manitoba, Saskatchewan and the three Territories are exceptions in this regard, as they have adopted an approach similar to that of the American *Restatement* by allowing a legal assignment to be effected using any written instrument evincing the requisite intention. See *The Law of Property Act*, CCSM, c L90, s 31(1); *Choses in Action Act*, RSS 1978, c C-11, s 2; *Choses in Actions Act*, RSY 2002, c 33, s 1(1); *Choses in Action Act*, RSNWT 1988, c C-7, s 1(2); *Choses in Action Act*, RSNWT 1988, c C-7, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28, s 1(2). *Cf Restatement*, *supra* note 12, § 317(1), 332(1).

58. Tolhurst, *supra* note 4 at 30. *Cf* Tham, *supra* note 4 at 30. This transfer, however, only pertains to the benefit of the contract—*i.e.*, to what is owed to the promisee—and in most circumstances does not and cannot involve a transfer of the corresponding burdens assumed by the promisor. See *Tolhurst v Associated Portland Cement Manufacturers* (1900), [1902] 2 KB (CA) 660 at 668, Colins MR [*Tolhurst v APCM*]; *Lounsbury Co v Duthie and Sinclair*, [1957] SCR 590 at 597. See also *Restatement*, *supra* note 12, § 328(2).

59. See Tolhurst, *supra* note 4 at 63. *Cf* Tham, *supra* note 4 at 9. Tham presents equitable assignment as a “*seeming*” transfer’ of the obligee’s entitlements against the obligor to the assignee” [emphasis added] that nonetheless “does *not* entail extinction of those very same entitlements” [emphasis in original].

60. This much is explicit in Benson’s account. See *Justice in Transactions*, *supra* note 2 at 89. See also Brudner & Nadler, *supra* note 3 at 188; Gold, *supra* note 3 at 19, n 84.

between these two classes of transaction from the perspective of a transfer-based account of contract law.

That a legal assignment amounts to a conveyance, not a contract, is particularly supported by three distinct but related features, highlighted in the above provision. The first, and likely the most obvious, is that a legal assignment does not require that the parties comply with the form of an exchange mandated by the contractual requirement of consideration. This requirement again amounts to an essential feature of a contract, according to Benson, and an implicit requirement according to most, if not all, of the other authors who defend a version of transfer theory.⁶¹ Instead, the conclusion of a legal assignment requires the use of a written instrument and the provision of notice to the debtor, which in the case of a legal assignment of contractual rights means notice to the promisor under the initial contract.⁶² Like a gift, a legal assignment therefore amounts to an inherently unilateral transaction, in which the assignor simply conveys rights to the assignee without receiving a reciprocal benefit of the type that Benson especially suggests allows a contract to transcend the limits of the *nemo dat* rule.⁶³

The second feature of a legal assignment that is highlighted by the statutory provision and which further supports its classification as a conveyance arises from the requirement that the assignment be “absolute.” In other words, a legal assignment must be intended to produce its effects immediately, not at a future point in time, in a way that unconditionally divests whatever rights the assignor may hold under a prior contract and vests those rights in the assignee.⁶⁴ Here

61. Benson, *Justice in Transactions*, *supra* note 2 at 60–61; Brudner & Nadler, *supra* note 3 at 198–203; Barnett, “Consent Theory of Contract,” *supra* note 20 at 292; Weinrib, *Idea*, *supra* note 24 at 137–40; Gold, *supra* note 3 at 43–46.

62. But see *Harding Carpets Limited v Royal Bank of Canada*, [1980] 4 WWR 149 at 160 (Man QB); *Restatement*, *supra* note 12, § 336(2). I note that a legal assignment that fails for lack of notice can nonetheless be treated as an assignment operative in equity. See *Holt v Heatherfield Trust Ltd*, [1942] 2 KB 1 at 4 [*Holt*]. In the case of an equitable assignment, the effect of notice is instead simply to allow the assignment to be fully opposed to the third-party promisor. See *Tolhurst v APCM*, *supra* note 58 at 668–69. This rule appears to follow the general principles applicable to all interests in equity, according to which they are enforceable against all third parties save for the bona fide purchaser without notice. See *Pilcher v Rawlins* (1871–1872), LR 7 Ch App 259 at 259.

63. Since it is not the contract itself that is assigned, but only the right gained by the promisee at the conclusion of a contract, a statutory assignment again does not typically even allow for the assignee to assume the corresponding duties initially incumbent upon the promisee. See *supra* note 58 and accompanying text.

64. See *Durham Brothers v Robertson*, [1898] 1 QB (CA) 765 at 773; *Dominion Creosoting Co v Nickson Co* (1917), 55 SCR 303.

again, a legal assignment can be taken to contrast with a contract, which at least typically involves a promise of some kind, and thus an undertaking binding the promisor to a future course of conduct.⁶⁵ And here, again, a legal assignment can be taken to present a strong parallel with a gift, which must likewise serve to immediately convey rights to the donee, or else will be characterized by the common law to amount to a gratuitous promise that is generally unenforceable due to the lack of consideration given in exchange.⁶⁶

Finally, and perhaps most importantly for the purpose of the present argument, the above provision also confirms that the rights gained by an assignee upon the completion of a legal assignment remain “subject to the equities”—which is to say that any defences that the promisor might have initially opposed to the promisee are carried over to the assignee as limits on the rights transferred by the assignment.⁶⁷ This feature can be understood to amount to nothing less than a particular application of the *nemo dat* rule, which generates special consequences in relation to legal assignments because these involve a transfer of rights under a prior contract. The assignment can transfer no greater rights than were conferred upon the promisee, by the promisor, at the conclusion of that contract.⁶⁸ As a result, the rights gained by an assignee are made subject not only to the defences available to the promisor against the promisee, but also to the continuing validity of the contract under which rights have been assigned, even once the assignment is complete. If the contract is ultimately held to be invalid, then there could have been no assignment of rights under that contract in the first place, and thus the assignee’s rights must be void as well.⁶⁹

To these features of the *nemo dat* rule as applied specifically to legal assignments of contractual rights, we can add the further limits that have already been touched upon in respect of conveyances in general. A legal assignment,

65. The close relationship between contract and promise is recognized even by proponents of transfer theory. See Benson, *Justice in Transactions*, *supra* note 2 at 35, 38-39; Brudner & Nadler, *supra* note 3 at 198-99; Barnett, “Consent Theory of Contract,” *supra* note 20 at 287; Weinrib, *Idea*, *supra* note 24 at 137-38; Gold, *supra* note 3 at 3.

66. As Lord Escher put it in *Cochrane*, a gift is “a transaction begun and completed at once... consisting of two contemporaneous acts, which at once complete the transaction, so that there is nothing more to be done by either party.” *Supra* note 20 at 75-76. *Cf Dalhousie College v Boutilier Estate*, [1934] SCR 642 at 645.

67. *Young v Kitchen* (1878), 3 Ex D 127 at 130; *London & Western Canada Investment Co v Dolph* (1918), 43 OLR 449 at 450-51 (HC) [*Dolph*]; *Costco Wholesale Canada Inc v Cazalet*, 2008 BCSC 952 at para 22.

68. Tolhurst, *supra* note 4 at 431, 434-35; *Restatement*, *supra* note 12, § 336.

69. *Dolph*, *supra* note 67; *Zhang v Tsai*, 2017 BCCA 371 at para 33. See also *Restatement*, *supra* note 12, § 336(1).

as with any other conveyance, cannot be concluded in respect of rights that the assignor does not presently hold.⁷⁰ Since the rights at issue are contractual rights, the assignor must necessarily have acquired these rights either as the promisee under the initial contract or else as an assignee under a prior assignment. If the would-be assignor has not yet acquired the rights that are to be assigned—which is to say, if these are future contractual rights that the would-be assignor hopes or even expects to acquire from a contract or a prior assignment—then there can be no legal assignment at all, just as there can be no completed sale of a thing unless the seller has already acquired rights to the things that the seller is attempting to convey.⁷¹

In each of these respects, legal assignments can once again be distinguished from contracts, even as transfer theories appear to require that we understand both assignments and contracts to involve a transfer of precisely the same type of right—whether it is understood as a relational right to a thing or a right against a person. As we have already seen above, a contract is *not* subject to the *nemo dat* rule and so is unaffected by the quality of the rights that the promisor holds, or does not hold, at the moment that the contract is concluded. It is not even necessary that the promisor hold rights to an external thing at all before the promisor can undertake by contract to convey those rights, such a contract being entirely valid according to the common law.⁷² But more than this, and further contrasting with the rules that apply to legal assignments specifically, it is also possible to conclude a contract in respect of future *contractual* rights—which is to say, in respect of contractual rights that the promisor has not yet acquired. As in the case of a contract for the sale of future goods, the promisor in such a

70. Although such an assignment may be upheld as an equitable assignment once the assignor has acquired the chose in action. See *Holroyd v Marshall* (1862), 10 HLC 191 at 209, Westbury LJ (HL (Eng)) [*Holroyd*]; *Collyer*, *supra* note 54 at 351; *Tailby v Official Receiver* (1888), 13 App Cas 523 at 531, Herschell LJ, 533, Watson LJ (HL (Eng)) [*Tailby*]; *Holt*, *supra* note 61 at 5; *Royal Bank of Canada v Madill* (1981), 43 NSR (2d) 574 at para 112 (CA) [*Royal Bank*]. Cf *Restatement*, *supra* note 12, § 321(2). I note that Benson explicitly recognizes the applicability of the *nemo dat* rule to assignments of contractual rights. See Benson, *Justice in Transactions*, *supra* note 2 at 86.

71. See UK *Sale of Goods Act*, *supra* note 26, s 21; Ontario *Sale of Goods Act*, *supra* note 26, s 22.

72. See *supra* note 26 and accompanying text. As also alluded to above, a promisor may even conclude multiple contracts pertaining to the same object, each with a different promisee, even if only one promisee will ultimately be able to obtain proper title to the thing at issue. This scenario is contemplated by sale of goods legislation. See UK *Sale of Goods Act*, *supra* note 26, s 24; Ontario *Sale of Goods Act*, *supra* note 26, s 25(1).

case is simply undertaking to assign these rights at a future point in time, once the promisor has acquired the contractual rights in question.⁷³

Taken together, these differences between contracts and legal assignments of contractual rights highlight the importance of accounting for the doctrinal distinction between the two classes of transaction as part of any interpretive account of private law. Yet doing so appears to present particular challenges for transfer-based accounts of contract law, which, I will suggest in Part III, cannot be completely addressed by one of the versions of transfer theory under study. Before turning to this part of my argument, however, it is first necessary to delve more deeply into the law of assignment. In particular, I will discuss the rules that govern the other type of assignment recognized in most jurisdictions that follow the broader Anglo-American legal tradition, namely the assignment of contractual rights operating in equity. This form of assignment gives rise to many of the same difficulties outlined above, including, most notably, those presented by the *nemo dat* rule. However, it also adds a further complication, in that it also presents a close connection to the type of contract just referenced, by which a promisor undertakes to assign contractual rights at a future point in time. I will refer to this arrangement in the remainder of this article as a “contract to assign rights.”

B. TRANSFER THEORY AND ASSIGNMENT IN EQUITY

By contrast to legal assignments, which appear to correspond to a relatively straightforward form of conveyance, albeit of specifically contractual rights, the precise doctrinal classification of equitable assignments is considerably more controversial. We can, however, deal with this class of transaction fairly briefly here, since the main classificatory challenges that it presents are closely tied to the broader controversies that continue to afflict the classification of equitable doctrines writ large.⁷⁴ This is an issue that, while important, is not particularly

73. This possibility is expressly contemplated in the *Restatement*. See *supra* note 12, § 321(2).

74. The challenge pertains to whether an equitable assignment amounts to a true transfer of a chose in action or only an apparent one. See *supra* note 59 and accompanying text. It is closely related to the debate over the nature of the trust beneficiary's interest, with some understanding the beneficiary as a proper owner of the trust property in equity and others understanding the trust as an obligation to convey rights which equity treats *as though* it were already performed. For the historical bases of these respective positions, see John Austin, *Lectures on Jurisprudence: Or the Philosophy of Positive Law* (John Murray, 1863) vol 1 at 388; FW Maitland, *Equity: A Course of Lectures* (Cambridge University Press, 1909) at 111-12.

relevant to the argument advanced in this article.⁷⁵ What is more directly relevant for the present argument, instead, is the aforementioned relationship that appears to exist between completed equitable assignments and contracts to assign rights.

Simply put, an equitable assignment can be seen to originate in a contract to assign rights, which equity then intervenes to treat as a complete assignment once certain conditions have been met.⁷⁶ Traditionally, and still typically, this is a contract in the full and proper sense of the term; for equity to recognize a complete assignment requires that the promisee have provided consideration in exchange for the promisor's promise to assign rights.⁷⁷ Although most jurisdictions now recognize the possibility of an equitable assignment arising out of other circumstances, where consideration is, strictly speaking, absent, even these alternative ways of concluding an equitable assignment remain closely tied to the idea of a promise pertaining to the assignment of rights under another contract.⁷⁸ The result is a transaction that presents an ongoing tripartite structure in each of these cases, with the assignee being required to join the assignor—that is, the promisee under the initial contract, who is also the promisor under the

75. I note that although proponents of transfer theory sharply disagree on the nature and continued relevance of the historical distinction between common law and equity, this does not appear to impact on the similarities between their approaches to contract law. See most notably Benson, *Justice in Transactions*, *supra* note 2 at 98-99; Brudner & Nadler, *supra* note 3 at 161-67. See also Jennifer Nadler, "What is Distinctive about the Law of Equity?" (2021) 41 *Oxford J Leg Stud* at 854 at 863-72.

76. For a general overview, see Tolhurst, *supra* note 4 at 64-69.

77. *Tailby*, *supra* note 70 at 548, Herschell LJ, 551, Macnaghten LJ; *Curtis v Langrock* (1922), 17 *Alta LR* 160 at 166, Stuart JA (CA); *Hobbs v Marlowe* (1977), [1978] *AC* 16 at 42, Simon of Glaisdale L (HL (Eng)).

78. Specifically, most jurisdictions also recognize at least one and perhaps two alternative bases on which equity will recognize an assignment, one being the reliance of the putative assignee, the other a failed attempt at concluding a legal assignment. See *In Re Rose v Inland Revenue Commissioners*, [1952] *Ch* (CA) 499 at 511, Evershed MR, 518, Jenkins LJ; *Sanderson v Halstead*, [1968] 1 *OR* 749 (H Ct J). See also *Restatement*, *supra* note 12, § 332(4). These forms of equitable assignment are reminiscent of the doctrine of proprietary estoppel, which serves to treat a gratuitous promise to convey property as a completed conveyance in equity. See *Cowper-Smith v Morgan*, 2017 *SCC* 61 at para 15; *Thorner v Major*, [2009] *UKHL* 18. They are therefore similar enough to the equitable assignment arising out of a true contract that my arguments below can be applied *mutatis mutandis*.

subsequent contract to assign rights—as a party to any claim brought against the initial promisor even once equity has deemed the assignment to be complete.⁷⁹

This arrangement presents additional challenges for transfer theories of contract law, over and above the problems already outlined with respect to legal assignments. This is because the two components of the overarching transaction—a contract to assign rights and a completed equitable assignment—are respectively subject to the same limitations as are any other contract and conveyance, including in relation to the *nemo dat* rule. Thus, a contract to assign rights can be concluded even if the promisor has not yet acquired the contractual rights to be assigned, but equity’s intervention to complete the assignment remains contingent, among other things, upon the acquisition of these rights by the promisor, now acting as equitable assignor. As one Justice of the High Court of Australia put it, for instance, in a case involving an equitable assignment of contractual rights that had not yet been acquired by the would-be assignor:

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.⁸⁰

What an equitable assignment appears to involve, then, is an overarching legal operation that combines elements of both a contract and an assignment between the same parties in a way that further blurs the line between both. Whereas the assignment that occurs following the intervention of equity remains subject to the general rules applicable to all conveyances, as is the case with a legal assignment, it is nonetheless clear from the foregoing that the assignor need not actually hold the contractual rights that are to be assigned at the moment

79. *Performing Right Society Ltd v London Theatre of Varieties Ltd*, [1924] AC 1 at 14, Viscount Cave (HL (Eng)); *Deisler v United States Fidelity & Guaranty Co* (1917), 36 DLR 29 at 30 (BCCA), *aff’d* (1917), 59 SCR 676; *Bubecha v Impact Imaging Ltd*, 2019 BCSC 663 at para 17. The joinder rule originates in the historical limits of Chancery jurisdiction. Since courts of equity could not transfer legal title to legal rights, including contractual rights, they were limited to compelling the assignor to add his name to a suit by the assignee at common law, effectively allowing the assignee to claim against the third-party promisor in the assignor’s name. See *Durham Brothers v Robertson*, [1898] 1 QB (CA) 765 at 769-70, Chitty LJ; *in re Westerton, Public Trustee v Gray*, [1919] 2 Ch 104 at 111. By contrast, an equitable assignment of equitable rights (including contractual rights assigned under a prior equitable assignment) was not subject to this historical limitation and is, therefore, not subject to the requirement of joinder. See *Dell v Saunders* (1914), 17 DLR 279 at 281 (BCCA).

80. *Palette Shoes Pty Ltd v Krohn* (1937), 58 CLR 1 at 27, Dixon J (HCA).

that the assignor undertakes, as promisor, to assign the rights at issue under a contract. All that the assignor must do in the interim is undertake to assign the rights at a further moment in time, with equity then intervening automatically to complete the assignment once the performance under that contract becomes possible, in accordance with the traditional maxim that “equity treats as done that which ought to be done.”⁸¹

To account for the operation of equitable assignments, we must accordingly be able to distinguish not only between contracts and assignments, but also between a contract to assign rights and a completed assignment between the same parties as part of the same overarching transaction. The explanation that promise theories are able to offer for this state of affairs is relatively straightforward and already hinted at in the above excerpt: Since they understand contracts to amount to a source of new rights (*i.e.*, they make the subject matter “exist”), the only additional difficulty that arises here pertains to why equity intervenes in the way that it does, so as to complete the assignment, or at least to treat the contract to assign rights *as though* it were a completed assignment.⁸² The contract to assign rights, since it amounts on this account to a source of new rights and duties between its parties is, if nothing else, clearly distinct from the assignment that occurs as a result of equity’s intervention.⁸³

The same is not straightforwardly true, however, with transfer theories, owing again to the fact that they understand contracts, like conveyances, to involve a transfer of already-existing rights. In the case of an equitable assignment, we thus find ourselves confronted with what appears to be two overlapping transfers of contractual rights: the first corresponding to a contract to assign rights, which involves a contractual transfer that relates in at least some sense to rights under another contract, and the second to the completed equitable assignment, itself amounting to a conveyance of rights under that same contract with a third

81. See *Holroyd*, *supra* note 70 at 209; *Collyer*, *supra* note 54 at 351; *Tailby*, *supra* note 70 at 531, 533; *Fraser v Imperial Bank of Canada* (1912), 47 SCR 313 at 356, Duff J; *Holt*, *supra* note 62 at 5; *Royal Bank*, *supra* note 70 at para 112. Cf *Restatement*, *supra* note 12, § 321(2). It is for this reason that an equitable assignment can and is often used to provide a general security over a debtor’s assets, including a debtor’s after-acquired assets. See *e.g. Re Urman* (1983), 44 OR (2d) 248 (CA).

82. For a similar argument, see David Fox, “Relativity of Title at Law and in Equity” (2006) 65 Cambridge LJ 330 at 354, 363.

83. As Tolhurst puts it in a footnote, for instance, if transfer theory were to be adopted, “it would suggest that as between the parties each would be seen as owning the other’s promise which appears to have proprietary consequences when the law has generally been that as between the parties their rights are personal and only property for the purposes of transfer.” See *supra* note 4 at 41, n 68.

party. Precisely why the former transfer, but not the latter, is exempt from the application of the *nemo dat* rule is not evident at first glance. Nor, for that matter, is it obvious why the second transfer of rights that occurs through equity's intervention is required in the first place when the initial contract to assign rights already involves a transfer of contractual rights between the future assignor and future assignee.⁸⁴

If the general distinction between contract and assignment presents difficulties for transfer theories writ large, then the structure of assignments in equity, which seemingly involve an overlapping contract and assignment between the same parties, only serves to deepen the problems these theories of contract encounter when grappling with the law of assignment. Both the contract to assign rights and the completed equitable assignment present doctrinal specificities, chief among them being that the latter, as a conveyance, is subject to the *nemo dat* rule, while the former is not. We have already seen that both versions of transfer theory are able to account for the reasons why conveyances are generally subject to this type of limitation in a way that is inapplicable to contracts, understood as a transfer of rights. The question left to consider now is whether, and to what extent, the more specific features of each version allow us to do the same for both the legal and equitable assignment of contractual rights.

III. RECONCILING ASSIGNMENT AND TRANSFER THEORY

By now, it should hopefully be apparent that the mere possibility of assigning contractual rights does not necessarily amount to a point in favour of transfer theories of contract. To the contrary, in fact, the doctrinal rules that govern these transactions potentially call into question the assumptions that underlie both the version of transfer theory that frames contract as a transfer of rights to things and the version that views it as a transfer of rights against persons, at least at first glance. So long as both understand a contract to amount to a transfer of existing rights and an assignment to amount to a conveyance of rights already transferred at least once before by contract, then it is not immediately clear how either version can sustain a distinction between *any* form of assignment and a proper contract, even as they each recognize the need to distinguish between contracts

84. Although Benson's account suggests that there should be only a single transfer of rights, encompassing both parts of the overarching operation, it still requires that we distinguish the effects of the initial contract to assign rights from the effects this transfer generates once the assignment has been "completed" in the same way that it distinguishes a promise to sell goods from a completed sale. See *Justice in Transactions*, *supra* note 2 at 357-59.

and conveyances as a general matter. Since an assignment is a transfer of existing rights, it would appear that these theories are bound to regard an assignment as both simultaneously contract and conveyance.

This conclusion, however, is only a tentative one, based primarily on the fact that, to date, proponents of transfer theory have not paid close attention to rules that actually govern the law of assignment. In the last part of this article, I therefore attempt to sketch out how each version of transfer theory canvassed above might be developed to address the issues presented by both the statutory and equitable assignment of contractual rights. To that end, I begin again with the version of transfer theory that conceives of contract as a transfer of rights to things, before undertaking the same exercise in respect of the Kantian alternative. Although my arguments are not intended to be fully dispositive, I think it reasonable to conclude from what follows that the version of transfer theory that views contract as a transfer of rights to things encounters far greater difficulties, owing most notably to the problems created by the nature of the contract to assign rights that serves to ground equitable assignments of contractual rights. By contrast, I argue that the Kantian version can address the problems presented by the law of assignment in their entirety.

A. ASSIGNMENT AND THE TRANSFER OF RIGHTS TO THINGS

In the case of the version that views contract as a transfer of rights to things, I have already suggested that it draws a distinction between contracts and conveyances on the basis that the former amounts to something like a relational transfer of rights, effective primarily between its parties, while the latter serves to convey a proper right *in rem*, truly opposable against the world at large.⁸⁵ To understand what this means more concretely, consider what occurs according to this version of transfer theory upon the conclusion of an ordinary contract pertaining to the sale of tangible goods. For Benson, the very form of an exchange between the parties is what allows the promisee to gain rights to the goods from the promisor, even in the absence of their physical delivery and even if the promisor does not presently hold the rights in question at the moment that the contract is concluded.⁸⁶ Such an arrangement is possible because the right that the promisee gains in this way remains relational, and therefore directly opposable only to the promisor. By contrast to the transfer that results from a conveyance, the initial conclusion of the contract does not confer a right to the thing with full *erga omnes*

85. See Part I(A), above.

86. Benson, *Justice in Transactions*, *supra* note 2 at 352-53. See also Brudner & Nadler, *supra* note 3 at 188-89.

effects, although strangers to the contract are generally under a duty to avoid interfering with the contractual relationship itself even prior to the performance of the contract.⁸⁷

Now, what happens in this version of transfer theory if the promisee under the contract to sell goods assigns those rights to a third party? Although an assignment obeys the general rules applicable to conveyances, it must nonetheless be understood from this perspective to involve a transfer of rights that are already relational in at least some sense, since they are rights already transferred under, and thus qualified by, a prior contract—in our example, a prior contract of sale. This appears to be the thrust of Benson’s account of the law of assignment, which is the only relatively detailed account offered by any proponent of either version of transfer theory:

[B]y alienating her own ownership in the contractual right to the assignee, the assignor can no longer exercise rightful control in her own behalf and for her own contractual interests with respect to the performance as promised her by the obligor. Supposing that the assignor has validly transferred to the assignee the whole bundle of the rights, immunities, and powers that make up her performance interest as a chose in action, the assignor ceases ipso facto to have any beneficial contract interest of her own in the subsisting contract.⁸⁸

The understanding of assignments suggested in this excerpt, according to which they amount to a transfer of rights under a prior contract, accords with the general view of these transactions as a proper *transfer* of contractual rights. As Benson puts it, an assignment involves a transfer of a “chose in action,” which in his estimation amounts to a right that continues to refer to the same thing as the relational transfer made under the prior contract but that has also been transformed by the effect of that contract into a right that is relational between its parties.⁸⁹ Although Benson is not entirely explicit on this point, we can infer, however, that this transfer is more akin to a conveyance and so, following the language employed above, to what we might term a “full” or non-relational transfer of the right in question. The result is a non-relational transfer of an

87. Benson, *Justice in Transactions*, *supra* note 2 at 354-55.

88. *Ibid* at 89, 387. Cf Brudner & Nadler, *supra* note 3 at 188-89.

89. Benson, *Justice in Transactions*, *supra* note 2 at 87. I note however that the chose in action corresponds in Benson’s estimation to only one part of what the promisee gains from an initial contractual transfer—that is, specifically, the promisee’s interest in receiving the thing through the performance of the contract (*ibid* at 86, 88). If we adopt Brudner’s account instead, we can say that the initial contract has transformed the right to a thing *qua* tangible thing into a right to its exchange value and that the assignment now serves to transfer that exchange value. See Brudner & Nadler, *supra* note 3 at 188.

already-relational right to a thing which, though it still pertains to the same tangible object as the initial contract, has been transformed by that contract into a chose in action that is now capable of assignment by the initial promisee, acting as assignor, to an assignee. It is the contractual right, the relational right to a thing held by the initial promisee, that is the object of the transfer effected by an assignment.⁹⁰

Taken on its own, this account appears sufficient to explain the effects of a legal assignment, which is the type of assignment that Benson appears to have primarily in mind.⁹¹ Since it is the assignee, and not the assignor, who holds the relational right to the thing once the assignment is complete, it follows that it is the assignee, and not the assignor, who can now claim the thing directly from the initial promisor, in a manner largely analogous to the way that the initial promisee could have claimed it prior to the assignment.⁹² But perhaps more importantly, since the transfer effected by a legal assignment amounts to a non-relational transfer of rights that are themselves relational under the prior contract, the rights so transferred also continue to be tied to and qualified by that subsisting contractual relationship.⁹³ An assignment, on this reading, is not a contract, even if it serves to transfer rights that have been severed from the physical control of the thing to which they pertain. It amounts instead to an effective conveyance, with the consequence that the rights gained by the assignee can be no greater than those held by the assignor at the moment that the assignment is concluded. Moreover, the rights so transferred are opposable directly to third parties, or at least to the promisor under the initial contract, who is, of course, a stranger to the assignment itself.⁹⁴

This same basis for distinguishing contracts from assignments does not appear to hold, however, when we turn to equitable assignments, which, as already outlined, appear to be superimposed by the intervention of equity

90. It follows that it is not necessary for the assignor to hold a proper *in rem* right to the tangible thing to complete an assignment. All that is necessary is that the assignor hold the chose in action, which is to say the relational right to that thing under the initial contract, as is expressly recognized by Brudner. See Brudner & Nadler, *supra* note 3 at 188-89. See also Benson, *Justice in Transactions*, *supra* note 2 at 87.

91. Neither Benson nor Brudner addresses the specificities of legal and equitable assignments at all.

92. Benson, *Justice in Transactions*, *supra* note 2 at 89-90. See also Brudner & Nadler, *supra* note 3 at 188-89.

93. Benson, *Justice in Transactions*, *supra* note 2 at 89.

94. As Benson recognizes, however, the opposability of the assignment to the original promisor is dependent on the provision of notice. *Ibid* at 90-91.

onto a prior contract to assign rights between the same parties.⁹⁵ This is primarily due to the particularities of the latter type of transaction.⁹⁶ By contrast to an ordinary contract of sale, this type of contract, by which a promisor undertakes to assign contractual rights at some point in the future, cannot be understood to involve a standard relational transfer of *in rem* rights to the goods in question, since the promisor has not undertaken to convey such rights. A promisor under a contract to assign rights has instead promised to *assign* rights under a prior contract—in the example given at the beginning of this section, a prior contract to sell goods—and so can perform the duty owed pursuant to that contract without having to acquire *in rem* rights in the goods at all. The only rights that the promisor must instead acquire for equity to treat the promise to assign as a completed assignment are the contractual rights under the prior contract, which are to be assigned to the promisee and which entitle the holder of the right to merely *claim* the goods from the promisor under the original contract of sale.⁹⁷

For the version of transfer theory that conceives of contract as a transfer of rights to things, this particular transaction thus presents a dilemma. Although it involves a promise to assign contractual rights, rather than to convey rights to tangible things, it must be understood, like a completed legal or equitable assignment, to involve a further transfer of rights that have already been qualified by a prior contract. That is, it must involve a transfer of *already*-relational rights. However, the contract to assign rights is not equivalent to a completed assignment either, for reasons already touched upon above. In particular, the ability of the promisor to conclude a contract by which the promisor undertakes to assign these rights is not conditioned by the *nemo dat* rule, including the specific consequences of this rule as they apply most notably to completed assignments. On a transfer-based view of contract law, a promisor under a contract to assign rights, like the promisor under any other contract, can thus transfer greater rights to the promisee than the promisor holds at the time the contract is concluded, including rights that the promisor does not presently hold at all. It further seems to follow that the promisor must remain bound to assign the rights at issue to

95. See Part II(B), above.

96. Strictly speaking, the issues discussed here thus arise even if we do not consider equitable assignment at all since the contract to assign rights appears to be entirely valid at common law and historically treated (*i.e.*, before the advent of the modern provisions permitting legal assignment) as a promise to confer the benefit due under a prior contract. See *Wright v Wright* (1749-1750), 27 ER 1111 at 1112 (Ch).

97. See *supra* note 81 and accompanying text.

the promisee even if the original contract under which rights are to be assigned is held to be void or is never concluded at all.⁹⁸

Stated differently, the difficulty that arises in this version of transfer theory is that it appears to be incapable of conceptualizing the contract to assign rights in such a way that simultaneously accounts for both its specificity, as a contract pertaining to a future assignment of contractual rights, and its status as a contract that escapes the limitations imposed by the rules of property law. As a contract, it must amount, per Benson's account at least, to a transfer of rights that is relational between its parties, and so must abstract entirely from the effects of any prior transactions that may relate to the same external objects. But as a contract that pertains specifically to contractual rights, this relationality, this abstracting effect of the contractual relationship, cannot be affirmed completely. Otherwise, the transfer effected by the contract to assign rights would simply amount to a transfer of rights to external things—in the example given at the beginning of this section, a transfer of rights to tangible goods—that is completely unqualified by the prior contract, and so indistinguishable from an ordinary contract pertaining to the conveyance of rights to those external things (*i.e.*, from the contract to sell goods).

The problem persists even if we push Benson's arguments further still, by characterizing the contract to assign rights not as a mere transfer of already-relational rights—as is ostensibly the case with a completed assignment—but as a specifically *relational* transfer of an already-relational right.⁹⁹ This characterization is superficially appealing, since it appears to allow the contract to operate as both a contract and a transaction pertaining to rights under a prior contract. However, the fact that a contract to assign rights involves a transfer of already-relational rights—which is to say, a further transfer of rights to the same external things that formed the object of a prior contract—means that it cannot be fully relational between its parties. Even if it serves to effect a relational transfer of these rights, it must take the effects of the prior contractual transaction and the qualifications it imposes on those rights into account. But as we have just seen, these qualifications are also precisely the grounds on which Benson accounts for the application of the *nemo dat* rule to assignments of contractual rights.¹⁰⁰

98. This possibility is also implied in the use of equitable assignments to provide general security over a debtor's assets since there is no way to know ahead of time which rights the equitable assignor will actually acquire and thus be made subject to the equitable assignment.

99. Benson does not contemplate the contract to assign rights, let alone this particular way of characterizing it.

100. Benson, *Justice in Transactions*, *supra* note 2 at 89.

It would seem to follow that the contract to assign rights, being conceptualized here as a transfer of already-relational rights, even if only a relative transfer of such rights, should be subject to precisely these same limitations.

If we accept that the contract to assign rights does not amount to a mere transfer of rights to tangible things akin to an ordinary contract of sale—as it appears we must—the only alternative way of understanding it, from the perspective of the version of transfer theory that understands contract as a transfer of rights to things, is thus as a *further* transfer of rights already transferred by contractual means. This makes it seemingly impossible to explain its specificities vis-à-vis an ordinary contract without outright assimilating it to a completed assignment.¹⁰¹ Ultimately, this conclusion suggests that this version of transfer theory does not provide the best possible interpretive account of the relationship between contract law and the law of assignment. Now, the last question to consider in this article is whether the alternative version of transfer theory, which conceives of contract not as a transfer of rights to things but of rights against persons, fares any better.

B. ASSIGNMENT AND THE TRANSFER OF RIGHTS AGAINST PERSONS

In contrast to the version of transfer theory espoused most notably by Benson, according to which it corresponds to a transfer of rights to external things, the alternative version set out in Kant's legal philosophy is one that understands contract to amount to a transfer of rights directly against the person of the promisor.¹⁰² At first glance, it is perhaps tempting to conclude that this version of transfer theory faces an even more challenging task when confronting the law of assignment, since the main basis on which it distinguishes between a contract and a completed conveyance is simply not available when attempting to distinguish a contract, including a contract to assign rights, from a completed assignment. Indeed, given that an assignment seemingly amounts to a transfer of the same right already transferred at least once before by contractual means, it must correspond, per this version of transfer theory, to a transfer of rights *in personam*—or as Kant calls them, *iura personae*—just as is the case with the

101. If we extend this argument to Brudner's version of transfer theory, for example, we might similarly say that a contract to assign rights amounts to a transfer of exchange value. Precisely how this is to be differentiated from a transfer of the exchange value of a thing (as in a completed assignment) is not clear. The same problems identified above in relation to Benson's argument thus apply here as well.

102. See Part I(B), above.

transfer effected by contract.¹⁰³ Whereas this version of transfer theory can easily distinguish a contract from an ordinary conveyance on the basis that a contract transfers rights *in personam* and a conveyance transfers rights *in rem*, no such distinction is sustainable when we turn to the law of assignment; both contract and assignment appear to transfer rights *in personam*.

This conclusion, however, does not necessarily foreclose the possibility of distinguishing between contract and assignment, particularly once we understand that Kant's *in personam* right—or *ius personale*—is not quite identical to the prevailing view of this notion found in English-language scholarship. Following the work of the American jurist Wesley Newcomb Hohfeld, this scholarship tends to distinguish a right *in personam* from a right *in rem* merely on the basis of the number of persons against whom the right can be enforced.¹⁰⁴ Kant's approach, instead, is one that understands a *ius personale* to be qualitatively different from a right *in rem*—or *ius reale*—for reasons already outlined above. In short, these categories of rights correspond to normatively distinct types of relationships, with the latter pertaining to the exclusion of others from a particular thing and the former a direct title to the person's freedom of action, thereby requiring that the promisee claim through the promisor in order to obtain the promised performance.¹⁰⁵

Indeed, once we dispense with the essentially quantitative understanding of an *in personam* right that follows from Hohfeld, there remains an alternative basis on which we might distinguish a contract from both forms of assignment under the Kantian version of transfer theory. This alternative can, once again, be set out most easily by beginning with the legal assignment of contractual rights. Since the right transferred by contract is one that corresponds, in this version of transfer theory, to a right directly against the person of the promisor, it matters that it is the *promisor* transferring the right and not someone else. In fact, we would be correct to presume that third parties generally lack the ability to transfer such a right against the promisor at all, either because they do not hold a right against the promisor or, what amounts to the same thing, because they are not justified in curtailing the promisor's freedom without a valid cause to do so.¹⁰⁶ Once the

103. This much is implicit in Gold's account at least. See *supra* note 3 at 19, n 84.

104. See Hohfeld, *supra* note 30 at 718. The basic features of Hohfeld's approach are adopted, for example, in the work of Peter Birks. See *Unjust Enrichment*, 2nd ed (Oxford University Press, 2005) at 164-65.

105. See Kant, *supra* note 9 at 37-38, 48. See also Weinrib, *Corrective Justice*, *supra* note 5 at 152-53.

106. As Kant tells us, a contractual right cannot be acquired "originally and on one's own initiative." *Supra* note 9 at 57.

promisor has entered into a contract, however, the promisee can be taken to hold a right against the promisor's person, which is to say that the promisee now has a valid title to restrict the promisor's freedom of action by demanding the promisor's performance of the promise. Moreover, although this right began as an innate right prior to the conclusion of the contract, it is a right that is acquired by the promisee as an external asset (*i.e.*, as a right other than the innate right that the promisor holds over the promisor's own freedom) in a way that allows the promisee to further convey it, by means of an assignment, to a third party.¹⁰⁷

In this version of transfer theory, then, there is a difference between the right transferred by contract and the right transferred by legal assignment that pertains not to its nature, taken in the abstract, but to the person against whom the right is opposable. The right conveyed by both a contract and a legal assignment corresponds to a *ius personale*, enforceable like the Hohfeldian *in personam* right against a single determinate person, but the "causality" to which it pertains, to borrow Kant's phrase, is not the same.¹⁰⁸ In the case of a contract, the promisor can be said to transfer a right against the promisor's *own* person, against the promisor's *own* freedom of action, conferring upon the promisee a claim to obtain performance from the promisor and from no one else.¹⁰⁹ And since the promisor has *transferred* a right against the promisor's own person, the promisor thereby undertakes a duty that is correlative to the right gained by the promisee, which gives rise to an obligation between the parties.¹¹⁰ In the case of a legal assignment, meanwhile, the assignor does not transfer a right against the assignor at all, but rather transfers a right against *another* person, namely the third-party promisor under a prior contract. The object of the right so transferred is the *promisor's* freedom of action, not that of the assignor.

Framing the distinction between contract and legal assignment in these terms allows us to account for the doctrinal distinctions between the two transactions set out above. First and foremost, it explains why the consequences of a legal assignment mirror those of an ordinary conveyance such as a gift, despite the transaction amounting to a conveyance of a right already transferred once before, under a prior contract. By assigning the right, the assignor merely divests the right to demand performance from the third-party promisor, vesting that right

107. The possibility of such an assignment appears to be implied in Kant's remark that "[t]he other's promise is...included in my belongings and goods." *Ibid* at 38. See also Gold, *supra* note 3 at 19, n 84.

108. Kant, *supra* note 9 at 48, 59.

109. *Ibid* at 59.

110. *Ibid* at 57.

in the assignee without personally subjecting the assignor to a correlative duty.¹¹¹ This account also allows us to resolve the problem created by the *nemo dat* rule and related rules of property law. Although the right transferred by contract pertains to a portion of the promisor's innate right to freedom, and so does not need to first be acquired by the promisor for the reasons already outlined, the same is not true in the case of an assignment, for the reasons already suggested. The right transferred by an assignment is one that merely *begins* as an innate right of the promisor but counts as an acquired right to an external thing—the promisor's causality—when in the hands of the promisee.¹¹² It follows that the promisee, or any other subsequent assignor, must actually hold the rights at issue before the legal assignment can be concluded. Otherwise, the would-be assignor is attempting to transfer a right that the would-be assignor does not hold, and in the process restricting the promisor's freedom of action without a valid title to do so.¹¹³

This same basis for distinguishing contracts from completed assignments remains applicable when we turn to assignments operating in equity, including in relation to the contract to assign rights that ostensibly serves to ground equity's intervention. It is here, I have suggested, that the version of transfer theory that conceives of contract as a transfer of rights to things encounters particularly acute difficulties, since it appears impossible on such a view to account for a contract to assign rights in a way that simultaneously distinguishes it from both an ordinary contract of sale and a completed assignment of contractual rights.¹¹⁴ No such difficulty arises under the Kantian transfer theory, however. The contract to assign rights remains, in this view, a transfer of rights against the promisor's own person, the only added feature being that the duty that the promisor thereby assumes is not a duty to complete the future transfer of a *ius reale* to a tangible thing, as in a contract for the sale of tangible goods, but a duty to complete the future assignment of a *ius personale* against *another* person, under *another* contract.

Put differently, the Kantian version of transfer theory allows for a distinction to be drawn between the original contract to assign rights and the effects of equity's subsequent intervention to complete the assignment by conceiving: (1) the contract to assign rights as a transfer of rights against the promisor under

111. Except for the general duty incumbent upon everyone not to interfere with the assignee's acquired rights, which on a Kantian account is perhaps not strictly a duty arising in private law. See Ernest J Weinrib, "Private Law and Public Right" (2011) 61 UTLJ 191 at 204-206 [Weinrib, "Private Right"]. See also Kant, *supra* note 9 at 44-46.

112. *Ibid* at 59.

113. *Ibid* at 57.

114. See Part III(A), above.

that contract (who thereby undertakes a correlative duty); and (2) the equitable assignment as a completed transfer of rights against a third party, as is the case with a legal assignment. This account explains, among other things, why an equitable assignment presents the tripartite structure outlined above: The future assignor, as promisor under a contract to assign rights, transfers a right against the promisor's *own* person to a promisee, which entitles that promisee to claim performance against the promisor. Meanwhile, the effect of equity's intervention is to complete the assignment, or at least to treat the contract to assign rights as though it were a completed assignment once the requisite conditions are met. The promisee is thereby allowed to compel the promisor to bring a claim against a third party for the promisee's direct benefit, in accordance with the maxim that equity "treats as done that which ought to be done."¹¹⁵

While the version of transfer theory that understands contract as a transfer of rights to things encounters difficulties, particularly in relation to assignments in equity, the Kantian version of transfer theory thus appears capable of accounting for the distinction between a contract to assign rights and the transfer that is ostensibly effected by equity's subsequent intervention. The two transfers, contract and assignment, remain entirely distinct on this view, pertaining as they do to different objects—*different* rights against *different* persons—instead of merely amounting, as they ostensibly do on Benson's account, to successive transfers of rights to the same external thing.¹¹⁶ Although, strictly speaking, it is not necessary to fully account for the precise manner in which equity intervenes in this context, even this feature is potentially explicable through something like the Kantian framework, which recognizes a general court power to complete a conveyance, or at least to treat a contract to convey rights as a completed conveyance, under certain circumstances.¹¹⁷ Consistent with the contractual origins of this transaction, outlined above, an equitable assignment might accordingly be understood to amount to nothing more and nothing less than a contract to assign rights, which equity then intervenes to perform (or to

115. See *supra* note 81 and accompanying text.

116. See Benson, *Justice in Transactions*, *supra* note 2 at 89.

117. See Kant, *supra* note 9 at 82. See also Weinrib, *Corrective Justice*, *supra* note 5 at 110-12; Weinrib, "Private Right," *supra* note 111 at 204-206.

treat as though it were already performed) by allowing the ultimate assignee to claim against the initial promisor through the assignor.¹¹⁸

IV. CONCLUSION

As I have argued above, the assignment of contractual rights has important implications for theories of contract that understand it as a transfer of existing rights rather than as a source of new rights and duties rooted in the moral duty to keep one's promises. This is so particularly because transfer theorists themselves tend to draw on the law of assignment in support of their particular conception of contract law, and because of the interpretive commitments generally accepted by proponents of both versions of transfer theory examined in this article, which require that they grapple with the doctrinal differences that nonetheless exist between contract and assignment.¹¹⁹ Ultimately, I have suggested that only one version of transfer theory, corresponding to the Kantian version that understands contract as a transfer of rights against the person of the promisor, is fully capable of accounting for these differences, especially as they pertain to the assignment of contractual rights operating in equity.

This conclusion might be understood to present a challenge for the broader relevance of transfer theories, most notably by contrast with their promise-centred competitors. That it is the Kantian version of the theory that appears most capable of accounting for the doctrinal features of the law of assignment is perhaps telling here. After all, it is this version that most closely resembles the account given by promise theories of contract, in which contract and conveyance are understood to complete qualitatively different types of legal operation by creating rights and transferring rights, respectively.¹²⁰ In contrast, most contemporary proponents of transfer theory follow the general thrust of Benson's argument by conceiving of contract as a transfer of rights over external things that is differentiated from a conveyance merely by the relational nature of the transfer in question. This means

118. There is a potential analogy here with the contract by which a seller promises to sell land, in which equity intervenes to treat the seller as a trustee of the land for the benefit of the purchaser. See *Lysaght v Edwards* (1876), 2 Ch D 499; *Simcoe Vacant Land Condominium Corporation No 272 v Blue Shores Developments Ltd*, 2015 ONCA 378. This scenario is also potentially explicable on the basis of something like the Kantian framework. See Sérafin, *supra* note 15 at 106-110.

119. See *supra* notes 5-6 and accompanying text.

120. As noted above, key proponents of promise theory, including Charles Fried, consciously draw on Kant's account of contract as well. See Fried, *supra* note 2 at 8, nn 2, 139-40. See also Ripstein, *supra* note 49 at 113. But see Weinrib, *Idea*, *supra* note 24 at 50-53.

that it is the most popular version of transfer theory that appears incapable of fully accounting for the law of assignment in the same way as its promissory rival, despite the support that it claims to draw from that same body of doctrine.¹²¹

Such a conclusion as to the general relevance of transfer theories, however, is by no means required by the preceding arguments. All I have attempted to show here is that transfer theories face particular challenges that promise theories do not when confronting the law of assignment and that one particular version of transfer theory, but not the other, is capable of meeting them in their entirety. These difficulties aside, there remain important reasons why we might still favour transfer-based accounts of contract law, the most important of which is that transfer theories do indeed appear to be capable of accounting for many of the essential doctrines of contract law in a way that promise theories do not.¹²² Although problems do arise at the level of the relationship between contract and conveyance, and more narrowly between contract and assignment, it should be remembered that these arise as a corollary of what likely amounts to the true distinctive advantage offered by transfer theories of contract: It is on this view, and perhaps only on this view, that constraints on individual autonomy can be recognized as an intrinsic feature of contract law and that the parties to a contract, like the parties to a conveyance, may be required to conform to a pre-existing normative order, not by virtue of some external policy imperative, but by the very logic of contract law itself.¹²³

121. See Benson, *Justice in Transactions*, *supra* note 2 at 354-55; Brudner & Nadler, *supra* note 3 at 188.

122. See *supra* note 2 and accompanying text.

123. See Benson, *Justice in Transactions*, *supra* note 2 at 26-27. See also Weinrib, *Corrective Justice*, *supra* note 5 at 21-29. Cf. Brudner & Nadler, *supra* note 3 at 107-108.

