Book Review Essay
Understanding the Law of Assignment (2023) 38 *Journal of Contract Law* 261-269

Understanding the Law of Assignment by C H Tham, Cambridge University Press, 2019, ISBN 9781108636674, xlvi + 475 pp

Equitable assignments are fundamental to many of the great agglomerations of capital in the Anglo-American world (consider the whole of securitisation and much structured finance), and yet on close analysis they are quite peculiar. It seems natural to characterise equitable assignments as a form of transfer, not least from their name and from the commercial reality, yet in many respects the relations between the obligor and obligee/assignor remain intact. Another approach, especially in the important case of equitable assignments of a legal chose in action such as a debt, is to regard them as giving rise to a trust, whereby the assignor holds the benefit of the chose on trust for the assignee. Professor Tham's work exposes the limitations of both those approaches, and advocates a third, based on a combination of agency and trust, which he suggests better explains the law. In developing that argument, the work extensively analyses the law connected with equitable assignments and assignments pursuant to s 25(6) of the *Judicature Act 1873* (UK) and its modern counterparts such as s 136 of the *Law of Property Act 1925* (UK) and s 12 of the *Conveyancing Act 1919* (NSW). The reasoning is innovative, precise and at times quite creative. It actively engages with issues of practical importance, explaining why the correct doctrinal underpinning matters. The work does not shrink from criticising passages in decisions – even decisions of ultimate appellate courts long understood to be authoritative – and it does so with restraint and courtesy. There are many, many pages of detailed consideration of (mostly English, mostly nineteenth and early twentieth century) case law, and a very clear structure and development of the work's claims. The sustained intellectual endeavour which has been applied on page after page is palpable. It yields many insights on familiar and less familiar decisions. In short, there is much to like. It should be added, in an era when standards of copy-editing are slipping, that the book is quite beautifully presented – the layout is exquisite, the chapters are well structured, and the physical book is delightfully printed and bound.

Yet this reviewer's enthusiasm is not unqualified. In order to enable readers to make up their own minds, it is necessary to summarise the book's structure and say a little more about its argument.

The book is divided into six parts. After a commendably clear introduction, Part II identifies the two prevailing conceptions, or "models", of equitable assignments, as the "substitutive transfer"

model, whereby a new relation is substituted between assignee and obligor, and the "partial" trust model, whereby the equitable assignor is regarded as holding the property on trust for the assignee. The author maintains that preferable to both is a more complicated approach, incorporating a bare trust and an unusual form of agency. "[E]quitable assignment should be conceived as operating through the combination of a bare trust plus an atypical agency in which the assignee is authorized to act as if he were the assignor, and without regard to **[262]** [the assignor's] interests" (p 99). This is described as the author's "composite, dualist conception of equitable assignment", and it is central to the work, which employs a very precise analysis of the relations between obligor, assignor and assignee following an equitable assignment. Having done so, Parts III and IV test the author's model against the principles applicable to problems involving joinder and notice. Part V deals with Statutes, notably the various equivalents to s 25(6) of the *Judicature Act 1873* (UK), and defends the second main claim of this work, namely, that a statutory assignment under s 25(6) is "an augmentative doctrine which does not create a distinct mode of assignment". The concluding Part VI ("Why It Matters") concisely explains areas where the conception of equitable assignments matters, including the effect of anti-assignment clauses, oral gifts of legal choses in action and assignments of parts of a chose of action.

It is also necessary to mention another aspect of this work, evident on a superficial or a deep review, and implicit in what has already been said. The work attends, very closely and precisely, to the jural relations between obligor, obligee and assignee, directly employing Hohfeldian analysis. The consequence is that it is necessary to have a familiarity with Hohfeldian distinctions and the author's terminology, and some readers may find aspects of that forbidding. No summary can do justice to the style and the detail. The extract below is of the work's principal claim:

Table 4.3 *Effect of Authorization Plus Release*

3.1	A has a claim-right against B that B do Φ;
3.2	A has a power against B to do Θ;
3.3	A has a privilege against B to invoke her power against B to do Θ, or not, as she pleases: she is under no duty to B to invoke that power, or not; and
3.4	A has an immunity against B changing A's jural relations with B in that B has no ability to effectively invoke A's power against B to do Θ.
3.5	By reason of the bare trust constituted in favour of C, A no longer has a privilege against C to invoke her power against B to do Θ as she pleases without regard for C's interests, or not; she is under a duty to C to invoke her power against B to do Θ, or not, in accordance with the terms of the bare trust; and
3.6	By reason of the authority granted to C, coupled with a release of his fiduciary obligations, A will no longer have an immunity against C changing A's jural relations with B in that C will now have the power against A to invoke A's power against B to do Θ, and as he pleased without regard for A's interests. That power is no longer for A, and A alone, to invoke; since A had authorized C to invoke such power as her agent. Furthermore, C is also privileged against A to invoke such delegated power against B as he pleases without regard for A's interests.

The argument is that equitable assignment should be conceived as operating through the combination of a bare trust plus an atypical agency in which the assignee is authorized to act as if he were the assignor, and without regard for A's interests,[105] leading to the results spelt out in Table 4.3.

[263] Professor Tham is surely correct to say that much of the difficulty in understanding "how equitable assignments operate rests in the inadequacy of the language of 'rights' and 'duties'" (p 28). His model is complicated, and its presentation is unavoidably technical. That is not a criticism *per se*, although it is far from clear to this reviewer that the solution to the unavoidable difficulties of language is resort to an abstract formalism which poses its own obstacles to clear understanding. To many who may have pondered equitable assignments less deeply, the impression may resemble the loss of confidence felt by high school students who believe they have understood the subatomic

world of protons and neutrons, with orbiting electrons in different shells, only then to encounter the miscellany of subatomic particles discovered in the second half of the twentieth century. The modern atomic model is much more difficult, but enables a better understanding of some otherwise inexplicable aspects of the universe. So far as I can see, the model in the book under review "works", in the sense that the rules and principles developed in relation to equitable assignments can be mapped onto the more primitive Hohfeldian relations between obligor, assignor and assignee. Doing so enables the analysis to transcend the inevitable ambiguity of the language of "rights" and "liability", both words famous for their multiple meanings.

Is it all worthwhile? In one sense, the answer is an enthusiastic yes. It is always worthwhile to study a basic institution afresh, with care and precision, in order to avoid the pitfalls of language and logic that pervade law, thereby to see old issues from a new perspective. This is a familiar mode of serious scholarship, and it is with this in mind that I read Justice Edelman's generous endorsement in the book's foreword. But in another sense, the law of equitable assignments is vastly different from the real world of quantum electrodynamics, which Richard Feynman famously delighted in teaching as something which could *not* be understood (see R Feynman, *QED: The Strange Theory of Light and Matter* (Princeton, 1985) ch 1). QED is intensely counter-intuitive, and yet it describes aspects of the natural world to unprecedented degrees of accuracy, so much so that it *must* reveal some fundamental truth. But equitable assignments are a human construct. The applicable principles are derived like any judge-made rule or principle from the haphazard body of case law within the artifice that is the legal system. Surely equitable assignments were derived in reaction to the needs of an increasingly mercantile society to deal in debts, the desirability for the royal courts to resolve mercantile disputes by rules that were not commercially absurd, and in reaction to common law's steadfast stance against maintenance. Windeyer J had this in mind when he wrote of the "somewhat unsophisticated view of legal rights that led the common lawyers to classify choses in action and debts with mere possibilities, and to condemn all assignments of them as leading to maintenance": *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 26. That very human history, which is surely at least a *part* of the reason equitable assignments manifest themselves as they do, means that the introduction of conceptual complexity in analysis may not have the same benefits as a scientific theory seeking to model the natural world.

More generally, much of law, and in particular much of equity, does not lend itself to a reductionist approach. As the Full Court of the Federal Court **[264]** recently observed, of a different aspect of equitable jurisprudence, "The judicial technique involved is not definitional, nor is it exemplified by aphorism or reductive logic": *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40 at [90]. (There is much truth in that observation, not all of it confined to equity.) Perhaps not all areas of equity are equally insusceptible to the reductive analysis deployed in the work under review, but it cannot be assumed that what works in the physical sciences will translate to law.

Does it assist the analysis to say that an equitable assignment incorporates an atypical agency? The answer may be "yes", insofar as comparing and contrasting two legal concepts may lead to a clearer grasp of the aspects of both, in much the same way as an undergraduate may be asked to compare a bailee's possession of a chattel with a trustee's ownership of a chattel in order better to understand trusts. But it is to be steadily borne in mind that "agency" is not a more primitive concept than equitable assignment, that "No word is more commonly and constantly abused than the word 'agent'", as Lord Herschell said in *Kennedy v De Trafford* [1897] AC 180 at 188, and in particular that introducing a concededly "atypical" agency need not advance the analysis. Similarly, to say that equitable assignment entails a trust does not self-evidently advance the analysis. The conception of a "trust" is also the opposite of a primitive concept. It was Professor Austin Scott who famously wrote that the "The trust is the whole juridical device: the legal relationship between the parties with respect to the property that is its subject matter, including not merely the duties that the trustee owes to the beneficiary and to the rest of the world, but also the rights, privileges, powers and immunities that the beneficiary has against the trustee and against the rest of the world" (*Scott on Trusts*, §2.4). Much the same point was made in the joint judgment in *ElecNet (Aust) Pty Ltd v Commissioner of Taxation* (2016) 259 CLR 73 at [50], decrying the utility of analysis of a "unit trust" in the abstract, as opposed to an analysis of the rights, powers and restrictions imposed by the relevant trust deed.

Introducing trust as a component of every equitable assignment also presents an immediate problem. Equity will not perfect an imperfect voluntary assignment by discerning an intention to create a trust. This work casts no explicit doubt upon Turner LJ's adage in *Milroy v Lord* that if something "is intended to take effect by transfer, the Court will not hold the intended transfer to

operate as a declaration of trust". There is at the least a real tension, if not an outright inconsistency, between a conception of equitable assignment as inevitably involving a trust, and a rule that a party who has intended to create a voluntary assignment may not be regarded as having created a trust.

Problems arise concerning the work's second main claim, concerning "statutory" assignments. It seems unlikely that an analysis which passes over the distinctive legislative history will be completely satisfying. Surely there is no avoiding the human element when one considers the nature of a statutory assignment. One of Roundell Palmer's reforms in the original *Judicature Act 1873* was to create a new statutory mode of assigning legal choses in action (such as debts), where there an absolute dealing in writing signed by the assignor of which the debtor was given notice. The future Lord **[265]** Selborne was addressing a practical problem, which at least extended to the difficulties concerning joinder of parties. How can we know? The fact that Lord Coleridge LCJ thought as much a few years later in *Brice v Bannister* (1878) 3 QBD 569 at 575 is some evidence of it. So too are statements of explicit purpose of earlier statutes directed to the same end. For s 25(6) of the *Judicature Act 1873* did not spring forth fully formed as a brand new mode of dealing with intangible property. Recent statutes to the same end authorising the transfer of policies of life assurance (30 & 31 Vic c 144) and marine insurance (31 & 32 Vic c 86) enacted in 1867 and 1868. There is an interesting difference between these two specific measures: the former did not permit the assignee to sue in his own name, while the latter did and the mischief to which it was addressed was recited to be that "it is expedient that the assignees of marine policies of insurance should be enabled to sue thereon in their own names". Section 25(6) adopted the same approach. There are many other examples in the mid- and late-Victorian statute book: mortgage debentures could be transferred under the *Mortgage Debenture Act 1865* (28 & 29 Vict c 78) as could shares under the *Companies Act 1862* (25 & 26 Vict c 89). Administration bonds were made assignable upon breach, and if the Court were so satisfied, it could order a registrar to assign the bond to some other person, "and such person, his executors or administrators shall thereupon be entitled to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him": *Probate Act 1857* (20 & 21 Vict c 77), s 83. Walter Warren's *The Law Relating to Choses in Action* (Sweet & Maxwell, 1899) summarises those and other statutes preceding the enactment of s 25(6) at pp 119-139, as well as with statutes enacted in the ensuing two decades at pp 186-203.

Of this mass of statutes preceding and post-dating the enactment of s 25(6), the work under review mentions only the *Policies of Assurance Act 1867*, at 406-409, developing the argument that there is "nothing in the 1867 Act that supports the proposition that it creates an assignment by way of substitutive transfer'". There is a ten page section on the "legislative history and purpose" of s 25(6) (pp 329-339) but it is directed principally to the proposition that s 25(6) was not mentioned in Lord Selborne's second reading speech. That is true, and somewhat remarkable, but what of the historical precursors which are likewise absent from the second reading speech? In particular, what of the 1868 statute authorising assignees of policies of marine insurance to sue in their own names? This passes unnoticed as a precursor to s 25(6), although a short section (less than a page) is directed to the corresponding section of the *Marine Insurance Act 1906* (and without noting it is a re-enactment of the earlier provision). More fundamentally, if the "statutory" assignment effected by s 25(6) is in truth only an equitable assignment, what of the suite of other statutory assignments enacted around this time? But putting those matters to one side, this reviewer welcomed the engagement in Part 5 with many statutory schemes (notably intellectual property statutes). This is a work which does not focus exclusively upon case law. It embraces legislation, which is after all the primary source of law not to mention change in all modern legal systems.

Turning to the applications in Part 6, this work maintains that a legal chose in action can be given away without writing. It is settled law in Australia that it cannot. Unquestionably the chose in action may engage s 25(6); it is thus legal **[266]** property which is assignable at law. Applying the principle in *Milroy v Lord*, the High Court reasoned that in order for a voluntary assignment to be effective in equity, the assignor must have done everything that was necessary to be done in order for there to be a legal assignment, which therefore required creating signed writing. Thus an oral gift of a debt is ineffective in equity, as was held in *Olsson v Dyson* (1969) 120 CLR 365, and as Windeyer J explained at length in *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9.

True it is, as the author points out, that this seemingly flies in the face of Lord Macnaghten's dictum in *William Brandt's Sons & Co v Dunlop Rubber Company* [1905] AC 454 that the statute "does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree". This point warrants a moment's pause, as an example of how the provocative aspects of this work can lead to insight. What did Lord Macnaghten really mean? The starting point is that Lord Macnaghten was addressing a judgment which neglected to attend to the submission by Hamilton KC (the future

Lord Sumner) that the creditor's direction amounted to an equitable assignment, even if it did not fall within the statute. This has been disguised in the reasons of Alverstone CJ by a material change to the form of the *ex tempore* reasons by the editor of the Law Reports. In the official version the Lord Chief Justice is recorded as saying, dispositively, that the document "does not fulfil the requirements necessary to entitle the plaintiffs to maintain this action whether as legal or equitable assignees of the debt sued for, because it is not an assignment of the debt, either legal or equitable": see [1904] 1 KB at 394. But in the version of the judgment which actually came before the House of Lords from which Lord Macnaghten was working (as quoted in the Appeal Cases at 461), the Lord Chief Justice wrote that the document "does not fulfil that which is necessary in order to entitle the plaintiff to sue, whether suing as equitable or as legal assignee, on the ground that it is not an absolute assignment or an assignment at all within that section". Thus what the Lord Chief Justice had actually said was that s 25(6) was a mandatory code for all assignments. It is unsurprising that an appeal was allowed, and it is perhaps unsurprising that an egregious error was airbrushed out of the law reports. Perhaps this was a less extreme example of editorial changes to the substance of a judgment than the decision which the same editor later described to Oliver Wendell Holmes as "unluckily it came before the one weak judge of our Chancery Division and I had to edit his offhand judgment considerably to make a decent show of it for the Law Reports" (Pollock to Holmes, 12 June 1926), but it is a reminder that reading judgments in context (as they must always be: *Commonwealth v Bank of New South Wales* [1950] AC 235 at 308) may sometimes require reading outside the authorised report. Only because this work advanced the theory that Lord Macnaghten should be understood as an exercise of an equitable jurisdiction (as to this see below) did I have cause to reread the decision, the summary of arguments made to it, and the decisions of the lower courts, thereby noticing the changes made in the process of reporting the latter. This is an example of the value of provocative and indeed creative legal scholarship. That said, having been provoked to do so by this work's clearly articulated arguments, I remain unconvinced, although I warmly acknowledge that the footnotes, some of which are **[267]** discursive and full of interesting nuggets, encouraged me to undertake this research (notably, extended footnotes 49 and 53 at pp 196-198). I think Lord Macnaghten's strong language in *William Brandt's* was a reaction to a very bad misapprehension of the position in the *ex tempore* judgment of the Court of Appeal. The work under review contends that "the rationalization that s 136(1) 'statutory' assignments are augmented equitable assignments (ie they are equitable assignments *plus*) is consistent with the English view that s 136(1) does not invalidate equitable

assignments of choses in action falling within its ambit which fail to comply with those requirements of s 136(1) which only the assignor could comlpete (ie in connection with the need for a sined writing). Therefore, as a matter of principle and authority, it remains possible for an assignor to make a present gift of a legal chose in action (such as a debt) orally without the need for a signed writing as a matter of English law" (p 436). But if one starts, as Windeyer J did, with the idea that the principle in *Milroy v Lord* (that equity will not perfect an imperfect gift of property assignable at law) is a "general rule", then it is at least arguable that it would apply in an ambulatory fashion by reference to the statutory regime which obtains from time to time. There are after all hierarchies of rules and principles; one thing the legal system is *not* is simply a disorderly "heap of rules", something which has profound consequences in its analysis: see for example Professor Henry Smith's work on systems theory in ch 9 of the *Oxford Handbook of the New Private Law* (OUP, 2020). Whether or not one agrees is not to the point; it would have been of interest for the argument to have been addressed in this work.

Turning to this work's chapter on joinder, there is an extensive analysis of *William Brandt's v Dunlops* [1905] AC 454; indeed, the decision is referred to on more pages than any other. Why was it unnecessary to join the assignor? The work contends that "perhaps" the assignee was not pursuing a common law action at all. "Indeed, once we recognize *Brandt's* to be a decision of the court in exercise of its *equitable* jurisdiction, it falls entirely in line with cases such as *Cator v Croydon Canal* or *Fulham v McCarthy*" (p 199). The author claims that reassessment is required of a series of decisions, including *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 and numerous decisions of the Court of Appeal, "which have taken *Brandt's* as authority for the proposition that 'when a legal chose is assigned, the need to join the assignor is procedural and not substantive'". This reflects the work's contention that "the rules of joinder of parties to proceedings brought within the court's equitable or common law jurisdiction are quite distinct from each other" (p 200). This distinction is deployed in order to explain whether the absence of a party is better regarded as "procedural" or "substantive": the former if the proceedings are "brought entirely within the court's equitable jurisdiction", the latter "where the proceedings involve recourse to the court's common law jurisdiction".

Some (like me) will find that reasoning unpersuasive. The Judicature legislation was as much about unifying the procedural rules applicable to the various superior courts as anything else. The pitfalls

associated with parties were as familiar to the Victorian reformers as any other (witness for example the learning in the second edition of Frederic Calvert's treatise on *Parties to a Suit in Equity* (1847), dealing with equitable assignment at pp 314-323). It **[268]** would be passing strange if *after* the Judicature reforms, there remained a difference in the procedural rules. To the contrary, a series of reforms to the rules governing parties at common law and in equity in the nineteenth century culminated in the Judicature rule "No action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it" (see *Boyd v Thorn* (2017) 96 NSWLR 390 at [96]). It seems counter-intuitive to regard post-judicature decisions as involving different rules as to parties based on whether they were exercising a common law as opposed to an equitable jurisdiction. And in any event how does one distinguish between these two categories, as one must, if indeed there are different rules governing the two? Take for example *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1, which is invoked to support the proposition in the text. The society brought an action for damages and injunction. It was tried without a jury before Branson J sitting at King's Bench. The claims were wholly statutory, based on infringement of copyright by performing or authorising the performance of two songs, or permitting a hall to be used for the performance. Section 6 of the *Copyright Act 1911* (UK) entitled an owner to all remedies "by way of injunction … damages, accounts and otherwise" as were conferred by law. Damages were pressed and nominal damages were awarded (although the book states at p 200 that "the claim for damages was withdrawn"). The work suggests that the "issue of a perpetual injunction is a matter solely within the court's equitable jurisdiction" (p 201), as a step in the argument that the equitable rule as to joinder was being applied. An alternative analysis is a little simpler: the claim was statutory, the action was not "solely within the court's equitable jurisdiction", and in any event the procedural rules governing joinder in a post-Judicature court which were common to all proceedings did not depend on whether the proceeding was regarded as being based on common law or equity.

There are some minor glitches, inevitable in a work of this magnitude. In explaining the history of s 25(11), the work helpfully identifies Sir Alexander Cockburn's letter to Selborne of 7 February 1873 at pp 334-335, which is less well known than it ought to be, notwithstanding that it is the source of the profoundly important s 25(11). A minor regret is that because the book relies on a fairly obscure secondary source, the quotation is slightly incorrect and the manuscript reference from Lambeth

Palace library is incorrect (cf (2011) 5 *Journal of Equity* 199 at 214-5). More worryingly, Sir Kenneth Jacobs' name is consistently misspelt (at pp 59, 259 and 270). The work describes Andrew Smith J's statement in *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd* [2012] 2 Lloyd's Rep 594 that "In the case of statutory assignments under section 136 of the Law of Property Act, 1925, the debt or other chose in action is transferred only if notice in writing of the assignment has been given to the debtor or other obligee" as "misleading and unhelpful" (p 328), although I would regard it as uncontroversially correct on an orthodox conception of statutory assignments of choses in action. The work analyses the vexed question whether a bare equitable assignee which itself assigned its interest thereby "drops out" of the picture, but fails to mention the analysis of the High Court of Australia in *Halloran v Minister Administering National* **[269]** *Parks and Wildlife Act 1974* (2006) 229 CLR 656 especially at [72]-[74] on this point.

Readers will judge for themselves whether this work provides, in the words of Justice Edelman's foreword, "justification for a very significant body of law" which will help us "to understand how it should develop". It is undoubtedly a creative and provocative work of genuine scholarship; that is not to deny its flaws.

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