

---

---

# THE LAW OF ASSIGNMENT

SECOND EDITION

---

MARCUS SMITH QC  
NICO LESLIE

---

---



OXFORD

# THE LAW OF ASSIGNMENT

SECOND EDITION

MARCUS SMITH QC

*BCL, MA (Oxon)*

*Of Lincoln's Inn, Barrister*

*A Chairman of the Competition Appeal Tribunal*

NICO LESLIE

*BA (Cantab)*

*Of Lincoln's Inn, Barrister*



OXFORD  
UNIVERSITY PRESS

OXFORD

UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,  
United Kingdom

Oxford University Press is a department of the University of Oxford.  
It furthers the University's objective of excellence in research, scholarship,  
and education by publishing worldwide. Oxford is a registered trade mark of  
Oxford University Press in the UK and in certain other countries

© Marcus Smith & Nico Leslie 2013

The moral rights of the authors have been asserted

First edition published in 2007

Second edition published in 2013

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in  
a retrieval system, or transmitted, in any form or by any means, without the  
prior permission in writing of Oxford University Press, or as expressly permitted  
by law, by licence or under terms agreed with the appropriate reprographics  
rights organization. Enquiries concerning reproduction outside the scope of the  
above should be sent to the Rights Department, Oxford University Press, at the  
address above

You must not circulate this work in any other form  
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence  
Number C01P0000148 with the permission of OPSI  
and the Queen's Printer for Scotland

British Library Cataloguing in Publication Data  
Data available

ISBN 978-0-19-958508-3

Printed in Great Britain by  
CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and  
for information only. Oxford disclaims any responsibility for the materials  
contained in any third party website referenced in this work.

# THE LAW OF ASSIGNMENT

SECOND EDITION

## FOREWORD TO THE SECOND EDITION

Assignments occur in a wide variety of contexts. Many are of everyday commercial importance, others more exotic. But the subject is marked by ancient terminology ('choses' or 'things' in action) and by distant history (the common law's reluctance to treat contractual relations as other than personal and the perceived risks arising from the buying and selling of causes of action). The interventions of equity and of various statutory provisions leave a patchwork picture, the implications of which are not always easy to comprehend or apply.

The topic also raises questions which are inherently difficult. Even more so, one may add, when associated with issues of private international law—in 2008 the Council of Ministers had to defer determination of which law or laws should govern 'the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person' when agreeing Rome I Regulation 593/2008: see article 27(2); no *via media* could be found to reconcile the competing arguments of block discounters in favour of the law governing the assignment and others favouring the law governing the claim assigned.

The first edition of the present work was by Marcus Smith QC alone. Its success in providing a wide-ranging review of the subject made it of value to the practitioner and academic alike. The second edition, in which Marcus Smith is joined by Nico Leslie, takes an even broader view of the field. It incorporates various new sections, including a substantial one covering the following and tracing of assets in circumstances where an owner is deprived of his property. But throughout it maintains the same high standard of clarity and analysis, starting as before with a useful overview of its now expanded contents and clarification of the terminology—'choses in action', property rights and intangible property, etc. The authors' jurisprudential interests manifest themselves in passages discussing the various interests involved in assignment in Hohfeldian terms. Comparative European law appropriately informs their analysis of the circumstances in which transfer of property occurs so as to preclude the following or tracing of assets.

The new edition is not only comprehensive, but clear, informative, well-referenced, scholarly and appropriately critical. It is also a good read, both for detailed study and for reference. It is a pleasure to commend the joint authors on producing so admirable a sequel to an already excellent first edition.

Lord Mance  
January 2013



## FOREWORD TO THE FIRST EDITION

The law of assignment is seldom visited by academics. Nor has it ever been friendly territory for practising lawyers, not because it is part of the hinterland where we are seldom taken, but because it is one of those dangerous streets where all too often we are surprised to find ourselves. This book is designed to help us at least orientate ourselves in the confusion, and, with luck, to find the right path.

'Assignment' is not an easy area of the law, and it is not one that is easy to categorize. It bridges property and personal obligations. It still bears the scars of the skirmishing between equity and the series of excuses that the common law hit upon to resist change. The invaluable contributions of law merchant are still observable and on occasion still need to be harmonized or modernized. The intervention of statute has brought its own problems. The line between substantive law and procedural rules can easily be lost. Added to all that, there are the inevitable difficulties that arise because the law of assignment covers a multiplicity of different types of obligation. It is not surprising that at times it seems to defy attempts to discern a consistent and logical structure.

As new international influences and new forms of commerce and financial dealings require the law to be flexible enough to recognize and accommodate new forms of business obligations, the rules of English law about transferring rights and obligations cannot be rigid or static. Established doctrines about transferring 'burdens'—even the language seems oddly stale—will require fresh examination. But sound legal progress requires a proper understanding of developments to date and a firm grasp of the governing principles. This textbook is timely in providing the well-researched and disciplined analysis that is needed. While the Judicature Act freed the common law from some of the chains in which it had tangled itself, the best part of a century and a half is long enough for a new body of judicial pronouncements to gather. The author treats them with a proper respect, that is to say a sceptical and critical respect. He avoids being sidetracked by that excessive regard for aberrant decisions that can so easily distort or disguise legal principles, not by the easy device of ignoring them, but by engaging with them and putting them in their place.

We should always be wary when lawyers adopt legal expressions that do not convey the usual meaning of the term. Often the layman's bewilderment is matched by the lawyer's fudge. 'Assignment' is just such a word. The achievement of the book is to provide a methodical structure to a somewhat formless body of learning and precedent. It also finds the right balance between the theoretical and the practical. The author's academic background provides the breadth of knowledge that enables him to draw together principles from different legal areas. As a practising lawyer he knows how to make his learning accessible to others.

Marcus Smith has produced a book which does not answer all the questions, but it does set the right questions, and does so with order and clarity. All lawyers know that finding the questions is at least as difficult as finding the answers. This is a textbook which will be welcomed by all lawyers who have to apply the law, and will, I hope, assist its methodical advancement.

Andrew Smith  
Royal Courts of Justice  
February 2007

## PREFACE TO THE SECOND EDITION

The generous reception given to the first edition of *The Law of Assignment* was at once surprising and very pleasing. The book received favourable, but constructively critical, reviews by (amongst others) Andrew Tettenborn [2007] LMCLQ 571, Gerald McMeel (2008) 37 CLWR 100 and Chee Ho Tham (2008) 124 LQR 175. It has also been cited in judgments both in England and in other common law jurisdictions, with notable citations by the United State Supreme Court and the Singapore Court of Appeal.

This, the second edition, seeks to build on that success. As well as updating the first edition (over five years the area has seen a lot of new material), the second edition has expanded on the first in a number of places, notably in the analysis of property rights (Chapter 2), the consideration of rights or causes of action (Chapter 3), securities (Chapters 6 and 19) and in a detailed assessment of how an owner of an intangible vindicates his rights if they are interfered with (Chapters 26 to 31).

All barrister authors will recognize the pressures of combining the day job with the job of writing. In this case, the pleasure of joining the Competition Appeal Tribunal as one of its part-time Chairmen rendered an expansion of authorial team inevitable, and it was a great pleasure when Nico Leslie agreed to become a co-author in 2011.

Additional thanks go to many people, but in particular to Ms Melonie Atraghji, Sir Richard Buxton, Dr Rory Derham, Mr Mark Gill, Professor Louise Gullifer, Dr Louise Merrett, Dr Simon Pulleyn and Andrew Smith J for their thoughts, help and encouragement. Naturally, we are responsible for all errors and omissions that remain.

We are also particularly grateful to Lord Mance for finding the time to write the foreword for this second edition, and to Andrew Smith J for writing the foreword for the first edition and permitting its reproduction here.

We also extend our thanks to the staff of Oxford University Press for bearing with us and for bringing the book successfully through to publication, in particular, Rachel Mullaly (who has been involved from the very beginning), David Lewis and Elissa Connor.

Finally, we would like to thank Tetyana Nesterchuk for all her work in reviewing the final drafts of the second edition, and welcome her as a co-author in the third edition.

We have endeavoured to state the law as at 12 December 2012.

MAS  
NXL  
12 December 2012

## PREFACE TO THE FIRST EDITION

The law of assignment has fascinated me ever since I encountered, and pondered over, the decisions of the Court of Appeal and House of Lords in *Pan Ocean Shipping Co Ltd v Creditcorp Ltd*, a case that continues to perplex. It was then that I came to appreciate the absence of a detailed and systematic text analysing choses in action, and their transfer.

This book is an attempt to fill that gap. I had intended, in this preface, to say that this was the first major attempt to grapple with assignment since Marshall's monograph, *The Assignment of Choses in Action*, was published in 1950. But books on assignment seem to be rather like buses: none for more than fifty years, and then two come along at once—for 2006 saw the publication of Tolhurst's *The Assignment of Contractual Rights*. Fortunately for me, this book and Tolhurst's have different agendas. As he states in his preface, Tolhurst's book is very much a thesis-based work, confined to one class of chose in action, contractual rights. My approach has been altogether more broadly based, and I have attempted to deal with all choses, including contractual rights, from a practitioner's perspective.

That said, although I have written this book from a practitioner's point of view, the historical development of the law of assignment has created a number of analytical problems that not only regularly occupy practitioners, but are also of interest to students of the law of assignment and to those who find fascination in the (regrettably, still difficult) relationship between law and equity. The fact that the common law was largely disinclined to recognize assignments led to the dominance of equity and, thereafter, statute law. As a result, the law of assignment is one area of English law where the interplay between different classes of right remains a frustratingly real and important one, the theoretical and practical implications of which are considered in Chapter 6.

In writing this book, I have incurred many debts and have many people to thank. Mr Justice Andrew Smith read each chapter in advanced draft, and provided me with many penetrating and helpful insights. I am also very grateful to Andrew for having found the time to write the Foreword. On specific areas of assignment, I have a trinity of Trinity fellows to thank: Professor Kevin Gray, who read and commented on the sections on leases of land; Louise Merrett, whose astute comments on Chapter 22 (the conflict of laws) were extremely helpful; and Jo Miles, who provided a swift response to my cry for help when I ventured (very briefly) into divorce and separation. The intellectual property sections were kindly read by Melonie Atraghji and Matthew Harris. Together, they saved me from a number of errors. I have also discussed assignment questions generally with a number of people, whose insights have proved valuable: in particular Simon Pulleyn, Stephen Moriarty QC, and Richard Handyside. I am grateful to my editors at OUP, Rachel Mullaly, Faye Judges, and Darcy Ahl, for their assistance in bringing the book to publication. The final text owes much to the careful reading of Catherine Minahan, Sushma Ananda, and Hanne Smith, who identified and corrected many stylistic errors, infelicities, and inconsistencies, and checked the references. Needless to say, all remaining errors and omissions are my own.



Finally, thanks are due to Fountain Court's ever-efficient librarian, Christine Child, who unfailingly tracked down the more obscure references that litter the text. She saved me enormous amounts of time.

Although I hope that I have paid due regard to Commonwealth authority and academic writing, I am very conscious of only having touched upon aspects of comparative law; I have no doubt that there is much to learn from European and American law. That, I hope, will change in future editions.

I have endeavoured to state the law as at 12 December 2006, although I have been able to incorporate a number of later developments. The book is dedicated to my family.

MAS

Temple

12 December 2006

## LIST OF AUTHORITY ABBREVIATIONS

Alberta SC	Alberta Supreme Court
CA	Court of Appeal
ChD	Chancery Division of the High Court of Justice
Cty Ct	County Court
CJEU	Court of Justice of the European Union
Div C	Divisional Court
ECJ	European Court of Justice
ExchD	Exchequer Division of the High Court of Justice
FamD	Family Division of the High Court of Justice
Fed Ct Australia	Federal Court of Australia
HC Australia	High Court of Australia
HC (Hong Kong)	Court of First Instance of the High Court of the Hong Kong Special Administrative Region
HL	House of Lords
Hong Kong CA	Court of Appeal of Hong Kong
KBD	King's Bench Division of the High Court of Justice
New South Wales CA	Court of Appeal of New South Wales
New South Wales SC	Supreme Court of New South Wales
New Zealand CA	New Zealand Court of Appeal
New Zealand HC	New Zealand High Court
New Zealand SC	New Zealand Supreme Court
Ontario HC	Ontario High Court
PC	Privy Council
QBD	Queen's Bench Division of the High Court of Justice
Queensland Dist Reg	Queensland District Registry
SC Canada	Supreme Court of Canada
SC Victoria	Supreme Court of Victoria
Scot Ct of Session	Court of Session, Scotland
South Australian SC	South Australian Supreme Court
UKSC	Supreme Court of the UK
US SC	US Supreme Court

## SUMMARY CONTENTS

<i>Table of Cases</i>	xlili
<i>Table of Legislation</i>	lxvii
<i>List of References</i>	lxxix
<i>List of Authority Abbreviations</i>	xcix

1. Introduction	1
-----------------	---

### PART I—THE NATURE OF INTANGIBLE PROPERTY

#### Overview of Part I

2. Nature and Characteristics of Intangibles	13
3. Rights or Causes of Action	53
4. Debts	63
5. Rights Under a Contract	71
6. Securities	103
7. Intellectual Property	155
8. Leases	179
9. Documentary Intangibles and Negotiable Instruments	191

### PART II—THE TRANSFER OF INTANGIBLE PROPERTY

#### Overview of Part II

10. Transfer of Choses in Action: Historical Overview	207
11. Conceptual Underpinnings	217
12. Negotiation and the Transfer of Money	265
13. Assignment of Choses in Action	275
14. Transfer of Choses in Action on Trust	305
15. Promises to Assign or Create a Trust	319
16. Assignments Under Section 136 of the Law of Property Act 1925	341

### PART III—TRANSFERS IN PARTICULAR CONTEXTS

#### Overview of Part III

17. Transfer of Insurance Contracts	359
18. Transfer of Leases	391
19. The Transfer of Securities	405
20. Transfer of Intellectual Property	451

PART IV—INTANGIBLE PROPERTY THAT IS INCAPABLE OF TRANSFER

Overview of Part IV

21. Assignment of Burdens	475
22. Intangibles Not Transferable by Reason of Public Policy	491
23. The Assignment of Bare Rights to Litigate: Champerty and Maintenance	495
24. Personal Obligations	517
25. Prohibitions on Assignment	521

PART V—THE EFFECTS OF ASSIGNMENT, THE PERSISTENCE  
OF PROPERTY RIGHTS, AND THE VINDICATION  
OF AN OWNER'S RIGHTS

Overview of Part V

26. Consequences and Effects of an Assignment	541
27. Priorities and the Loss of Title	573
28. Extinction of Intangible Property	611
29. <i>In Rem</i> Claims: Following and Tracing	665
30. <i>In Personam</i> Claims Protecting Property	697
31. Multiple Claims and the Avoidance of Multiple Recovery	707

PART VI—SPECIAL REGIMES FOR TRANSFER

Overview of Part VI

32. Insolvency and Assignment	715
33. Involuntary Transfers	733

PART VII—SECURITY

34. Security over Intangibles	743
-------------------------------	-----

PART VIII—CONFLICT OF LAWS

35. Assignments and the Conflict of Laws	765
--	-----

<i>Index</i>	799
--------------	-----

## DETAILED CONTENTS

<i>Table of Cases</i>	xliii
<i>Table of Legislation</i>	lxvii
<i>List of References</i>	lxxix
<i>List of Authority Abbreviations</i>	xcix

### 1. Introduction

A. Overview of the Book	1.01
B. The Nature of Intangible Property—Part I	1.04
C. The Transfer of Choses in Action—Part II	1.16
D. Transfers in Particular Contexts—Part III	1.19
E. Intangible Property Incapable of Transfer—Part IV	1.21
F. The Effects of Assignment, the Persistence of Property Rights, and the Vindication of an Owner's Rights—Part V	1.22
G. Special Regimes for Transfer—Part VI	1.33
H. Security over Intangibles—Part VII	1.34
I. Assignments and the Conflict of Laws—Part VIII	1.35

## PART I —THE NATURE OF INTANGIBLE PROPERTY

### Overview of Part I

### 2. Nature and Characteristics of Intangibles

A. Overview of the Chapter	2.01
B. The Law of Property	2.08
(1) The Nature of Property Interests	2.08
(2) An Analysis of Interests	2.15
'Rights'	2.17
'Privileges'	2.20
'Powers'	2.24
'Immunities'	2.27
Overview	2.29
(3) Property Interests	2.31
(4) The Nature of Ownership	2.39
The right to hold the property and to exclude others from the property	2.40
The privilege to dispose of the property	2.41
The power to use	2.42
Conclusion	2.43
(5) Things Susceptible of Ownership: 'Property'	2.44



C. The Place of Intangibles in English Law	2.47
(1) Overview	2.47
(2) The Classification of Things (or Interests in Things) at Common Law	2.48
(3) Definition of a Chose in Action	2.55
(4) 'Choses in Action' and 'Intangibles'	2.62
(5) Equity and the Classification of Things	2.65
D. The Nature and Characteristics of Choses in Action	2.68
(1) Overview	2.68
(2) Choses in Action are Interests in Intangibles	2.72
Pure intangibles	2.74
Documentary intangibles	2.75
(3) A Chose in Action is an Interest in a Thing Recognized by the Law as Property	2.79
(4) Choses in Action are Private Law Rights	2.81
(5) Choses Can be Either Legal or Equitable	2.87
The distinction between legal and equitable rights	2.87
'Mere' equities	2.90
(6) Present and Future Choses	2.100
Significance of the distinction	2.100
The nature of the distinction	2.101
The distinction between future choses and rights enforceable in the future	2.106
The insolvency exception	2.112
Implications of the rule that rights presently existing but enforceable only in the future are present choses	2.113
E. Co-ownership and the Fragmentation of Ownership	2.114
(1) Overview	2.114
(2) Concurrent Ownership	2.123
Forms of concurrent ownership	2.123
Concurrent ownership of intangibles	2.124
Analysis in the context of assignment	2.126
(3) Successive Ownership	2.127
(4) Fragmented Ownership	2.129
 3. Rights or Causes of Action	
A. Overview of the Chapter	3.01
B. Rights of Action	3.03
(1) Different Types of Right of Action	3.03
(2) Private Law Rights of Action	3.04
(3) Public Law Rights of Action: Judicial Review	3.08
(4) Public Law Rights of Action: Criminal Prosecutions	3.12
C. The Nature of a Private Law Right of Action	3.15
(1) The Concept of a Cause of Action	3.15
(2) Merger in Judgment and Cause of Action Estoppel	3.17

Merger in judgment	3.20
Cause of action estoppel	3.23
Compromise	3.26
D. Judgments	3.28
E. A Right of Action Distinguished from its Fruits	3.30
<b>4. Debts</b>	
A. Overview of the Chapter	4.01
B. The Nature of a Debt	4.02
(1) Definition	4.02
(2) Present and Future Debts	4.05
(3) Contingent Debts	4.06
(4) Debt Actions and Actions for Damages	4.10
(5) Debts, Money and Payment	4.12
The parameters of the payment obligation are described by contract	4.13
Payment is a consensual act requiring the accord of both creditor and debtor	4.14
Payment by offset of items on a running account	4.15
Payment by set-off	4.16
A legal commitment to pay is not payment	4.18
Exchange is not payment	4.19
C. Types of Debt	4.20
D. Syndicated Loans	4.25
E. Nature of Debts as Property	4.26
<b>5. Rights Under a Contract</b>	
A. Overview of the Chapter	5.01
B. Nature of Contractual Rights	5.05
(1) Contractual Rights and Obligations are Essentially Bilateral	5.05
(2) Rights under Contracts, not Contracts, are Assignable	5.09
(3) Range of Rights Embraced	5.12
(4) Contracts Under Seal	5.13
(5) Future and Contingent Rights	5.16
C. The Common Law Rule that a Promise for the Benefit of a Third Party Cannot be Enforced Directly by that Party	5.20
D. The Contracts (Rights of Third Parties) Act 1999	5.23
(1) Introduction	5.23
(2) Scope of the 1999 Act	5.27
Negotiable instruments	5.28
Section 33 of the Companies Act 2006	5.30
Contracts of employment	5.32
Contracts for the carriage of goods	5.34

(3) Manner of Creation of Third Party Rights	5.36
Express provision	5.37
Term purporting to confer a benefit on a third party	5.39
The third party must be expressly identified	5.42
(4) Enforcement of Third Party Rights and Defences	5.44
Enforcement	5.44
Defences available to the promisor	5.47
(5) Effect of the Creation of Third Party Rights on the Contracting Parties	5.53
Creation of a new class of enforceable third party rights	5.53
Variation or rescission of the contract and the need for third party consent	5.54
Enforcement of the contract by the promisee and double liability	5.57
E. The Rule that a Promise for the Benefit of a Third Party Cannot be Indirectly Enforced and the Exceptions to that Rule	5.58
(1) The General Rule	5.58
(2) Exceptions to the General Rule	5.59
Trustees	5.60
Undisclosed principals	5.61
The rule in <i>The Albazero</i>	5.62
Protection of the 'performance interest'	5.91
F. Imposing Contractual Obligations on Third Parties	5.104
(1) Novation	5.105
(2) Vicarious Performance	5.106
G. Contractual Rights as Property	5.110
<b>6. Securities</b>	
A. Overview of the Chapter	6.01
B. The Nature of a 'Security'	6.04
(1) Definition	6.04
(2) 'Taking Security' Distinguished From 'Securities'	6.07
(3) A Classification of Securities	6.09
Shares	6.10
Debt securities	6.12
Hybrid securities	6.16
(4) International Securities Identification Numbers	6.19
C. The Legal Incidents of Securities	6.21
(1) Shares	6.21
Companies that issue shares	6.21
Nature of the rights and obligations that a shareholding confers	6.23
Rights and obligations generally conferred on shareholders	6.28
Different classes of shares	6.30
(2) Debt Securities	6.32
(3) Hybrid Securities	6.34
D. An Overview of How Securities are First Issued and Held	6.35

---

(1) Allotment, Issuing and Holding of Securities	6.35
(2) Different Ways of Holding Securities	6.37
Paper-based systems	6.37
Electronic forms of transfer	6.40
(3) Approach in the Next Sections	6.41
E. Holding Paper Securities	6.43
(1) Shares	6.44
Issue of shares in a newly-formed company	6.44
Registered shares	6.47
Bearer shares	6.57
(2) Debt Securities	6.62
Definitive bearer debt securities	6.65
Definitive registered securities	6.68
F. Dematerialization	6.70
(1) Overview	6.70
The 2001 Regulations	6.70
The definition of 'securities'	6.72
The 'relevant system'	6.73
An 'Operator'	6.74
'System-participants' and 'sponsoring system-participants'	6.76
'Participating issuers' and 'participating securities'	6.80
'System-members'	6.82
Contractual arrangements between participants in CREST	6.84
(2) The Introduction of Securities into the Relevant System/CREST	6.85
Overview of the process	6.87
Compliant articles of association of the company	6.88
Operator agreement to admit the shares	6.91
Company agreement to admit the shares	6.92
Registers of dematerialized shares	6.94
Introduction of shares into the dematerialized system	6.105
(3) The Introduction of Other Securities into the Relevant System/CREST	6.115
Compliant terms of issues	6.116
Operator agreement to admit the securities	6.118
Issuer agreement to admit the securities	6.119
Registers of dematerialized securities	6.120
Introduction of securities into the dematerialized system	6.124
(4) Implications of Dematerialization: The Rise of the Nominee	6.125
The rise of nominees in the holding of securities	6.125
The nature of an equitable interest in shares	6.127
Implications of growing 'equitable' ownership	6.128
G. Immobilization	6.130
(1) A General Description	6.130
(2) Growth of Immobilization	6.134
(3) Detailed Description of an Immobilized System	6.137