

*This essay was originally published as Chapter 34 of Equity & Trusts in its second and third editions – due to the need to limit the length of that book (200 pages of new material were added) this essay is now published in the fourth edition of that book in only truncated form as Chapter 31. Here then is the full, original version, before proof-reading. This essay considers the trust as part of property law and in particular explores some of the paradoxes bound up with the notion of property that is used in trusts law: e.g. why do some trusts require that the property is segregated, whereas other cases have subjugated the identification of which property is held on trust from time-to-time behind questions of conscience (e.g. in relation to constructive trusts in tracing cases, or constructive trusts over bribes). There are also problems of quasi-property here, on which see below ...*

## THE NATURE OF PROPERTY IN EQUITY AND TRUSTS

### 34.1 QUESTIONS OF PROPERTY AS THEY APPLY TO TRUSTS

#### 34.1.1 The component legal aspects of a trust

There is much in this book which has had to do with commerce and much which has had to do with property. The development of the courts of equity in England and Wales has inter-acted closely with commercial developments – the company, the floating charge, the trust itself<sup>1</sup> – and also with the law of property – the trust of land, family settlements, and so forth. The historical competition between the courts of common law and the courts of equity saw responsibility for much of these areas move between the two jurisdictions. The courts of equity became amenable to commercial goals such as the control of contractual obligations through specific performance,<sup>2</sup> rectification and rescission,<sup>3</sup> as well as to disputes over the use of land through equitable easements,<sup>4</sup> the enforceability of the burden of negative covenants,<sup>5</sup> and the equity of redemption in mortgages.<sup>6</sup> There is no reason in the abstract why the courts of common law could not have developed means of achieving the same goals. After all common law developed its own notion of fraud and could therefore have made the small leap to a notion of unconscionability too. Throughout its complex history, however, common law failed to develop procedural rules to allow such concepts to be developed in its own courts once they had been manufactured in equity. Amongst all of these developments it is the trust which has demonstrated itself to be the most versatile and wide-ranging technique in equity's armoury. The modern equity which is visible to us today is the product of this history by means of which equity has both developed and discarded many forms of action, many procedural rules and many substantive concepts. But it is not just equity which has changed, the world with which equity is confronted has changed radically too over time. This chapter considers the change in the nature of the property with which equity has had to deal. Most of the discussion will focus on the trust institution, being equity's most important tool in property disputes.

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1 As considered in depth in chapter 25.

2 Chapter 30.

3 Chapter 32.

4 *Ives v. High* ... .

5 *Tulk v. Moxhay* ... .

6 Para 23.3.

We might think of the law of trusts as being a mixture of concepts derived from the law of property (as to ownership of the trust fund, as to tracing property rights, and so forth) and also from the law of obligations, loosely defined, (as to the liability of the trustee for breach of trust, the potential liability of third parties for losses suffered by the trust, and so forth). Between express trusts and trusts implied by law, as categorised in chapter 36, the nature of those property rights and those obligations may differ markedly from context to context. The trust has also been presented in this book as an off-shoot from equity which developed from the powers of the Courts of Chancery as a means of regulating the conscience of the common law owner of property by recognising that the beneficiary also has rights in that property. Nevertheless, the modern express trust has hardened into an institution which is built on certainty<sup>7</sup> and formal rules<sup>8</sup>, and so has appeared to move away from its general, equitable roots as a means of controlling the conscience of the trustee.<sup>9</sup> In tandem with the growing debate about the nature of trusts implied by law, it is suggested that the time has come to recapture those equitable roots and to understand trusts as being the kith and kin of equitable remedies like specific performance, injunctions and so forth. Only then will the potentially broad social application of equitable concepts become apparent.

Bound up with this reclaiming of the trust's roots is a need to understand some of the logical problems which trusts law faces primarily because its ancient methods of understanding property as being necessarily something tangible and readily identifiable do not mesh easily with the sorts of disputes which have come before it in recent years concerning intangible property of a very different sort. Furthermore, this chapter will consider how theories of the legal nature of property impact on the law of trusts. In particular it will question the binary division between explanations of property rights as either attaching *to a thing* or as constituting rights *against other persons*. It is suggested that the logic of that form of property law which was developed to deal with land has been applied uncomfortably to intangible, movable property. The treatment of issues concerning electronic money and other choses in action with those same rules has generated a large number of additional problems.

### 34.1.2 Problems with the logic of express trusts

The rapid growth of the importance of the express trust in every context from testamentary trusts to modern pensions funds has meant that the logic of the rudimentary trusts has been bent out of shape. With the earliest trusts over land it was easy to see why, if Richard left England for a number of years and entrusted his lands to John for safekeeping in the interim, then Richard should be recognised by equity as retaining effective title in that land until his return. Equity would recognise Richard's rights even if common law title over that land had been transferred to John to facilitate his role of keeper of Richard's lands. So far so good.

However, that logic only works for property like land which does not change its essential nature and which is difficult to mix with other property. It is a logic which does not apply so neatly to situations in which money held in an electronic bank account is transferred into another electronic bank account and mixed in a way which is impossible to untangle by restoration of the property. The rules which have been developed, for example as to the need for the segregation of property, have sought to extend principles developed in relation to land into disputes concerning other forms of property. The result is that those rules have begun to seem increasingly unsuited to the cases they are supposed to resolve.

The following logical problem arises with even the simplest express trust. Suppose that Simon leaves £10,000 to be held by Tina on trust for Brian and Betty in equal shares. There is no suggestion that that trust would be invalid: if the £10,000 is identifiable, if Brian and Betty are identifiable and if Simon clearly intends to create a trust. What is more difficult is the suggestion that Brian and Betty have rights *in* the trust fund. We cannot know in which property each of them has their rights. As a matter of common sense we could say 'well Tina would simply have to divide that property into two equal halves'. We could also say: 'It's only money after all – what could it matter who gets which notes provided that they get the correct *value*?' That is the key: Brian and Betty do not have rights *in* the trust fund. Rather, they have rights *against the trustee* as to the treatment of that property and they have rights *against the rest of the world* to prevent any third party from interfering with the fund held on trust for them. To that extent they have proprietary rights: to that extent they are able to direct the trustee to transfer title to them under the rule in *Saunders v Vautier*. But they do not have rights *in* the trust moneys in the same way that we might have said that Richard, in the previous example, ought to be recognised as having rights *in* the land. Richard's rights attached to clearly identifiable property in the form of his land; whereas Brian and Betty have rights of a given value to a share in a fund of money. The difference is that the logic of trusts law applies evenly in relation to certain kinds of property but not in relation to others.

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<sup>7</sup> See chapter 3.

<sup>8</sup> See chapters 4 and 5.

<sup>9</sup> *Westdeutsche Landesbank v. Islington* [1996] AC 669.

Even if the property were land held on trust by Tina such that Brian and Betty were to have rights to occupy the land, trusts law would say that Brian and Betty have equitable interests *in* the land even though neither of them has any right to remove any of that land nor to deal with it separately from the other beneficiary. The only way in which they could deal with it separately would be to sell the land and to divide the sale proceeds between themselves.<sup>10</sup> Even then, they would have no right *in* any specific money received for the sale until Tina had separated it and transferred it to them: up to that moment their so-called *proprietary* right would have been a right only to control the manner in which Tina dealt with that property. Their more useful right, in real life, is more likely to be the right to occupy the property – that is, a right to *use* the property. The most significant rights which Brian and Betty would have would be their rights to control Tina’s treatment of the property and the right to prevent others from occupying the land. Their most significant rights are therefore rights operative *against* other people and not rights *in* the land.

### 34.1.3 Rights having value – not identity

The traditional English lawyer’s approach to property law as enforcing rights against an identified item of property is an insufficient explanation of the broad potential range of features of those rights. For example, in relation to the proportionate rights which the beneficiary acquires against a mixed fund. English law recognises the beneficiary as having proprietary rights against that fund even though no particular property need be segregated for the use of an individual beneficiary in circumstances where property is held, for example, ‘on trust equally for A and for B’. Rather, it is said that A and B have property rights in proportion to half of the fund. In truth what they have is a claim against the trustee in relation to *a value equivalent to* half of the value of the fund. The claim, while described as being proprietary, is in fact merely a personal claim against the trustee which will *result in a transfer of property* – that is, half of the property held on trust provided that constitutes half of the value of the fund.

The so-called proprietary claim is nothing more than a *personal claim with proprietary consequences* in this context: that is, a right to control another person’s treatment of property so that the use of that property is affected. This is qualitatively different from saying that the proprietary right attaches only to the property itself.

A claim to a mixed fund is therefore also substantively different from a claim for the freehold of land which is a proprietary claim relating undoubtedly to identifiable property (the land itself). The certainty of that claim, as a claim relating only to that particular land, can be compared with the comparative vagueness of a claim to a part share of a mixed bank account. Typically, the legal analysis of money held in an electronic bank account is such that the property involved is commonly accepted as being susceptible to treatment by the rules for tangible property despite the fact that it is in truth only evidence of a debt owed by a bank to its customer. A bank account is merely a chose in action: a contractual recognition by the bank that the account holder has deposited money with it and that the bank is required to return that money to the customer in accordance with the terms of their contract. It is not true to say that there is money *in* a bank account. Rather, the bank account is an acknowledgement of a claim in favour of the account holder with a given value attached to it. Therefore, to claim an equitable proprietary right over ‘money in a bank account in equal shares’ with another beneficiary is to present a logical fallacy: the claim is merely a claim to an amount of value owed by the bank to the account holder (or trustee in this example). There is no identified property available: only value.

To pursue this point a little further, even if we were to bring a claim against an amount of money in cash, rather than in a bank account, that money is itself only currency.<sup>11</sup> It is tempting to think of notes and coins as being tangible property. In fact, notes and coins are merely tangible evidence of a personal claim against the Bank of England in the form of the legendary ‘promise to pay the bearer on demand’ the face value of the banknote. The property held in a bank account is accepted as being property *in legal practice* because that is the only way of maintaining the logic of modern capitalist society: that is, that a promise by a bank to repay a deposit is equivalent to a property right. It is accepted as being property *in theory* on the basis that it constitutes a set of transferable rights and obligations.<sup>12</sup> Property theorists argue that because this account is capable of being transferred to another person or has a particular value, then it should be treated as though it were property. In this chapter, those rights which are transferable encapsulations of merely personal rights are referred to as being ‘quasi-property’. The ensuing discussion of property and of the nature of money in this chapter teases apart these arguments and apparent contradictions.

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<sup>10</sup> As considered in chapter 16.

<sup>11</sup> As defined later, currency is itself only evidence of a personal liability on the part of a central bank to meet a claim based on any banknote or coin.

<sup>12</sup> Penner, 1997, 105.

## 34.2 THEORIES OF PROPERTY IN LAW

The core contention of the following section is that even the sophisticated distinctions in modern legal theory fail to account fully for mutual, collectivist forms of property ownership and also fail to give an account of the nature of personal claims (such as bank accounts held in electronic form) which is sufficiently coherent. This section considers the nature of property as understood by law and also the extent to which property as understood by law involves rights.

### 34.2.1 The ordering of property theory

In this discussion I want to do two things. First, I want to establish (at least in outline terms) that the legal conception of law cannot be categorised *either* as simply rights in things *or* as rights between people. Rather, I shall attempt to demonstrate that there are times when rights in property are best expressed as rights in a thing and at other times as rights between people. However, I shall also seek to establish that there are two other positions which need to be recognised: contexts in which property rights are established by democratic control over property, and contexts in which pseudo-proprietary rights are supported in law in relation to purely personal claims.

Therefore, I am arguing for a fourfold division in the understanding of property in law. The thread running through these four divisions is that property rights can only be understood as *rights with a value attached* and that the law will give a variety of remedies in different contexts to the four different forms of rights: in short, many of theories of property in law are confusing the nature of the remedy with the nature of the right it supports. For example, to conceive of a number of beneficiaries as each having separate proprietary rights in a fund of money held on trust for them equally is to confuse the beneficiary's right against a proportion of the fund with the remedy of delivery up property of a given value. Suppose the beneficiary seeks to enforce a right to be delivered her share of the total fund in a manner permitted by the terms of the trust. The beneficiary does not have any right to *the particular property* paid over by the trustee until it is actually paid over by the trustee: up to that time the beneficiary had merely a right to *some property of that value* to be paid to her by the trustee. To call the right of the beneficiary 'proprietary' is to elide the claim with the remedy.

Many so-called property rights of this kind have in fact nothing to do with property and everything to do with rights which can only be exercisable between two particular people and no one else, for example in relation to transferable debts where property is only owed between debtor and creditor (whoever that happens to be from time to time, given that those rights can be transferred). Consequently the conception of property currently accepted by English law is so vacuous as to be meaningless because it does not differentiate systematically between property rights constituting an entitlement to an identified item of property from an entitlement to be paid an amount of money from a trust fund: both are described as being 'proprietary'. That is not to deny that English law accepts such rights as being property rights – rather it is to question the logic behind such a position. What is argued for in this chapter is a recognition of different forms of rights in relation to property or different forms of rights with a value attached arising in different contexts.

(1) *Property rights as 'rights in a thing'*

The simplest property right is the right to the use of a thing. The simplest form of rights in a thing arise in relation to ownership of land. In this conception of property the homeowner has rights in her land, whether in the form of rights to prevent others from using that land, rights to deal with the land, or rights to adapt the land (within the confines of planning law). The simplest example of this phenomenon in relation to investment would be a nominee relationship under which an investment manager held property for an individual investor on bare trust. If that property were to be invested so as to generate an income stream without the capital being passed to any other person (like an ordinary bank deposit) then it could be said that the investor retained rights in the very property which was passed into the control of the investment manager. However, once the investment manager is permitted to dispose of the original capital to acquire other investments (perhaps securities) then the investor's rights transfer from the original capital into the securities which are acquired by the trustee. The rights of the investor have therefore transferred from one item of property to another.

Once the trustee is entitled to take the investor's capital and mix it with other investors' capital, then the rights of the investor become qualitatively different in property law terms. The investor has personal rights against the trustee as provided for in their contractual arrangements. The property rights which the investor holds will similarly be subject to the terms of that contractual arrangement. If the trustee is bound to acquire securities on behalf of those investors, to hold those securities and any income stream on trust for the investors, and then to sell the securities on a given date and divide the proceeds *pro rata* between the investors, then the investor would be said to acquire an equitable proprietary interest in the investment fund. The value of that equitable interest would be proportionate to the fraction of the total fund which each investor contributed at the outset.

Here there is a logical leap in property law. As pointed out above, that mixed fund is said to be held on trust for *all* of those investors even though no single investor would be able to identify which securities within the general pool were the particular property of that investor. However, the law of trusts recognises a proportionate right in each investor provided that the entire fund is segregated from other entire funds. There is no particular problem with this in common sense terms. What is interesting, however, is that the law of property is prepared to elide the concepts of separate property and of value. Whereas the investor contributes property A (the investment stake), that right is said automatically to transfer to property B (the securities) and property C (the income stream from the securities). The elision occurs when the law says that the investor does not have to have its own investment held distinct from the remainder of the pool, but rather that the law will recognise that each investor has made an investment of a given proportion of the total value of the fund.

Thus *property* becomes *value* for all practical purposes: one stands for the other. It is of no interest to the investor which securities are segregated for her, provided that she receives its cash return. This has ramifications for the legal treatment of unit trusts,<sup>23</sup> eurobonds,<sup>24</sup> pension funds,<sup>25</sup> and shareholdings in ordinary companies<sup>26</sup> – as considered elsewhere in this book. What is important to note is that the 'rights in a thing' thesis is easily diluted in the practice of property law to connect to value rather than necessarily to any single, particular thing.

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23 Chapter 24.

24 Para 21.5.

25 Chapter 26.

26 Para 25.1.

## (2) Property rights as 'rights against people'

The property rights as 'rights against people' thesis, identified most commonly with Hohfeld, is predicated on the following notion: property rights should not be considered as rights which attach to a thing but rather as rights which protect the rights of the owner against the actions and rights of other persons.<sup>27</sup> Therefore, an example of this form of right would be a freehold covenant in favour of plot of land, Blackacre, which prevents the owner of neighbouring land, Whiteacre, from building above a certain height such that the owner of Blackacre can grow vegetables in open sunlight rather than in the shadow of Whiteacre's buildings. The right could be said to be a right which is exercisable by the owner of Blackacre against the owner of Whiteacre to enable him personally to grow vegetables and therefore a right activated between persons, and not necessarily which attaches to Blackacre because a subsequent owner of the land might not want to grow vegetables. . Alternatively, under the rights-in-a-thing thesis, this could be said to be a right which necessarily attaches to Blackacre and would have no sense nor any efficacy in relation to any other land. The law of freehold covenants requires that, for the covenant to run with Blackacre, it must touch and concern that land.<sup>28</sup> A right to prevent a neighbouring landowner from building above a given height would clearly be of benefit to the land but that does not mean that the motivation for creating that right was not predicated on the covenantee having a personal need to ensure sunlight not shadow passing to Blackacre across Whiteacre. That the covenant must touch and concern the land is not doubted: what is asked is whether such covenants are better thought of as rights in the thing or rights between persons affecting their use of that land. In relation to freehold covenants, that they are attached to specific land and would make no sense if the covenantee purported to transfer them to the owner of different land means that they will generally be considered as attaching to the thing.

Nevertheless, in civil code jurisdictions it is only the equivalent of the fee simple absolute in possession which would be considered to be a property right whereas all other rights would be merely personal rights. Thus, a covenant would be considered to be merely a personal right and the means of its running with the land a matter of some complexity. In English law, even, there is a logical contrast between a fee simple and a mere covenant against the fee simple. A covenant or an easement clearly affects the nature of the property rights which make up the fee simple over the servient tenement because it means that the freeholder does not have a right, for example, to build above a given height within his bundle of property rights. So, in *Rhone v Stephens*<sup>29</sup> it was accepted by the House of Lords that negative covenants were property concepts because they had this subtractive effect on the quality and content of the owner's property rights.

The trust, however, constitutes a very different form of property right. When we suggest that the beneficiary has rights in the trust fund they are not absolute rights of ownership but rather they are equitable interests. If the property held on trust is money in a bank account, then the beneficiaries' names will not even appear on the cheque book, they will not be empowered to spend that money to acquire securities to be held on trust: such tasks are the preserve of the trustee. The property rights of the beneficiary are rights to demand that the trustee adhere to the terms of the trust set down by the settlor, or to refrain from permitting conflicts of interests or the preferential treatment of one beneficiary over another. It is only the principle in *Saunders v Vautier* which permits the beneficiaries to direct the trustees how to deal with the property. Otherwise, the position of the beneficiary is passive: reactive always to the good conscience of the trustee. The property right here is therefore not simply in the sense of dominium, or simple ownership, as understood by civil code jurisdictions. Instead, the property right is embodied in a right to *control* the activities of the trustee, rather than simply the right to *own* it.

The evolution of more sophisticated forms of property has necessarily required more ethereal forms of rights in property than was necessary in relation to straightforward ownership of land. The covenant suggests a more complex form of property right than simple ownership of the fee simple. Discretionary trusts taken over bank accounts or over copyrights do not constitute such self-evident effects on the quality of the property which is the subject of the trust. It is suggested that there needs to be a further category of property right which recognises that the power of control of property is in itself a form of property right. With the increasing importance of community-based initiatives it will be important for the law to facilitate them by developing legal structures that recognise such democratic control as being equivalent to proprietary rights in such entities. Even in company law it is suggested that the understanding of the share as simply a 'bundle of rights' constituting property is insufficient to explain the complex web of relationships which exist in a company and which constitute both effective *entitlements* and also *assertions* of rights against the assets of the company.

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<sup>27</sup> Eleftheriadis, 1996.

<sup>28</sup> *Spencer's Case*...

<sup>29</sup> [1994] 2 AC 310.



### (3) *Pseudo-property rights – ‘transferable personal claims’*

Property law does recognise as property some phenomena which in truth constitute only personal claims. Their status as property is said to rest primarily on their transferability or ‘separability’.<sup>30</sup> As set out above, in a mixed trust fund the beneficiaries are all said to have proprietary rights even though there need be no particular part of the fund segregated for their use: thus their claim of a certain value can generate a remedy which does grant them rights in a particular thing, but where that thing can be identified only after judgment. For example, where a single beneficiary within a beneficial class of ten people who are entitled in equity to a fund of £10,000 which is held on trust for them “in equal shares” has a right to one tenth of the total fund but does not own any specific £1,000 outright until that amount is paid to her by the trustees. Until the trustee effects payment, the beneficiary has, in truth, only a right against the trustee of a given value. It is tempting then to talk of such beneficiaries’ rights as being in truth merely personal claims.<sup>31</sup> Nevertheless, English trusts lawyers talk of the beneficiary’s one tenth share in the total fund as being a property right, with the result that the beneficiary can sell that right to another person, or borrow money against it, or be recognised as a secured creditor in the event of the trustee’s insolvency. Beyond that assertion as an example of the mutable logic of the law of property, the more general point made in this short section is that some things which are recognised as being property by English law are in fact only personal claims.

The most common example of this phenomenon is the chose in action. The chose in action is a claim which attaches to one person and is exercisable over another. The chose in action is accepted in English law as being itself an item of property capable of transfer at law and having a value of its own. It is this transferability and this possibility of distinct value which imbue such personal claims with the status of property. So it is that money held in an electronic bank account is treated as being property and the bank account itself (being a chose in action owed by the bank to its customer) is also property. What is peculiar about this form of property is that ownership of the right does not in itself give rise to any right in any identifiable property. Rather it is a claim which entitles the holder of the right to be given some property of a given type and value – here, sterling – when she calls for it. The important factor here is not the identity of the property but rather its value: to put it crudely, it does not matter which pound coins are handed over provided that they have the same value as the value of the claim. The transferable personal claim is therefore property with no identifiable proprietary base.

The upshot of the foregoing discussion is that there is a profound, two step logical difficulty in English law’s understanding of choses in action and similar claims as being property. First, there is something illogical in saying that a claim which is only a personal claim in itself ought to be considered to be property in the same way that, for example, rights attaching exclusive title in immovable property like land are considered to be property. Second, given that there is only a narrow distinction to be drawn between an ordinary personal claim and the possibility of transferring a personal claim, there is a weakness in a system of property law which supports completely different rights and remedies in relation to one form of personal claim from the other.

At the edge of the law of property there is an awkward distinction drawn between those claims which are considered to be property and those claims which are not. The following section advances the argument that there is a further category of relationship which ought to be considered to be proprietary given English law’s attachment to conceiving of transferable personal claims as being property: that is, the status of democratic control over property as being a form of property right.

### (4) *Control as a property right – property which cannot be owned*

Ben Elton’s play *Gasping* is a satire of the Thatcherite policy of privatising essential services like water and electricity: it assumed an attempt to privatise and to market air. Part of the central conceit of the play was the illogicality of suggesting that any person owned the air we breathe such that it could be privatised and sold off. The logical problem which arises with the privatisation of such services is this: how can water and air be privatised if they do not belong to anyone in the first place? Of course, part of the answer might be that it is *service* of providing drinkable water to millions of citizens which was being privatised. Nevertheless, the point remains: to what extent can all matter be owned?

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<sup>30</sup> The latter is the argument considered by Penner, 1997, 105.

<sup>31</sup> Penner, 2002.

In another book I posited the example of the Essex Road in Islington and a different way of thinking about ‘ownership’ of that road.<sup>32</sup> The Essex Road is ‘owned’ by the Crown in some way that we know to be true as part of constitutional law but which has little practical relevance: it is not suggested that the Queen would ever choose to picnic in the middle of Essex Road. Rather, Essex Road is administered by government through the Highways Agency and the local authority through whose jurisdiction it passes. There are powers to close the road for maintenance, to legislate for the speed and manner in which people may use it, and so forth. But that does not capture the essence of the ownership of Essex Road because Essex Road is just a foul-smelling, congested strip of tarmac which connects Islington Green with Newington Green. It is lined with shops, houses and residential estates. It is not really ‘owned’ by anyone. For some it is a route to work or school, for others it is the place where they live, for others it is simply another part of London. In this context, *use* is far more important than *ownership*. In chapter 28 we considered the manner in which co-operatives hold money for the common purposes of the members of the co-operative: no single person has ownership, rather all members have ownership and rights of use. So it is with Essex Road: it is available and it is used. It is not useful to think of it as being owned.

This idea that property exists and is shared is very useful in relation to the law of trusts. As explained at the outset of this chapter, there are problems with thinking of beneficiaries under a trust as having rights *in* the trust property where there is more than one beneficiary. Rather, those individuals have rights against the trustees and protective rights against the rest of the world to prevent interference with the property. As between the beneficiaries there is merely a right to use or a right to receive some value derived from that fund. For the member of a co-operative there is a right to receive value or benefit from the co-operative; for the member (or shareholder) of a company there is a right to receive a benefit for the company in the form of a dividend.

The common link between all of these various forms of belonging (whether as beneficiary, member or shareholder) is a benefit of a given value. The only difference is the manner in which English law recognises the nature of those rights. A beneficiary under a trust is said to have rights in the property under *Saunders v Vautier*<sup>33</sup> in accordance with the terms of the trust; a member of a co-operative has rights based on the core constitution of the co-operative based on the law of contract; and the shareholder has rights based on company law to receive property on the winding up of the company or otherwise to be benefited in accordance with the constitution of the company. In each situation, a form of contractual thinking applies the principles contained in the constitutive documents of each entity<sup>34</sup> (trust, co-operative or company) as binding the rights and obligations of the members *inter se*. What this establishes is a form of democracy between those members in which the shareholders can vote to take control of the company, the members of the co-operative can control their common undertaking, and the beneficiaries acting together can call for delivery of the trust property.

The purposes of this diversion into the respective statuses of beneficiaries, members of co-operatives and shareholders are twofold. First, to explain one frequently overlooked commonality between these different legal categories: that democratic action between rightholders may have the same effect as the exercise of what is commonly accepted as being a property right. Second, to demonstrate that in a hyper-complex world it is not a straightforward question ‘what is the nature of property in law’ because the rights of individuals and companies differ from context to context between rights to use property, rights to the exclusive possession of property, rights to prevent others from using property, and rights to derive a benefit from property.

### 34.2.3 The modern forms of property

#### *Tangible money theory*

One important aspect of property law cases in the last decade of the 20th century was the unsuitability of concepts formulated originally to deal with disputes over land to complex commercial disputes involving claims to money held in electronic bank accounts.<sup>35</sup> ‘Tangible money theory’ is the term used in this section to encapsulate this phenomenon.

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<sup>32</sup> Hudson, 2000:1, 50.

<sup>33</sup> (1841) 4 Beav 115.

<sup>34</sup> It is acknowledged that a trust is not technically an ‘entity’ – although see Hudson, 2000:1, 67.

<sup>35</sup> Hudson, 1999:3.



For example, in the appeal in *Westdeutsche Landesbank v Islington*<sup>36</sup> the principal focus of the House of Lords was on the proprietary rights attaching to a capital amount of (in total) £2.5 million which had been transferred by the bank to a local authority at the outset of a transaction which was subsequently held to have been void *ab initio*. The bank was said to have lost its right to trace into the bank account to which the £2.5 million was transferred because that account had gone overdrawn between the time of receipt of the payment and the commencement of the action for restitution of the £2.5 million. The consequence of the House of Lords' unanimous finding (on that point at least) was that the money at issue is seen to have 'disappeared' once it passed from that bank account. What this means is that 'money' in this context is tangible (once the account has gone overdrawn, the money is said to have disappeared<sup>37</sup>) rather than being considered to be an amount of value which has passed into the possession of its recipient (which would not necessarily be said to have disappeared when the account ran overdrawn<sup>38</sup>).

Therefore, a transaction involving the transfer of money between an account in the name of A, held with X Bank, to an account in the name of B, held with Y Bank, constitutes the satisfaction of an undertaking between A and B to transfer amounts between them, and also constitutes a re-correlation of the debts between A and X Bank, and between B and Y Bank. Those transactions can be considered in two ways. First, as a transfer of property from A's account to B's account. This is the English law approach. It is an approach built on two premises. Initially that physical currency would move between A and B, and latterly that the book entries used to record those transfers were themselves a recognition of a transfer of tangible property. The second analysis would be that no property has past.<sup>39</sup> The property has not passed from A to B because A retains its rights against X Bank, only in relation to a smaller cash value. What has actually taken place is an alteration in the size of the debts which are owed between the respective banks and their customers. That is, value has passed from A's account and equivalent value has been added to B's account. No identifiable property has passed at all.<sup>40</sup>

It is no accident that the word 'pecuniary' comes from the Greek '*pecus*' meaning cow; and that the word 'chattel' has the same stem as 'cattle'. In both instances, once human beings had moved on from assigning rights in land between one another, they looked to their livestock as the next form of matter over which they wanted to create proprietary rights. In short, property law as 'rights in a thing' works well when dealing with 'my land' or 'my cow' but does not translate to situations in which the property is intangible. For example, the loss of the right to trace rule<sup>41</sup> is necessarily orientated around the notion of property being tangible.<sup>42</sup>

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36 [1996] AC 669.

37 *Bishopsgate v Homan* [1995] 1 WLR 31.

38 An approach taken by Lord Templeman, *obiter*, in *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072; [1986] 3 All ER 75. However, this approach has been much doubted.

39 Hudson, 1999:2.

40 Eg in *R v Preddy* [1996] AC 815 where accusations of theft were dismissed in the context where a telegraphic transfer from one bank account to another was held not to involve the transfer of 'property' for the purposes of the Theft Act 1968 but rather only an alteration in the value of those choses in action.

41 Para 19.8.

42 Cf *Re Goldcorp* [1995] AC 75; para 3.4.

### *The lightness and the softness of modern property*

It has long been the case that there are some who have much property and some who have little. Typically, this inequality in property ownership has meant that life is comparatively easy for some and hard for others. What is observable in the modern world is that our attitudes towards property have changed profoundly, even if the inequalities have remained broadly the same. It has been observed by the sociologist Richard Sennett that the most successful entrepreneurs and business leaders of our age treat their business assets not as property to be guarded and maintained but rather as simply assets which can be sold and turned to account without sentiment.<sup>43</sup> The relationship of commercial people to their property has consequently become “light”. Where once the industrialist owned a factory, employed labour from the local community and therefore established ties with that community, now manufacturers are less likely to own their own factories, preferring instead to exploit commercial brands and to grant franchises to third party factory owners to produce their goods for them. The principal consequence of such arrangements is that the brand owner has no direct connection with the workforce. The only real property involved is the trade mark imprinted on the trainers, on the coffee cup or on the sweatshirt. This has been expressed as granting the industrialist “lines of flight” from the use of any given workforce or geographic location because production can be shifted to another factory or another manufacturer.<sup>44</sup> The involvement with this property is consequently light. The metaphor for our age is software, soft links between people and places.

It is not just the wealthy industrialists who have this sense of only soft links with their property. Our culture encourages us to be fashionable. Instead of developing ourselves through thought, reflection and study, we are encouraged to shop for our identities. We can buy clothes, music, cars, cosmetics and films to shape our selves. When they go out of fashion, we abandon them and buy some more. We have become consumers rather than producers.<sup>45</sup> Of course, for those who are not very wealthy there are still the problems of maintaining their property by paying their mortgages, their credit card bills and so on. For them, property is less light – instead it is burdensome.<sup>46</sup>

In parallel with the increasing intangibility of the property which equity is asked to deal with, our social attitudes to property are also becoming softer. The metaphors used, for example, in relation to the law of tracing even in relation to complex financial transactions like the interest rate swap in *Westdeutsche Landesbank v Islington*<sup>47</sup> are of “a stolen bag of coins”, as though we can only think of such property as though it were represented in tangible form such that its face value was the same as its intrinsic value in gold. This fails to deal adequately with the softness of this form of property as it passes through the computerised records of the bank which holds the accounts. As the world becomes ever more virtual – through e-mail, web-sites, telephone call centres – our property law is failing to keep pace. The complexities caused by the issues considered in this chapter are the result of adapting ancient principles to very different forms of property.

### *The fragility of our understanding of property*

What this tells us is that the current state of our property law is the product of its history. That the earliest forms of property law were generated over land and livestock has given rise to a code of rules which are predicated on the presence or absence of that property. Another approach to property law would be to focus on the value represented by the property rights rather than on the identification of the specific property claimed. Foucault focuses on ‘*les choses dites*’<sup>48</sup> as constituting the genesis of many of our social customs and laws. His point is that things are only the way they are because we say they are.<sup>49</sup> In other words, if we said that these things were to be different, then they would be different. Our property law is organised in the way that it is because we accept that it ought to be. Any student of English law or equity should understand them both as being the product of things that are said (principally by lawyers and judges): our law is the product of texts and of speeches in the form of statutes and law reports. All of this law is the product of things which are said. Therefore, this law is capable of change simply by virtue of different things being said.

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43 Sennett, 1998, 61.

44 Hardt and Negri, 2000.

45 Bauman, 2002.

46 Hudson, 2003:1.

47 [1996] AC 669.

48 That is, ‘things said’.

49 Foucault, 1972.