

## BOUNDARIES OF PERSONAL PROPERTY



# Boundaries of Personal Property

## Shares and Sub-Shares

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*For  
Peter Birks  
and  
Ugo Mattei*



# Preface

This is a book on the idea of personal property and its place in proprietary taxonomy. It is opposed to modern scepticism about the desirability of precision in legal classification and advocates a more authentic understanding of the law of property—in other words, an understanding which is closer to the roots of the idea of property in law and consistent with its long history.

A focus is necessary for such a broad topic. Thus, this study of the boundaries of personal property uses shares as a test case. It has both an inward and an outward aspect, the intellectual emphasis being on the latter. Inwardly, it looks at shares, seeking to understand them at a time of rapid change. Modern shareholders, much as they continue to think of themselves as such, often stand one step removed from the share itself. They hold what this book calls a sub-share. This part of the inquiry asks in what sense shares and sub-shares can be conceived to be things, how those things can be alienated, and how they are protected in litigation. Outwardly, the book then investigates whether personal property can be contemplated as a sub-category of the law of things and, more particularly, as the law of all things locatable in space, alienable, or vindicable in court (*locanda*, *alienanda*, and *vindicanda*).

The outward-looking inquiry considers three boundaries: within the law of property, the line between realty and personalty proves relatively uncontroversial; the second boundary lies between property and obligations; the third between wealth and non-wealth. The second, often obscured by an all-encompassing notion of property as wealth, is the main concern.

The conclusion is that, to respect the difference between property and obligations, the law of property must be confined to rights in *locanda*, which is as much as to say to rights in corporeal things enlarged to include those few ideational things capable of spatial identification. *Alienanda* and *vindicanda* are found to be mere approximations for the law of wealth. Shares and sub-shares, alienable and vindicable but not locatable, are not property in the strict sense.

The inward-looking perspective looks at a ‘mutant’ subject-matter. What is widely known as finance law, even when approached from a narrow angle as an illustration of property law, is difficult to photograph. That is because of the chameleon-like character of the creatures which populate it (think of the multifarious shapes of derivatives), which renders the law’s aspiration to regulate them with any degree of stability almost vain. As a consequence, the inward aspect of this book depends on the temporary and somewhat ephemeral exemplification of certain situations in which securities might find themselves at this single point in time. The struggle to update this information was ended with

delivery of the manuscript on 15 December 2004. I have endeavoured to state the mutant law as it was on that date with one or two extra details being inserted into the tables at proof stage.

By contrast, this book's outward-looking preoccupation for the boundaries of property is timeless. While it rests on volatile examples taken from the life of shares and sub-shares, it does not fear volatility. In this book, the picture of the institution of property in private law, as framed by taxonomy, matters more than the snapshot of the financial detail. That broader picture has some claim to permanence.

Brasenose College, Oxford, 31 May 2005



# Acknowledgements

This book is a revised and updated version of my Oxford doctoral thesis.

Acknowledging the help of others without attempting to apportion responsibility for one's work is a complicated affair. An attempt follows.

At the beginning of my time in Oxford I met Bernard Rudden. I could not believe my luck when he accepted to meet me regularly for tutorials, without having any formal obligation to do so. Most of the ideas expounded in this book were tested in those exquisitely challenging sessions, the most glorious of which would end with cream tea.

I owe a debt of gratitude to Roy Goode, who alerted me to the initiatives of Unidroit and the Financial Markets Law Committee in the field of securities, generously sharing with me the commercial lawyer's unique insight into these matters. I remember our many thought-provoking conversations very fondly.

Dan Prentice encouraged me at the early stages of this study and made himself available to discuss the idea of share.

At the end of my doctoral studies, in Trinity Term 2002, Ewan McKendrick and Thomas G Watkin examined my D Phil. Albeit with some delay, I would like to thank them for turning an awe-inspiring experience into a pleasure.

In Italy, Michele Graziadei, who first instructed me in the rudiments of English law as an undergraduate in Trento, has unconditionally supported my decision to try my academic luck abroad. I am grateful to him.

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I would like to offer this book to two great scholars and dear friends.

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The exploration of taxonomy, in so far as it is governed by intellectual rigour, is dedicated to the memory of my friend Peter Birks, who knew that this book

x *Acknowledgements*

would be for him. Having tirelessly probed the thesis with supervisor's eyes, he would be holding the first printed copy of the book, feigning nonchalance for the argument, and benevolently inspecting the train on the jacket instead.

Brasenose College, Oxford, 31 May 2005

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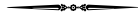
**Prospect**





# 1

## *Introduction*



### A TWIN AIMS OF THIS BOOK

**T**HE LAW OF personal property is unfashionable, in two senses. In the first sense, it lacks a fashion or shape of its own because it is underconceptualized or equivocally conceptualized. In the second and more mundane sense, it is not in fashion. Shares, by contrast, are widely talked about. Despite the increased interest of the public in more sophisticated forms of investment,<sup>1</sup> shares continue to be popular. Shares are conceptually anterior and chronologically antecedent to other financial instruments. It makes sense, therefore, to start with them.

This book seeks to define the boundaries of the law of personal property by using shares and sub-shares to test various hypotheses as to the location of those boundaries. The term ‘sub-shares’ will be explained later.<sup>2</sup> Rapid change is overtaking the law and practice of dealing in shares. It is increasingly important to understand their nature and, hence, their capacity to cope with innovation. From that perspective the book has an internal and an external aspect. Internally, it aims at a better understanding of shares themselves. Externally, it seeks to establish the scope and nature of the category in which shares belong.

It is indisputable that in English legal literature and law schools the law of personal property has been greatly neglected by comparison with land law. But real property, important as it is, no longer constitutes the basis of social status. Personal property matters ever more. This can be seen in various contexts. The value and vigour of the art and antiquity market is one example.<sup>3</sup> But the

<sup>1</sup> Such as equity derivatives and the participation in hedge funds. Institutional investors have even more sophisticated ways of investing, eg structured products such as credit derivatives.

<sup>2</sup> Ch 3 text to nn 87–93.

<sup>3</sup> Underlined in litigation, eg *Gotha City v Sotheby's (No 1)* [1998] 1 WLR 114 (CA) and (*No 2*) *The Times*, 8 October 1998; and in doctrine, eg A Kenyon and S Mackenzie ‘Recovering Stolen Art: Australian, English and US Law on Limitations of Action’ (2002) 30 *U Western Australia L Rev* 233. In the US cf JH Merryman’s work on cultural property and the abundant legislation reviewed in LS Underkuffler *The Idea of Property: Its Meaning and Power* (OUP Oxford 2003) 110–16. This area now has its own journals: *Art Antiquity and Law* (Institute of Art and Law University of Leicester 1996–); *The International Journal of Cultural Property* (OUP Oxford 1998–2002), however, appears no longer to be published. Cf the brand new Italian D Lgs 22 gennaio 2004 no 42, containing the new legislation on *beni culturali*, comprehensively understood as comprising

principal manifestation of the dominance of personal property is the overwhelming role of company securities, especially shares, as stores of wealth. Lawyers have tended to exaggerate the insignificance of wealth based on money, credit and trade, which has never been of negligible importance.

It is true that land used to support labour and entailed evident social control. It is similarly true that chattels were less solemnly protected from the risks inherent in circulation, which meant in turn that they commanded less majestic proprietary learning. Exaggerating the economic importance of land served to underpin the law's dichotomy between moveables and immoveables.<sup>4</sup> The contrast between the permanence of land and the ephemeral nature of most chattels carried with it, and was made to justify, the requirements of formality and hence of professional participation in the ordering of interests in immoveable property.<sup>5</sup>

Criticism of this imbalance can be found even in the early 19th century. In the much reviled property code—later more carefully renamed 'systematic reform'<sup>6</sup>—which he composed for England in 1826, the chancery lawyer James Humphreys condemned the presence of tenure, uses and bare trusts ('merely formal trusts') as obscuring the enjoyment and transmission of land. He pointed approvingly at the absence of such hindrances within the law of personal property. He went out of his way to suggest that the latter category of property, free from such burdens, formed 'an aggregate far exceeding descendible land in produce and value'. He already had in mind funds, stock and other securities.<sup>7</sup>

Likewise, modern talk of the importance of personal property assumes that shares and other company securities fall within that category. Indeed it is that assumption which suggests that personal property must no longer be neglected. Yet caution is necessary, for there are at least two ways of reading the statement to the effect that shares are property. One takes an economic standpoint, while the other has legal significance.

The economic perspective is easily understood by laymen. It makes good sense to invest in a portfolio of financial instruments with a view to appropriating, and storing, the market value that those shares have in the present or will

'moveables and immoveables . . . of artistic, historical, archeological, ethno-anthropological, archival, and bibliographical interest and other things recognized by law as signs of civilization' (art 2(2), my translation).

<sup>4</sup> According to Gambaro *La proprietà. Beni, proprietà, comunione* (Giuffrè Milano 1990) 22–24, dwelling on the greater importance of land in order to explain the opposition between the two categories of things is 'outrageous nonsense, the repetition of which does not increase its intellectual quality' (my translation).

<sup>5</sup> The origins of the involvement of notaries in Italy are traced in M Santoro *Il notariato nell'Italia contemporanea* (Giuffrè Milano 2004).

<sup>6</sup> B Rudden, entry 'Humphreys, James (1768–1830)' in HCG Matthews and B Harrison (eds) *Oxford Dictionary of National Biography* (OUP Oxford 2004) vol 28, 806.

<sup>7</sup> J Humphreys *Observations on the Actual State of the English Laws of Real Property, with the Outlines of a Code* (J Murray London 1826) 172, 202 discussed in B Rudden 'A Code Too Soon. The 1826 Property Code of James Humphreys: English Rejection, American Reception, English Acceptance' in P Wallington and RM Merkin (eds) *Essays in Memory of Professor FH Lawson* (Butterworths London 1986) 101, 102.

acquire in the future.<sup>8</sup> The media reinforce the prominence of shares by dealing with quotations on a daily basis. The press documents the globalization of the trading of securities and monitors the state of the economy worldwide.<sup>9</sup>

By contrast, the legal aspect of the statement that shares are nowadays the most important form of property poses an additional question as to the meaning and scope of the legal category which we know as ‘property’ or ‘the law of property’. This then raises a number of acute analytical problems. It can be said, without prejudice to the discussion still to come, that these difficulties revolve around the relationship between the layman’s category of ‘assets’ or ‘things of value’ and the lawyer’s more closely defined, and probably narrower, view.<sup>10</sup>

Thus, the outward-looking theme which forms the backbone of the book is the question whether it is analytically correct to describe shares as property in any but the loosest sense. That question goes to the heart of the instability of ‘property’, for the word swings back and forth even in juristic contexts between a colloquial and a technical sense. Moreover, the technical sense is itself unstable, for lawyers, though not unaware of the contrast, have not yet settled the narrower sense or senses in which ‘property’ shall be used.

## B STRUCTURE

This book has five parts. Part I is introductory. Chapter 1 explains the *raison d’être* of this book. Chapter 2 will attend to the present state of the law of personal property and establish how its boundaries are currently perceived. The law of property can be contemplated as having an interior boundary and an exterior boundary or boundaries. The interior boundary lies between real and personal property, while the exterior boundary or boundaries mark off the law of property from other areas of the law. To mark out the territory of personal

<sup>8</sup> In a macroscopic, rather than individualistic, perspective, the scale of investments is mirrored in the reports of the World Federation of Exchanges, the trade organization for regulated securities and derivative markets, settlement institutions and related clearing houses, and their diverse services to capital markets. The domestic market capitalization (=total number of domestic companies’ issued shares of various classes multiplied by their respective prices at a given time) of Borsa Italiana (Italian Stock Exchange) in September 2004 amounted to US\$647,812; that of the London Stock Exchange to US\$2,505,159. The year-to-date total value of share trading (=total number of shares traded multiplied by their respective matching prices) at the end of September 2004 amounted to US\$694,146.9 on Borsa Italiana and to US\$3,809,317.6 on the LSE: World Federation of Exchanges *Focus* (no 140 Oct 2004) <<http://www.world-exchanges.org/publications/Focus1004web.pdf>> (accessed 31 Oct 2004) 31, 37. Cf Borsa Italiana *Fatti e cifre della Borsa Italiana 2003* <<http://www.borsaitalia.it/opsmedia/pdf/13647.pdf>> (accessed 31 Oct 2004) 40–49.

<sup>9</sup> For a discussion of the broadsheet newspapers as a source of financial information, M Brett *How to Read the Financial Pages* (Random House London 2003).

<sup>10</sup> The misleading sound of the expression ‘*assetti proprietari*’, which seems to bring the two together, is, in reality, a synonym for ‘allocated wealth’ and a linguistic habit of economists rather than lawyers. For the meaning, B Libonati ‘Gli assetti proprietari: contendibilità del controllo e regolamentazione’ *Rivista del diritto commerciale e del Diritto Generale delle Obbligazioni* 2001 I 1, 1–3. An analysis of the distribution of wealth on the modern markets is in GM Gros-Pietro E Reviglio and A Torrisi *Assetti proprietari e mercati finanziari europei* (Il Mulino Bologna 2001).

property both boundaries will have to be considered. Chapter 3 introduces structural innovations which have profoundly changed the nature of shareholding. The chapter's ultimate concern is to establish an efficient terminology which can cope with these changes and to lay down a programme for rectifying the abuses of proprietary language, where they can be identified as such.

The three central parts of the book are symmetrical. Each one proposes to tackle one aspect of shares and then to follow that analytical study with a critical discussion of the manner in which that matter bears on the understanding of the boundaries of personal property. In this way Part II first attempts to speak of shares as things. It confronts them with different conceptions of 'things'. The narrowest conception would confine 'things' to tangible objects. A slightly broader conception would allow the word to include whatever is capable of being situated in a portion of space, and a still broader and looser conception would require neither *corpus* nor location. Part II comes to the conclusion that special importance attaches to the intermediate conception. The synthetic expression chosen throughout this book to refer to things 'which are capable of being located' is *locanda*. Part II is so named.

Although the use of Latin is not nowadays recommended and should not be indulged in for its own sake,<sup>11</sup> it here serves purposes of conciseness, 'clarity and impressiveness of expression'<sup>12</sup> which could not be achieved in any other way. Adjectives ending in *-ndus* in Latin are known as gerundives. The gerundive is an inflected form deriving from a verb and is passive in meaning, so that the gerundive of a verb signifies 'capable of, prone to, susceptible of' the action described by whatever verb is in question,<sup>13</sup> or 'fit for' that action.<sup>14</sup> In this case the verb is *locare*, meaning 'to place'. The noun *locus*, 'place', can be recognized in the root of the verb.<sup>15</sup> Its gerundive form *locandus* will therefore mean 'capable of being located'. *Locanda* is the neuter plural form of the same adjective. *Locanda* therefore means, and will hereinafter be understood as, 'all things capable of being located in some place'.

Following the pattern described above, Chapter 4 in Part II—*Locanda*—looks inward at the exceptional nature of shares, caught as they are between pure intangibles and documentary intangibles, and asks in what sense, if any, a share can be called a thing. Chapter 5 then looks outward to the law of property

<sup>11</sup> Lord Woolf, then Lord Chief Justice, decreed the death of courtroom Latin with his Reforms to the Civil Justice System, which came into effect on 26 April 1999: see the glossary appended to the Civil Procedure Rules 1998 SI 1998/3132; C Plant (ed) *Blackstone's Civil Practice 2004* (OUP Oxford 2004) [97.1]. The proscription of Latin gadgets caused, in some cases, more problems than it sought to solve. Cf the contest launched for finding an unnecessary translation for *pro bono publico*, eventually won by the rendition 'law for free'.

<sup>12</sup> Pope John XXIII 'Apostolic Constitution *Veterum Sapientia* on the Promotion of the Study of Latin' (22 February 1962) <<http://www.adoremus.org/VeterumSapientia.html>> (31 Oct 2004).

<sup>13</sup> LR Palmer *The Latin Language* (Bristol Classical Press London 1999, reprint of Faber & Faber 1954) 321.

<sup>14</sup> Sir James Mountford *Kennedy's Revised Latin Primer* (Longman Harlow 1962) 59 [107].

<sup>15</sup> Entry 'loco, āvi, ātum, 1, v. a. [locus] . . . to place, put, lay, set, dispose, arrange' in CT Lewis and C Short *A Latin Dictionary* (Clarendon Press Oxford 1879).

and investigates the sense in which it can be said to be the law of entitlements to things. It finds one coherent boundary around entitlements to things ‘locatable’ in space. But this answer causes more difficulty for the proposition that shares are property. This inquiry is therefore suspended, while the book explores other boundaries.

Part III addresses alienation of shares, viewing them as ‘things which are capable of being alienated’, or, using another gerundive, *alienanda*. The Latin adjective *alienus*, *-a*, *-um* means ‘belonging to another’. The verb in this case is *alienare*, which originally meant ‘to make one person or thing another’s’, hence, of things, ‘to make something the property of another, to alienate, to transfer by sale’.<sup>16</sup> *Alienatio* was the abstract noun describing the transfer of a thing to another, so as to make it his property.<sup>17</sup> *Alienanda* are therefore things capable of being alienated to another.

Once again, Part III—*Alienanda*—begins by examining shares in the inward-looking fashion, in order to explain how title to shares is transferred. In this Part, however, the aspiration to symmetry must allow for a complication brought about by the modern history of the transfer of shares. The traditional mode of acquisition by entry of the transferee’s name in the register of the company is being replaced by computerized mechanisms which have sped up alienation by dispensing with paper. This revolution has brought with it a number of as yet only half-solved problems. Chapters 6 and 7 describe, respectively, the old and the new mechanisms. Chapter 8 is then outward looking. It assesses the importance of alienability in determining the content of the law of personal property. It turns out that the law of property cannot satisfactorily be described as the law of all things alienable. The search for boundaries has to be resumed in the next Part.

Part IV deals with things, title to which is protected through the institutions of the law. In Roman law the action which reasserted title to things in court was the *vindicatio*. Thus, this Part is about ‘all things capable of being vindicated’ or, using the gerundive, *vindicanda*. The Latin verb *vindicare* meant ‘to lay legal claim to a thing’.<sup>18</sup> The *vindicatio* was the corresponding action. It did not embrace any and every kind of laying claim to a thing but only the direct assertion ‘*meum esse*’ (‘the thing is mine’). Since a broader and lamentably loose use of ‘vindication’ is frequently encountered among English scholars, Part IV—*Vindicanda*—has to start by clarifying what the term denotes.<sup>19</sup>

<sup>16</sup> Ibid entry ‘alieno, āvi, ātum, 1, v. a.’.

<sup>17</sup> Ibid entry ‘Alienatio, -onis, f.’; Justinian *Digest* 18.1.67: ‘Alienatio tum fit, cum . . . dominium ad alium transferimus . . .’. The full text can be read in F de Zulueta *The Roman Law of Sale* (Clarendon Press Oxford 1949) 103.

<sup>18</sup> Lewis and Short (n 15 above) entry ‘vindico (. . . also written vendico), āvi, ātum, 1, v. a. [vim—dico, to assert authority . . . in a case where legal possession of a thing claimed . . .; hence . . .] to lay legal claim to a thing, whether as one’s own property or for its restoration to a free condition’. A lawyer lexicographer would not willingly have used ‘possession’ in this context.

<sup>19</sup> In particular, the usage of ‘vindication’ by G Virgo *The Principles of the Law of Restitution* (OUP Oxford 1999) and LD Smith ‘Transfers’ ch 5 in P Birks and A Pretto (eds) *Breach of Trust* (Hart Publishing Oxford 2002) will be criticized below, introduction to Pt IV n 3.

Within Part IV, Chapter 9 is inward looking. It deals with the situation in which shares get into the wrong hands and have to be claimed or reclaimed by the person whose entitlement to them is being denied. Equitable and legal devices that serve the assertion of interests in shares are reviewed, and continental equivalents are sought. Chapter 10 then asks whether ‘vindication’ is the distinguishing characteristic of all items belonging to the law of property, as opposed to those belonging to other areas of the law. A third hypothesis as to where the external frontier of the law of personal property lies is thus stated and examined, but it too is found wanting.

The single chapter of Part V is the conclusion, which mirrors the dual task of the book. On the one hand, it comes to a decision on whether in the lawyer’s sense of the word shares are or are not property. On the other hand, the position finally taken as to the proper boundaries of personal property turns on the essentially simple proposition that legal terms often find their meaning in an opposition between contrasting classes. Thus, the boundary of property may well depend on the variable in contemplation as ‘non-property’.

## C THE CONTEXT OF THIS STUDY

In its inward-looking perspective this book is not isolated. Unlike personal property as a whole, company shares are not an unexplored area of the law. This study is founded on English law. It so happens that rights in company securities have dominated a number of recent leading English cases. Some account of other jurisdictions, however, is desirable because many aspects of dealing in securities are increasingly transnational. Italian law, which has recently introduced progressive securities law, provides the materials for the principal comparison. Reference to other legal models will only be occasional, due to the difficulty of conducting multifold comparisons between legal systems.

It is the outward-looking perspective, however, which constitutes the *leitmotiv* of this book, which hopes especially to further the study of the boundaries of personal property.

### 1 Inward-looking Literature

Recent research has emphasized different aspects of the law of shares. In England, such aspects of the indirect dealing in securities as the custody relationship, the automation in the processing of securities trades, dematerialization, and the issues of conflicts of law posed by cross-border intermediation have been studied for over a decade.<sup>20</sup> The regulation of and jurisdiction over financial ser-

<sup>20</sup> J Benjamin and M Yates *The Law of Global Custody: Legal Risk Management and Securities Investment and Collateral* (2nd edn Butterworths Lexis Nexis London 2002); the first edition was published in 1996.

vices prompt a vigorous symbiosis between practitioners and jurists.<sup>21</sup> The space occupied by these matters in the periodical literature, the survival of loose-leaf editions of some practitioners' books,<sup>22</sup> and the conspicuously chameleonic character of websites of financial content, suggest that, perhaps more than in any other area, practice requires constant rethinking of underlying theory.

Equity and debt financing are then often dealt with together as parallel aspects of the financial life of a company.<sup>23</sup> Within this framework, however, little attempt is made to consider shares as property or to review their importance as stores of wealth. A similar focus is also absent, although perhaps less surprisingly, from *précis* of practical orientation,<sup>24</sup> economic studies,<sup>25</sup> or histories of investment.<sup>26</sup> These have no space for taxonomical inquiries.

Some discussion of the desirable level of regulatory control in the financial sector has taken place in the national literature.<sup>27</sup> However, the proliferation of 'Securities Directives' covering all aspects of the capital-raising process, the provision of investment services, and the trading of securities on the markets, have made it increasingly meaningless to conduct the debate other than on a European plane.<sup>28</sup> Other work has focused on private international law.<sup>29</sup>

A great number of both remote and modern studies of the nature of securities in general and shares in particular exist in Italy.<sup>30</sup> The very recent reform of

<sup>21</sup> R Goode *Commercial Law in the Next Millennium: The Hamlyn Lectures* (Sweet & Maxwell London 1998) 3; R Goode *Commercial Law* (3rd edn Butterworths Lexis Nexis London 2004) 1204–5; R Goode 'Rule, Practice and Pragmatism in Transnational Commercial Law' (28th Mann Lecture, London, 15 November 2004).

<sup>22</sup> S Firth *Derivatives Law and Practice* (Sweet & Maxwell London 2003), many of whose dividers had no content at the time of writing.

<sup>23</sup> Cf E Ferran *Company Law and Corporate Finance* (OUP Oxford 1999) pt III on 'Share Capital'.

<sup>24</sup> M Becket *How the Stock Market Works: A Beginner's Guide to Investment* (2nd edn Kogan Page London 2004) 5–9; A McGee *Share Capital* (Butterworths London 2000).

<sup>25</sup> A best-seller since 1973 has been BG Malkiel *A Random Walk down Wall Street* (8th rev edn Norton New York 2003).

<sup>26</sup> CD Ellis *Capital: The Story of Long-term Investment Excellence* (Wiley Hoboken NJ 2004).

<sup>27</sup> M Blair et al *Blackstone's Guide to the Financial Services and Markets Act 2000* (Blackstone Press London 2001); E Ferran and CAE Goodhart (eds) *Regulating Financial Services and Markets in the 21st Century* (Hart Publishing Oxford 2001).

<sup>28</sup> N Moloney *EC Securities Regulation* (OUP Oxford 2002) 53–82, 55–56 fn 12. The 'Securities Directives' address mostly the issuer of securities. They concern the admission to listing, the imposition of disclosure requirements on issuers, and the mutual recognition of disclosure documents. Other legislation addresses the provision of investment services (*ibid* pt III); or the securities-trading market regime (*ibid* pt IV). Significant additions to the legislative scenario are Dir 98/26/EC on Settlement Finality in Payment and Securities Settlement Systems (Settlement Finality Directive) [1998] OJ L166/45 and Dir 2002/47/EC on Financial Collateral Arrangements (Financial Collateral Directive) [2002] OJ L168/43. Cf E Ferran *Building an EU Securities Market* (CUP Cambridge 2004).

<sup>29</sup> MS Ooi *Shares and Other Securities in the Conflict of Laws* (OUP Oxford 2003) discusses, among other things, the impact of the Hague Convention on the Law Applicable to Certain Rights in respect of Securities Held with an Intermediary (*ibid* 283–307), the text of which can be found at <<http://hcch.e-vision.nl>> (accessed 31 Oct 2004).

<sup>30</sup> Amongst the best-known or most recent: G Ferri *Titoli di credito* (2nd edn UTET Torino 1965); C Angelici *Le azioni* in P Schlesinger (ed) *Il Codice Civile Commentato* (Giuffrè Milano 1992); B Libonati *Titoli di credito e strumenti finanziari* (Giuffrè Milano 1999); C Balzarini *Le azioni di società* (Giuffrè Editore Milano 2000); F Briolini *I vincoli sui titoli di credito* (Giappichelli Torino 2002) 273 ff; G Laurini *I titoli di credito* (Giuffrè Milano 2003).



company law<sup>31</sup> has prompted a multitude of new commentaries to those revised parts of the Civil Code which concern shares.<sup>32</sup> The matter has also been revisited in the light of the innovations introduced in the area of securities regulation, with regard, in particular, to financial intermediation and dematerialization. The identity of the legal persons supplying investment services and a minutely detailed regulation of their conduct have aroused scholarly interest.<sup>33</sup>

As far as comparative literature is concerned, shares, although never enjoying comparative lawyers' undivided attention, have aroused their curiosity in two ways. On the one hand, they have been touched on sporadically in textbooks of general comparative law addressed to neophytes.<sup>34</sup> On the other hand, the vast majority of the works published under the rubrics of 'finance law' or 'stock markets' are inherently comparative, for they either propose combinations of a wide range of jurisdictions<sup>35</sup> or show awareness of the necessity of a global approach to the matter.<sup>36</sup>

## 2 Outward-looking Literature

The present study examines the frontiers of personal property in relation to the claim that shares are part of it. It enlists comparative law to show how different legal systems cope with the examination of shares as property. This outward-looking aspect has been neglected in the literature. In English law the indifference towards the boundaries of personal property is but one aspect of the precarious condition of the subject. This will be the subject of Chapter 2. At European level, however, things are hardly better. The European Union's otherwise pervasive legislative initiatives ignore property, whether real or personal. Property has long suffered from an 'exceptionalism' which has drawn its *raison d'être* from the inexplicable promise by the Community of non-interference

<sup>31</sup> D Lgs 17 gennaio 2003 nos 5 and 6 (made under L delega 3 ottobre 2001 no 366) in force since 1 January 2004.

<sup>32</sup> Notably, the new edition of the treatise by GE Colombo and GB Portale (eds) *Capitale: Euro e Azioni. Conferimenti in denaro* (UTET Torino 2004); cf G Cian (ed), *Commentario breve Cian-Trabucchi al Codice Civile* (7th edn CEDAM Padova 2004).

<sup>33</sup> F Sartori *Le regole di condotta degli intermediari finanziari* (Giuffrè Milano 2004).

<sup>34</sup> Cf the chapter on corporate law in the first edition of RB Schlesinger *Comparative Law. Cases and Materials* (Foundation Press Brooklyn 1950) 417 ff and the account of the disappearance of bearer shares from the US business practice in the sixth edition: RB Schlesinger HW Baade PE Herzog EM Wise *Comparative Law. Cases—Text—Materials* (6th edn Foundation Press New York 1998) 899–921. However, shares are ignored in the best Italian equivalent: R Sacco *Introduzione al diritto comparato* (UTET Torino 1992).

<sup>35</sup> Most obviously, perhaps, the series of books by Philip Wood, especially *Comparative Financial Law* (Sweet & Maxwell London 1995) and the graphically ambitious *Maps of World Financial Law* (3rd edn Allen & Overy London 1997).

<sup>36</sup> KJ Hopt and E Wymeersch (eds) *Capital Markets and Company Law* (OUP Oxford 2003); R Costi and L Enriques *Il mercato mobiliare* in G Cottino (ed) *Trattato di diritto commerciale* (CEDAM Padova 2004) 17–28.

with national ways of dealing with ‘property ownership’.<sup>37</sup> Even from a comparative standpoint, obligations and the larger questions which assemble under the label of ‘legal system’ have hitherto taken the lion’s share of comparative study. Property has proved less attractive to comparatists.<sup>38</sup> An exception is the work of some eminent Italian scholars, who have devoted extensive study to personal property<sup>39</sup> and occasionally touched upon the necessity of an investigation of its boundaries.<sup>40</sup> However, the implications of classifying shares as property have not been explored as a topic in its own right. The ultimately unexplored question is whether shares can help draw the boundaries of property. The present book hopes to answer it, thus also taking one step towards rectifying the imbalance, hitherto weighted towards obligations.

In so far as legal literature deals with shares, it is not its main preoccupation to address or justify the assumption that the law of property provides the right tools and language with which to handle them. On the continent this question was first explored by a modern analysis of the German law of negotiable instruments and then revisited by a very recent Austrian comparative study. Einsele’s *Wertpapierrecht als Schuldrecht*<sup>41</sup> discusses whether alternatives to the traditional *Sachenrecht* (law of things, including the law of personal property) would be preferable to describe the circulation of ‘securitized’ rights or receivables. Concepts of the law of obligations are found more apt to analyse negotiable instruments. While the latter intersect only occasionally with shares, and even then rather marginally,<sup>42</sup> Einsele’s attempt to shift the analysis into the law of obligations (*Schuldrecht*) highlights the need for a similar inquiry in relation to ‘equity’. A sequel and a critique has come with Micheler’s very informative *Wertpapierrecht zwischen Schuld- und Sachenrecht*, which has provokingly

<sup>37</sup> Compare the non-interference policy in the Draft Treaty Establishing a Constitution for Europe (18 July 2003) Conv 850/3 art III–331 with the attention to property in the Charter of Fundamental Rights of the European Union OJ C 364/01 (18 December 2000) art 17. The Community’s abstention from property is criticized in D Caruso ‘“The Missing View of the Cathedral”: The Private Law Paradigm of European Legal Integration’ (1997) 3 European LJ 3; D Caruso ‘Private Law and Public Stakes in European Integration: The Case of Property’ (2004) 10 European LJ 751, 752–55, 762–63; cf G Griffiths ‘The Bastion Falls? The European Union and the Law of Property’ (2003) 8 Conv 39.

<sup>38</sup> The widespread attitude of indifference as to the analytical value of the proprietary conceptual apparatus is denounced by TW Merrill and HE Smith ‘What Happened to Property in Law and Economics?’ (2001) 111 Yale LJ 357, 357–60.

<sup>39</sup> A Gambaro *La proprietà: Beni, proprietà, comunione* (Giuffrè Milano 1990) 21–49, 323–34; U Mattei *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Greenwood Press Westport CT 2000) 86–91; U Mattei *La proprietà* in R Sacco (ed) *Trattato di diritto civile* (UTET Torino 2001) 66–73.

<sup>40</sup> A Gambaro ‘Perspectives on the Codification of the Law of Property: An Overview’ (1997) 5 Eur Rev Private L 497, 503 believes that neither the investigation of the boundaries of the law of property nor the question whether property includes incorporeals are issues suitable for codification.

<sup>41</sup> D Einsele *Wertpapierrecht als Schuldrecht: Funktionsverlust der Effektenurkunden im internationalen Rechtsverkehr* (*The Law of Negotiable Instruments Viewed as Law of Obligations: The Loss of Function of Documents of Title in International Legal Transactions*) (Mohr Tübingen 1995, my translation).

<sup>42</sup> Mainly when dealing with bearer shares: Ch 4 below, text to n 72.

supplied a different answer to the same question, suggesting that the best analysis of negotiable instruments is that which makes use of both the instruments of the law of things and those of the law of obligations.<sup>43</sup>

In England, Benjamin's *Interests in Securities*<sup>44</sup> has employed proprietary language to explain the new pattern of shareholding in which investors for the most part hold indirectly within a structure of intermediation. That is to say, the share itself is held by some financial institution. An analogy can be drawn to money. We speak of 'our money' although, apart from cash in hand, we have none. What we have is a claim against our bank, which in turn has a claim against another bank. This analogy cannot be pressed too hard, lest it prejudice the inquiry into the nature of that which the modern investor actually has, which is almost certainly different from that which a current account holder has against his bank. The phenomenon of intermediated holding is not peculiar to shares. It is common to most 'securities', understood as any type of 'transferable financial asset'.<sup>45</sup> Equity and debt securities (that is, shares and debentures) are only instances. Benjamin coins the phrase 'interests in securities' to denote that which the lower-tier investor has. There are securities and, below the holder of the securities, there are interests in securities.

Benjamin's book defends and insists upon a proprietary analysis. It announces as much in its sub-title. Upon closer analysis, however, her own work illustrates the urgent need for an inquiry into the proper boundaries of the law of personal property.<sup>46</sup> The present book's debt to the mine of practical information contained in her work is manifest.<sup>47</sup> However, our perspective differs profoundly from Benjamin's in that our emphasis is on the external question.

One further attraction of the outward-looking perspective is the opportunity to tidy up the terminology used in these recent studies. This extends both to 'new' language coined to cope with innovations and some 'old' language which has been abused. As for the former, various cumbersome expressions have been adopted to denote modern investors' interests. The latter includes 'res', 'real', 'real action', 'property rights' which 'originated in real actions', and 'vindication' as 'the original real action'.<sup>48</sup> In the modern discourse they echo their Roman originals but are not always faithful to those ancient predecessors. Language, old and new, will be re-examined in Chapter 3.

<sup>43</sup> E Micheler *Wertpapierrecht zwischen Schuld- und Sachenrecht: Zu einer kapitalmarktrechtlichen Theorie des Wertpapierrechts. Effekten nach österreichischem, deutschem, englischem und russischem Recht* (Springer Wien 2004).

<sup>44</sup> J Benjamin *Interests in Securities: A Proprietary Law Analysis of the International Securities Markets* (OUP Oxford 2000).

<sup>45</sup> *Ibid* [1.02].

<sup>46</sup> Some preliminary results of the analysis have been laid out in A Pretto, review, in (2001) 15 *Trust L Intl* 111.

<sup>47</sup> The treatment of intermediation in the trading of securities and the custody of investments has also benefited from AO Austen-Peters *Custody of Investments: Law and Practice* (OUP Oxford 2000).

<sup>48</sup> Benjamin (n 44 above) [13.17].

## D GENERAL NATURE OF CONCLUSIONS

The two aspects of this book have been introduced as ‘inward-looking’ and ‘outward-looking’. The former looks into shares and sub-shares as such. The latter searches for proprietary boundaries. Shares are indisputably stores of wealth and, in as much as the notion of wealth overlaps with that of property, boundary lines need to be drawn to relate and separate those two, easily confounded, concepts. The practical importance of the inward perspective enhances the prominence of the outward aspect of the work, where the intellectual emphasis lies. On pain of deep and continuing confusion, the province of the law of property must be determined. It may be helpful to end this introduction by giving some indication of the nature of the conclusions on that front.

When the law of property is contrasted with the law of obligations, there is no way of drawing its boundary in a way which allows shares to stay within it. This principal conclusion may be perceived as an outrage against ordinary usage. Recent authors have been able to persuade themselves that shares can be accommodated within the concept of property. That is because they have taken their eyes off the line between property and obligations and adopted the layman’s, as opposed to the lawyer’s, idea of property.

It is not, however, the main preoccupation of this book to show that there is a competition between a legal and a colloquial sense of property. Within the law itself there are competing usages, the narrowest being that which preserves the ultimately inescapable contrast with the law of obligations. Nevertheless, there is more than one context in which the law attaches practical consequences to a much wider but still not wholly untechnical conception.

The impact of this study on practice can only be doubted by those who regard legal order and the correct use of language as secondary matters. The observation that the investigation of the nature of ‘entitlements’ is at the core of much important study currently taking place at an international level should dissipate doubts as to the utility of conceptualization. Current initiatives by the European Commission,<sup>49</sup> Unidroit,<sup>50</sup> and the Bank of

<sup>49</sup> Commission of the European Communities *Clearing and Settlement in the European Union: The Way Forward* (final draft of Communication to the Council and the Parliament COM(2004)312 final, 28 April 2004) <[http://europa.eu.int/comm/internal\\_market/financial-markets/clearing/index\\_en.htm](http://europa.eu.int/comm/internal_market/financial-markets/clearing/index_en.htm)> (accessed 31 Oct 2004). Cf Giovannini Group *First Report on Cross Border Clearing and Settlement Arrangements in the European Union* (November 2001) identifying 16 barriers to the integration of the European financial market, and *Second Report on Clearing and Settlement Arrangements in the European Union* (April 2003) envisaging actions to eliminate them <same website>.

<sup>50</sup> Unidroit Study Group for the Preparation of Harmonised Substantive Rules on Transactions on Transnational and Connected Capital Markets (Restricted Study Group on Harmonised Substantive Rules regarding Securities Held with an Intermediary) *Draft Convention on Substantive Rules regarding Securities Held with an Intermediary* (Rome, April 2004) part of Study 78 <<http://www.unidroit.org/english/workprogramme/study078/main.htm>> (accessed 31 Oct 2004), on which also P Paech ‘Harmonising Substantive Rules for the Use of Securities Held with Intermediaries as Collateral: The Unidroit Project’ (2002) Uniform L Rev 1140.

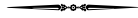
England,<sup>51</sup> whilst primarily keen to remedy the lack of uniformity in the law regulating clearing and settlement systems in Europe,<sup>52</sup> have shown awareness that no progress on this front can be made without answering the question of the nature of the interest held by him who holds shares through an intermediary. Reference to the findings of these studies will be made, where relevant, in the course of the book.

This book hopes to complement the attention internationally devoted to the nature of the account-holder's entitlement by showing that the decision to call it 'proprietary' cannot be made without reflecting on its impact upon the classification of the area of law where these entitlements purport to find a niche, namely personal property. That makes taxonomy of the essence. Our opening statement was to the effect that personal property is currently unfashionable. In so far as that is understood to mean that personal property lacks a fashion or shape, this book hopes to draw its contours. In so far as that means that personal property is unpopular, this book hopes to awaken the sleepy academic debate around it.

<sup>51</sup> A specially constituted working group of the Financial Markets Law Committee of the Bank of England has produced several papers on the theme of *Property Interests in Investment Securities*, and the following more specific sub-themes: *International Overview*; *Resources and Materials*; *The Six Classic Priority Scenarios*; *The Regulation of Securities Intermediaries by the FSA*, all published on 5 July 2004 and available at <<http://www.fmlc.org/papers.htm>> (accessed 31 Oct 2004). These have formed the background to the further paper *Analysis of the Need for and Nature of Legislation Relating to Property Interests in Indirectly Held Investment Securities, with a Statement of Principles for an Investment Securities Statute*.

<sup>52</sup> On these mechanisms, see Ch 7 below, text preceding n 37 and text to nn 53–54.

## *The Condition of Personal Property*



### A THE NEGLECT

THE IDENTIFICATION OF the law of property with real property entails that courses on property systematically avert their eyes from the valuable market in fine art and antiquities, the complexity of dealings in aircraft and other means of transport, the intricate law relating to money itself, and, above all, the enormous volume of wealth invested in company securities. Merely to bring these matters to mind is to recognize that in our time the ‘over-concentration’ on land is ‘inexcusable and anachronistic’.<sup>1</sup>

This is not in fact a new anxiety. The poor state of personal property caught Blackstone’s eye as early as 1766. He observed:

Under the name of things *personal* are included all sorts of things *moveable*, which may attend a man’s person wherever he goes; and therefore, being only the objects of the law while they remain within the limits of it’s [sic] jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and *immoveable*, as lands, and houses, and the profits issuing thereout. These . . . were the principal favourites of our first legislators: who took all imaginable care in ascertaining the rights, and directing the disposition, of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them; but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded as a transient commodity. The amount of it indeed was, comparatively, very trifling, during the scarcity of money and the ignorance of luxurious refinements, which prevailed in the feudal ages. . . . But of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented it’s [sic] quantity and of course it’s [sic] value, we have learned to conceive different ideas of it. Our courts now regard a man’s personality in a light nearly, if not quite, equal to his realty.<sup>2</sup>

<sup>1</sup> P Birks ‘Introduction’ in P Birks (ed) *Examining the Law Syllabus: The Core* (OUP Oxford 1992) 7, 8.

<sup>2</sup> W Blackstone *Commentaries on the Laws of England. Volume II. Of the Rights of Things* (Oxford 1766) (facsimile of 1st edn of 1765–69, University of Chicago Press Chicago and London 1979) 384–85. Cf Humphreys (Ch 1 n 7 above).

In retrospect it cannot be said that common lawyers persevered in the change of heart noticed in the last lines. Personalty is sparsely taught and rarely learnt.<sup>3</sup> The complacency of the law schools on this score is difficult to justify. Although the importance of this ‘half-paper’ is obvious to other European legal traditions and to commercial practitioners in general, academic publicists will still take no notice.<sup>4</sup>

Although personalty does find a place in broader works on commercial law,<sup>5</sup> the literature on property reflects this want of sustained academic attention to anything but land. Millennial studies assessing the health and development of the law subject by subject contain no explicit reference to it.<sup>6</sup> Textbooks entitled ‘property law’ turn out to be barely more than metonymies, where the promise of a comprehensive treatment of the whole subject stands in fact for treatment of one of its parts, namely land law.<sup>7</sup> Blackstone noticed that this habit of mind could be traced back to earliest times:

Our antient law-books . . . do not . . . often condescend to regulate [personal] property. . . . There is not a chapter in Britton or the mirroir . . . and the litle that is to be found in Glanvil, Bracton, and Fleta, seems principally borrowed from the civilians.<sup>8</sup>

The half-page literature review which follows, limited to England, can aspire to be almost complete, if only because of the limited number of studies ever dedicated to the subject.<sup>9</sup> The needs of practitioners were met by the 18 editions of *Williams on Personal Property* between 1848 and 1926.<sup>10</sup> Almost contemporary were the nine editions of *Goodeve’s Modern Law of Personal Property* between 1887 and 1949.<sup>11</sup> The 20th-century personal property scenario was dominated by the five editions of *Crossley-Vaines on Personal Property*,<sup>12</sup> which appeared

<sup>3</sup> W Swadling ‘Teaching Property Law: An Integrated Approach’ in Birks (n 1 above) 22, 23–25.

<sup>4</sup> A Tettenborn, review of S Gleeson *Personal Property Law* (FT Law & Tax London 1997) [1999] LMCLQ 586, 586–87.

<sup>5</sup> R Goode *Commercial Law* (3rd edn Butterworths Lexis Nexis London 2004) 24–63 is devoted to ‘Basic Concepts of Personal Property’.

<sup>6</sup> E Cooke and D Hayton ‘Land Law and Trusts’ ch 22 in D Hayton (ed) *Law’s Future(s)* (Hart Publishing Oxford 2001) 433–52.

<sup>7</sup> R Smith *Property Law* (4th edn Longman Harlow 2003); WT Murphy *Understanding Property Law* (Sweet & Maxwell London 2004). A happy exception is R Chambers *An Introduction to Property Law in Australia* (LBC Information Services 2001). A forerunner of the integrated approach was D Jackson *The Law of Property* (1992, out of print).

<sup>8</sup> Blackstone (n 2 above) 385.

<sup>9</sup> What follows discounts the existence of regional Commonwealth studies, eg RG Hammond *Personal Property. Commentary and Materials* (rev edn OUP Auckland 1992). Work by Italian theorists is mentioned in Ch 1 above, text to nn 39 and 40.

<sup>10</sup> The first edition was J Williams *Principles of the Law of Personal Property for the Use of Students in Conveyancing* (S Sweet London 1848). Other authors were added from the 12th edition onwards. The last edition was TC Williams and WJ Byrne *Williams on Personal Property* (18th edn Sweet & Maxwell London 1926).

<sup>11</sup> The first edition was LA Goodeve *The Modern Law of Personal Property* (W Maxwell & Son London 1887). Other names were added from the 2nd edition onwards. The last edition was RH Kersley *Goodeve’s Modern Law of Personal Property* (9th edn Sweet & Maxwell London 1949).

<sup>12</sup> J Crossley Vaines *Personal Property* (Butterworths London 1954); ELF Tyler and NE Palmer *Crossley Vaines’ Personal Property* (5th edn Butterworths London 1973).

between 1954 and 1973, preceded and followed by one or two minor studies.<sup>13</sup> Bell's *Modern Law of Personal Property in England and Ireland*<sup>14</sup> appeared in 1989. In the 1990s and almost contemporarily Bridge and Gleeson each wrote books bearing the identical title, *Personal Property Law*.<sup>15</sup> The most comprehensive treatment of the subject has probably been achieved through Palmer and McKendrick's *Interests in Goods*, whose declared aim is 'to convey the range and complexity of modern transactions in personal property and the diversity of their subject matter'.<sup>16</sup> Worthington's collection of materials on personal property, mostly intended for reading by students, has had the merit of signalling that the subject is fit for teaching.<sup>17</sup> In Birks's taxonomical endeavour, the monumental *English Private Law*, Swadling provides a rare example of the reintegration of real and personal property.<sup>18</sup>

## B CURRENT BOUNDARIES

The controversial boundary which constitutes the central preoccupation of this book is that which defines the relation between the law of property and the law of obligations. Within property there is also an internal boundary between real and personal property. It is a statutory truth that shares are not real property and, seemingly of necessity, must therefore be personal property.<sup>19</sup>

### 1 Real and Personal Property

The internal distinction between real and personal property is increasingly of only historical significance.<sup>20</sup> Unlike the outer boundary, this one is not unstable. It will be convenient to mark it clearly. Misunderstanding of the nature and origin of this internal frontier can deeply disrupt the understanding of property.

<sup>13</sup> WHH Kelke *An Epitome of Personal Property Law* (Sweet & Maxwell London 1901); HW Wilkinson *Personal Property* (Sweet & Maxwell London 1971).

<sup>14</sup> AP Bell *Modern Law of Personal Property in England and Ireland* (Butterworths London 1989).

<sup>15</sup> MG Bridge *Personal Property Law* (2nd edn Blackstone London 1996), of which there is now a new edition (3rd edn OUP Oxford 2002); S Gleeson *Personal Property Law* (FT Law & Tax London 1997).

<sup>16</sup> N Palmer and E McKendrick (eds) *Interests in Goods* (LLP London 1993) v and (2nd edn LLP London 1998) ix. 'Goods' in this case has been 'construed . . . liberally' to include a wide range of moveables.

<sup>17</sup> S Worthington *Personal Property Law. Text, Cases and Materials* (Hart Publishing Oxford 2000).

<sup>18</sup> WJ Swadling 'Property. General Principles' ch 4 in P Birks (ed) *English Private Law* (OUP Oxford 2000) vol II 263–74, to be read in conjunction with the 2004 *Second Cumulative Updating Supplement*.

<sup>19</sup> CA 1985 s 182(1) [Nature, transfer]: 'The shares or other interest of any member in a company (a) are personal estate or, in Scotland, moveable property and are not in the nature of real estate or heritage'.

<sup>20</sup> Swadling (n 18 above) 203, [4.46].



One linguistic premise is necessary. In the law ‘real’ can never be understood in or even in relation to its now common sense as a synonym for ‘genuine’ or ‘actual’. It is always an Anglicization of the adjective from *res*, which is the Latin for ‘thing’.<sup>21</sup> A further complication is that, notwithstanding its Latin reminiscences, this language is often used in ways which depart considerably from its Roman applications. In Birks’s words:

The law uses ‘real’ to mean ‘in some significant way thing-related’, but the nature of the relation is not always the same. Very importantly, there is a difference between the ‘reality’ which is indicated in the contrast between real and personal property and the ‘reality’ indicated in the contrast between real and personal rights.<sup>22</sup>

Here, therefore, ‘reality’ denotes the quality of ‘thing-relatedness’. The thing-relatedness of real property differs from the thing-relatedness of real rights. The former is a non-Roman type of ‘reality’, as will be shown immediately below.

The latter type of reality, as illustrated in ‘real rights’, relates to the external frontier of property law, between property and obligations. In that context ‘real’ can only function as a synonym for ‘proprietary’ as opposed to ‘personal’. ‘Personal’ is then a synonym for ‘obligatory’. These meanings, inherent in the opposition between real and personal rights, are the only ones which have substantial technical importance and the only ones true to the original Roman applications of the words which support them—*res* (thing) and *persona* (person or individual) respectively.<sup>23</sup> Chapter 5 will explain them further.

First must come an explanation of how the adjectives ‘real’ and ‘personal’ were bent to form the phrases ‘real property’ and ‘personal property’. It will be useful to say at once that another term which attracts this language is ‘action’. There was the closest possible link between the category of real property and the category of real actions, but the early common law understood real actions in a sense absolutely alien to Roman law.

The centre of the English wealth system has traditionally been land. This was true at least until the Industrial Revolution. Land was permanent wealth, outliving every generation of its inhabitants. The ideas of power, jurisdiction and lordship were implicated in title to it. Hence land became the subject of feudal tenure, that is, it was the foundation of the relationship whereby a tenant held of a lord. The fact of being in possession as a feudal tenant was called ‘seisin’. Alongside tenure, elaborate rules governed inheritance and the doctrine of the estates capable of subsisting in the land itself. ‘Estate’ here denotes an interest measured in time. Neither tenure nor the doctrine of estates applied to personalty.<sup>24</sup>

All property subject to seisin was protected by means of actions which allowed the claimant to recover the thing itself. In English law it was because the

<sup>21</sup> PGW Glare (ed) *Oxford Latin Dictionary* (OUP Oxford 1982) entry ‘rēs, reī, f, 3’.

<sup>22</sup> P Birks ‘Before We Begin: Five Keys to Land Law’ in S Bright and J Dewar *Land Law: Themes and Perspectives* (OUP Oxford 1998) 456, 470.

<sup>23</sup> PGW Glare (ed) *Oxford Latin Dictionary* (OUP Oxford 1982) entry ‘persōna -ae, f, 4–6’.

<sup>24</sup> JH Baker *An Introduction to English Legal History* (4th edn Butterworths London 2002) 223–26, 229, 278–79, 389–90.

action would achieve this recovery that it attracted the name ‘action *in rem*’ or ‘real action’. The name given to that class of action then transferred to the assets claimable by such actions. In this way the corresponding property came therefore to be known as real property.<sup>25</sup> It happened that the assets which could be recovered by the real actions were, in the main, interests in land. Hence the modern meaning of ‘realty’ and ‘real estate’.<sup>26</sup>

However, the correlation between interests in land and realty was not originally perfect. The lease of land or ‘term of years’ remained personalty even after it had become specifically recoverable: partaking of the nature of real property to the extent of being the subject of tenure but not to the extent of being subject to estates, it acquired the anomalous classification as a ‘chattel real’.<sup>27</sup> Again, although chattels did not descend to heirs with the deceased’s land, some items which were by nature personalty, such as the armour of a knight or the crown jewels, or the best utensils of the deceased, did pass to heirs. Heirlooms as such were realty, being metaphysically annexed to the family’s land.<sup>28</sup> About the stability of this connection to the land we would perhaps be less adamant nowadays. Also, real property included a number of other types of incorporeal hereditaments which to a greater or lesser extent do not strike the modern mind as being land.<sup>29</sup>

Some of these aberrations on a boundary which otherwise marks off land from other things are echoed in modern courts. A question arises, for instance, whether or not chattels have become annexed to land so as to become realty and whether some, such as mobile homes, could be treated as land for some statutory purposes even if not so annexed. Bungalows and boathouses have recently proved problematic in this sense.<sup>30</sup> It remains broadly true that the old real actions lay for land and that the ‘reality’ of both the actions and their subject-matter meant that the claimant recovered the thing itself.

<sup>25</sup> *ibid* 298, 380.

<sup>26</sup> Comparative remarks on the meaning of the latter are found in N Kasirer ‘Le real estate existe-t-il en droit civil? Un regard sur le lexique juridique de droit civil de langue anglaise’ in R Sacco and L Castellani (eds) *Les multiples langues du droit européen uniforme* (L’Harmattan Italia Torino 1999) 89; A Gambaro ‘A proposito del plurilinguismo legislativo europeo’ (2004) 58 *Rivista Trimestrale di Diritto e Procedura Civile* 287, 292.

<sup>27</sup> AWB Simpson *A History of the Land Law* (2nd edn Clarendon Press Oxford 1986) 248–50.

<sup>28</sup> Baker (n 24 above) 380–81.

<sup>29</sup> Eg seignories, advowsons, tithes, rents, franchises, easements and profits, offices and dignities: an overview is *ibid* 246, and see *ibid* 380, 383, 423, 427–28, 431.

<sup>30</sup> In *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HL) the House of Lords had to decide on a claim for the possession of land on which the defendant’s prefabricated bungalow was placed. The question was whether he had a protected tenancy under the Rent Act 1977. It was held that, the nature of the structure being such that it could only be enjoyed in situ and could not be removed, save by a process of demolition, it must have been intended to form part of the realty of that site, and therefore ceased to be a chattel. As each of the timber frame walls were placed in position to build the bungalow, they all became part of the structure, which was itself ‘part and parcel of the land’ (690, 693 Lord Lloyd of Berwick). The absence of any attachment of the bungalow to the soil, other than gravity, was held to be irrelevant, for ‘accession can operate even where there is only a juxtaposition without any physical bond between the article and the freehold’ (697, 699 Lord Clyde). In *Chelsea Yacht and Boat Co Ltd v Pope* [2000] WLR 1941 (CA) a similar question arose in relation to a houseboat.

Assets which did not benefit from this scheme of specific recovery, the reaction to its infringement being merely an action *in personam*, were known as personal property. Personal property comprised mainly ‘chattels’, a French word whose English equivalent is ‘cattle’. However, while ‘cattle’ was confined to livestock, legal chattels included all moveables and those interests in land which retained some of the features of personalty and counted as such despite being equipped with ‘real’ protection. Impermanent and perishable, often fungibles with no individual characteristics, chattels were wealth for which recovery *in specie* was never guaranteed. A successful claimant in respect of these chattels would be awarded a money equivalent, what the Romans would call *condemnatio pecuniaria*.<sup>31</sup> ‘Personal’ were those actions which were not ‘real’. Again the term is Roman but its meaning is not. The confusion runs very deep. It affects the discussion of the protection of rights to securities.<sup>32</sup> Professor Nicholas warns us that ‘an *actio in rem* is not, in form, one which compels the defendant to return the *res*. (This is the sense in which the Common Law uses the term “real action”)<sup>33</sup>’.

The roots of this confusion date from the 13th century. It was from Bracton himself that English law learnt to assume that it was the result of the claim which determined the real or personal nature of the action, hence the real or personal nature of the property claimed. Money judgments were the result of personal actions aiming at the protection of personal property; recoveries *in specie* were necessarily brought about by real actions claiming back real property. This outcome-based ‘reality’ and ‘personality’ appears to be a purely English coinage and bears only a semantic resemblance to the authentic Roman division of actions.

Early common lawyers had access to Justinian’s *Institutes*. There they could read that actions were principally divided between those *in rem* and those *in personam*: ‘Omnium actionum . . . summa divisio in duo genera deducitur: aut enim in rem sunt aut in personam’.<sup>34</sup> Justinian’s personal actions lay for claims in which a plaintiff would sue a defendant who was under an obligation to him, alleging that he ought to give him something or do something. Real actions, by contrast, would be brought against a defendant with whom the plaintiff was in dispute about title to a thing. The nature of the Roman actions was claim-based, not outcome-based. It was the form of the claimant’s assertion that attracted the label. In a real action the plaintiff directly asserted his entitlement to the thing in question: ‘That book is mine!’ In a personal action he would assert that the defen-

<sup>31</sup> Baker (n 24 above) 379, 391–400.

<sup>32</sup> Ch 10 below, text to nn 10–14.

<sup>33</sup> B Nicholas *An Introduction to Roman Law* (Clarendon Press Oxford 1962, repr with corrections 1969, 1996) 101.

<sup>34</sup> Justinian *Institutes* 4.6.1 (text of P Krueger); P Birks and G McLeod (trs and eds) *Justinian’s Institutes* (Duckworth London 1987) 129: ‘The main classification [of actions] is into two: every action . . . is either real or personal’.

dant ought to do something: 'You ought at civil law to pay me ten sesterces!' In the classical law absolute adherence to the principle of monetary condemnation (*condemnatio pecuniaria*) meant that even in a real action the judge would in the end have to give a money judgment.<sup>35</sup>

The wholly different outcome-based understanding of actions and its correlation with the nature of real and personal property was advanced by Bracton and, up to our own days, has never been displaced. He said, speaking of 'Actions *in rem* for an immovable':<sup>36</sup>

Actions *in rem* are those given against a possessor, [he who possesses in his own name, not in another's, no matter by what *causa*,] because he has or possesses the thing and can restore it or name its owner, as where one claims a specific thing, an estate or a piece of land, from another and asserts that he is its owner, and seeks the thing itself, not its price or its value or an equivalent of the same kind, and it is an immovable, corporeal thing that is claimed, for whatever reason, against one who is under no personal obligation.<sup>37</sup>

Then, discussing 'Actions *in rem* for movables':

What was said above applies if the thing sought is an immovable. Now we turn to movable things, a lion, an ox or an ass, a garment, or something reckoned by weight or measure. It seems at first sight that the action or plea ought to be both *in rem* and in *personam*, since a specific thing is being claimed and the possessor is bound to restore that thing. But in truth it will only be *in personam*, because he from whom the thing is sought is not bound to return the thing absolutely but disjunctively, to restore it or its value. By simply paying its value he is discharged, whether the thing itself is in existence or not. Thus if one vindicates his movable carried off for whatever reason or lent, in his action he must state its value and frame his action in this way, 'I, such a one, demand that such a one restore to me such a thing worth so much,' or 'I complain that such a one wrongfully detains from me (or 'has robbed me of') such a thing worth so much.' Otherwise, no value being named, the vindication of the moveable will fail. The same will be true if movables reckoned by weight, number or measure are claimed, as goods in bulk, money or grain, or others reckoned by liquid measures, as wine and oil. If goods of this sort are claimed it is sufficient if the defendant restores the equivalent in weight, number, kind and amount, and thus, since he is not

<sup>35</sup> P Stein (ed) WW Buckland *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev edn CUP Cambridge 1963) 627, 657–59.

<sup>36</sup> The spelling of 'moveable' and 'immoveable' retains the 'e' in English legal usage. That usage has been preferred throughout this book. The spelling of 'immovable' in quotations here reflects the American usage of Bracton's translator, Professor SE Thorne of Harvard.

<sup>37</sup> GE Woodbine (ed) and SE Thorne (tr) *Bracton on the Laws and Customs of England* (Harvard University Press Cambridge MA 1968) vol II 292 [f 102]:

Actiones vero in rem sunt quae dantur contra possidentem, qui nomine proprio possideat ex quacumque causa et non alieno, quia habet rem vel possidet quam restituere potest vel dominum nominare. Ut si quis petat ab alio rem certam, fundum aliquem vel terram, et se contendat inde dominum, et persequatur rem illam et non eius pretium nec eius aestimationem nec tantundem quod sit eiusdem generis, et sit res corporalis immobilis quae petitur ex quacumque causa versus aliquem qui nullo iure personali obligatus est.

compelled absolutely to the restitution of the thing sought the action will be *in personam*, since he may be discharged by the payment of an equivalent.<sup>38</sup>

In a famous lecture on actions Maitland, reflecting on the use of Latin formulas by English scholars, expressed the worry that '[t]hese divisions of actions never, however, well fit the native stuff; they always cut across the form of writs'.<sup>39</sup> And, commenting on Bracton, he said:

[T]his remark which made the reality or personality of the action depend not on the nature of the right asserted by the plaintiff but on the result of the judgment, has had results which as I think are much to be regretted. In the first place it is the origin of all our talk about real and personal property. The opinion comes to prevail that the action is 'real' if a favourable judgment gives possession of lands, tenements and hereditaments, 'personal' if damages are awarded and 'mixed' if both lands and damages are recovered. Gradually the terms 'things real' and 'things personal' begin to make their appearance and to supplant the old, and surely far better terms *terrae et tenementa* on the one hand, *bona et catalla* on the other.<sup>40</sup>

So long as the reading of 'thing-relatedness' as specific recoverability<sup>41</sup> is confined to the distinction between real and personal property, it does little enough harm. However, there is a proven danger that the history which defines that internal frontier of personal property can spill over into the attempt to understand the much more important external frontier between property and other areas of the law. That risk is already eventuating. In America it is already widely believed, seemingly under the influence of one important article in the Harvard Law Review, that the hallmark of property is specific recoverability.<sup>42</sup>

<sup>38</sup> Ibid vol II 292–93 [f 102b]:

Dictum est supra si res sit immobilis quae petitur, nunc tamen sit res mobilis quae petatur, sicut leo, bos, vel asinus, vestimentum, vel aliud quod consistat in pondere vel mensura. Videtur prima facie quod actio sive placitum esse debeat tam in rem quam in personam, eo quod certa res petitur, et quia possidens tenetur restituere rem petitam. Sed re vera erit in personam tantum, quia ille a quo res petitur non tenetur praecise ad rem restituendam, sed sub disiunctione, vel ad rem vel ad pretium. Et solvendo tantum pretium liberatur, sive res appareat sive non. Et ideo si quis rem mobilem vindicaverit ex quacumque causa ablatam vel commodatam, debet in actione sua definire pretium et sic actionem proponere, *Ego talis peto quod talis restituat mihi talem rem tanti pretii*, vel, *Conqueror quod talis iniuste mihi detinet, vel robbavit, talem rem tanti pretii*. Alioquin non valebit rei mobilis vindicatio, pretio non apposito. Idem erit si res mobiles petantur quae consistunt in pondere, numero vel mensura, sicut massa, pecunia vel triticum, vel aliae quae in liquido consistunt, sicut vinum et oleum. Quo casu si huiusmodi res petantur, sufficit si implicatus tantundem restituat quod sit eiusdem ponderis, numeri, generis et mensurae, et unde quia praecise non compellitur ad rem quae petitur, erit actio in personam cum implicatus per solutionem tantundem possit liberari.

<sup>39</sup> AH Chaytor and WJ Whittaker (eds) FW Maitland *The Forms of Actions at Common Law* (CUP Cambridge 1965) 74; Simpson (n 27 above) 25–46.

<sup>40</sup> Maitland (previous note) 74–75.

<sup>41</sup> Birks 'Five Keys' (n 22 above) 456, 471.

<sup>42</sup> G Calabresi and AD Melamed 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 Harvard L Rev 1089, 1089 and 1125. On the influence of this article in Italian law, U Mattei 'I rimedi' in G Alpa et al *Il diritto soggettivo* in R Sacco (ed) *Trattato di diritto civile* (UTET Torino 2001) 105, 136–42. D Laycock 'The Scope and Significance of Restitution'

In England one important book concerned precisely with the classification of company securities appears to fall into a similar error when discussing property as opposed to obligations.<sup>43</sup>

The kind of 'reality' or 'thing-relatedness' which really matters in the modern law is that which is indicated in the contrast between personal and real rights.<sup>44</sup> That usage of 'real' and 'personal' is claim-based, as opposed to outcome-based. The more prominent the outcome-based meaning, the greater the danger of misunderstanding the external frontier of property. This danger is aggravated when the outcome-based meaning migrates from the Anglicization 'real' to the Latin *in rem*. The corruption of the original Roman sense of *actio in rem* hinders the understanding of *vindicatio* as the prototype of such actions. The language of 'vindication' being very much in use in modern scholarly discourse, its abuse is particularly dangerous.<sup>45</sup> The thing-relatedness of property, which founds its intrinsic diversity from obligations, is a concept surrounded by disorder, notwithstanding its undeniable importance in legal talk.

## 2 Property and Obligations

For the neglected study of personal property to make progress it must have a clear view as to the nature of the interface between property law and other areas of the law. The bordering area with which we are especially concerned is that of obligations. The two sections which follow begin that outward-looking study by showing, first, that writers on personal property, if they have drawn that line at all, have hitherto drawn it somewhat awkwardly, and, secondly, by underlining the fact that a cavalier attitude to that exercise is not acceptable.

### (a) Disorder

Books on personal property have hitherto tended to treat their subject episodically. They make no commitment to any defined concept but confine themselves to a number of topics intuitively deemed to fall within the subject. Introductory sections purporting to define personal property are content to rely on the residual definition of personal as 'non-real'. The reader is tacitly assumed, once instructed in this internal mystery, to know the outer boundary of the law of property. Yet it is there that the problems lie. The real–personal binomial thus obscures the more problematic truth that the law of personal property is first

(1989) 67 Texas L Rev 1277, 1290–93, maintaining the multi-causality of restitution, appears to take it for granted that specific restitution of a thing is the mark of the law of property: 'The restitutionary remedy gives plaintiff a property right in the thing wrongfully taken or withheld from him and in its identifiable proceeds' (1291).

<sup>43</sup> J Benjamin *Interests in Securities: A Proprietary Law Analysis of the International Securities Markets* (OUP Oxford 2000): a refutation is below (Ch 10 text to nn 15–20).

<sup>44</sup> Birks 'Keys' (n 22 above) 472–75.

<sup>45</sup> Pt IV below.

and foremost a subset of the unity that is the law of property.<sup>46</sup> Authors committed to the episodic strategy are agreed that the field of analysis consists in ‘titles’ or ‘interests in moveables’.<sup>47</sup> They then exemplify the behaviour of moveables in a number of situations, among which are ‘transfers of title’, ‘remedies’,<sup>48</sup> and ‘persistence of interests’.<sup>49</sup> A single one of these episodes can become the subject-matter of a book.<sup>50</sup> At the cost of evading the larger issue this gives a coherence to the work which is often lacking from more ambitious books.

Chapters which do purport to address the ‘legal nature of property’ often treat it as no more than a nominal preoccupation. That is to say, some authors feel the need to mention it amongst their tasks but introduce highly heterogeneous materials. This can sometimes be excused or explained by the literary genre of the work, as in the case of ‘cases and materials’ textbooks.<sup>51</sup> Yet it would not be possible to deduce from this assemblage of materials any answer to the question whether a share should be regarded as property and, if so, in what sense, for the promise of a definition of property is not fulfilled.<sup>52</sup>

The belief that amplitude of coverage can justify dispensing with conceptual certainty undermines even the very best treatises on personal property, whose paradigm might be considered to be Palmer and McKendrick’s *Interests in Goods*.<sup>53</sup> Chapter by chapter this is on the whole the best account of the subject, but its systematics is deficient. The opening part, called ‘Defining Property’, avoids a conceptual definition of the book’s subject-matter. Uncomfortably collecting together sub-headings as diverse as information as property, proprietary rights in human tissue, global custody, insurable interests, interests in wreck, possessory title, and the legal nature of a share, this part is internally episodic as a result. The ‘property’ spoken of in this case can only mean ‘wealth’, under which almost anything can be encompassed.<sup>54</sup> The five pages on the legal nature of a share regrettably miss the chance to engage in an outward-looking

<sup>46</sup> In Scotland, with its traditionally stronger attachment to intellectual coherence, Reid says of the understanding of property as three essentially different sets of rules—land, corporeal moveables and incorporeal property—that they conceal the unitary nature of property, there being only one set of rules subject to local variations in particular cases: KGC Reid *The Law of Property in Scotland* (Butterworths Edinburgh 1996) 5.

<sup>47</sup> This is evidenced eg in the table of contents headings of S Gleeson *Personal Property Law* (FT Law & Tax London 1997) v–vi and AP Bell *Modern Law of Personal Property in England and Ireland* (Butterworths London 1989) ix–xii.

<sup>48</sup> Gleeson (previous n) 105, 285.

<sup>49</sup> Bell (n 47 above) 457.

<sup>50</sup> LPW van Vliet *Transfer of Movables in German, French, English and Dutch Law* (Ars Aequi Libri Nijmegen 2000).

<sup>51</sup> Worthington n 17 above. Ch 1 ‘Defining Personal Property’ encompasses a range of public law, law and economics, and jurisprudential issues.

<sup>52</sup> *Ibid* [3–36]. The sections ‘Types of personal property’ [1.2.2] 4–6 and the pleonastic ‘Types of property rights: interests in property’ [1.4] 16–17 are not illuminating in this sense.

<sup>53</sup> N Palmer and E McKendrick (eds) *Interests in Goods* (2nd edn LLP London 1998).

<sup>54</sup> The line between wealth and non-wealth will be referred to in Ch 8 as the third frontier of the law of property, counting the first frontier as the division between real and personal property and the second frontier as the line dividing property from obligations.

operation.<sup>55</sup> The burden of analysis is evaded through a vague hint that there might well be a problem in ‘accommodating “obligations” within the rubric of property’. The same agnosticism as to the necessity of conceptual precision is to be found with regard to information as property, for it is accepted that ‘the property label is a conclusion not a premise’.<sup>56</sup> The classification of interests in goods into Parts illustrates the common law’s traditional scepticism as to the need for rational systematic. For example, pledge is not classed under ‘Security and Payment’. Instead it finds a niche,<sup>57</sup> together with solicitors’ liens,<sup>58</sup> in a section on ‘Transmitting and Distributing Property’. Equitable liens find a different home under ‘Claims, Indemnities, Remedies and Wrongs’.<sup>59</sup> Again, a civilian eye finds it difficult to explain the location of abandonment under ‘Transmitting and Distributing Property’,<sup>60</sup> far away from the discussion of ownerless goods and original acquisition, to be found under ‘Originating and Transforming Property’.<sup>61</sup>

American law manifests a similar indifference. The impression of arbitrariness surrounding the choice of personal-proprietary episodes as the subject-matter of personal property does not diminish when the choice is to concentrate on ‘rules’ protecting property. For the last 30 years, following the publication of a famous article by Professors Calabresi and Melamed in the *Harvard Law Review*, American lawyers have been familiar with the unitary concept of ‘entitlements’ within which a differentiation is then made according to the nature of the rules for protecting those entitlements.<sup>62</sup> The language of ‘property’ and ‘liability’ is invoked in that differentiation, so that ‘entitlements’ are said to be protected by ‘property rules’ or ‘liability rules’. An entitlement is the interest which society deems to prevail in a clash between conflicting alternatives. Property rules, it is claimed, involve a decision as to who is allocated the initial entitlement to some form of wealth. Such entitlement can then be traded in voluntary transactions in which the parties, and in particular the seller, agree upon its value. An entitlement protected by a ‘property rule’ cannot be turned into money by an agency of the state such as a court. Hence specific recovery becomes the mark of the property rule. In contrast, a liability rule is at play whenever, pursuant to an infringement of such entitlement, the loss of the entitled person can be made good through the payment of an objectively determined value. The unitary idea of entitlement is intended by the authors to allow ‘a unified perspective’ and hence to overcome the fragmentation of the lawyer’s

<sup>55</sup> G Barton ‘The Legal Nature of a Share’ ch 5 in Palmer and Mc Kendrick (n 53 above) 111–15.

<sup>56</sup> N Palmer and P Kohler ‘Information as Property’ ch 1 *ibid* 3–24, 22.

<sup>57</sup> N Palmer and A Hudson ‘Pledge’ ch 24 *ibid* 621–47.

<sup>58</sup> A Hudson ‘Solicitors’ Liens’ ch 25 *ibid* 649–60.

<sup>59</sup> J Phillips ‘Equitable Liens: A Search for a Unifying Principle’ ch 39 *ibid* 975–93.

<sup>60</sup> A Hudson ‘Abandonment’ ch 23 *ibid* 595–619.

<sup>61</sup> A Bell ‘Bona Vacantia’ ch 8 *ibid* 207–26; P Birks ‘Mixtures’ ch 9 *ibid* 227–49; HN Bennett ‘Attachment of Chattels to Land’ ch 11 *ibid* 267–99.

<sup>62</sup> G Calabresi and AD Melamed ‘Property Rules, Liability Rules and Inalienability: One View of the Cathedral’ (1972) 85 *Harvard L Rev* 1089.



vision brought about by the distinct subjects commonly called property and tort. In the authors' own words, they are engaged in 'an attempt at integrating the various legal relationships treated by these subjects'.<sup>63</sup>

The initial flaw in this analysis is that 'property' and 'torts', even meant as synthetic descriptions for two areas of the law, are not correctly juxtaposed. In England Birks's attention to taxonomy has shown that the former is a response to an event, in the same category as obligations, while the latter, more comprehensively called 'wrongs', are events triggering a response, in the same series of other events such as manifestations of consent or unjust enrichment or miscellaneous others.<sup>64</sup> The event 'wrong' often triggers the response 'obligation'. Therefore, to make the authors' reference to two areas of the law homogeneous, we would have to speak consistently of property and obligations, not property and tort. The authors' categories of 'property rules' and 'liability rules' come close to re-inventing this ancient opposition. Much is lost in the discontinuity derived from their failing to appreciate this fact. One seems to see the wheel being painfully re-invented.

The consequences of ignoring the outer boundaries of property or, respectively, those of obligations, bring about further distortions. Thus, the *proprium* of liability entitlements is seemingly their capacity, in the event of infringement, to be replaced by a monetary equivalent, consisting in a collectively determined approximation of their original value.<sup>65</sup> This view shifts attention from the nature of an entitlement to the outcome of an action brought for its protection, thus perverting legal analysis in a way not dissimilar from Bracton's outcome-based description of the nature of real and personal actions.<sup>66</sup> In other words, if protection by 'property rules' is taken to define the law of property, that area of law turns out to be the law of protection *in specie*, as opposed to the law of protection through money judgments. There is no evidence that the authors are aware of having taken legal thought a full circle, back to the 13th century and, as some would say, back to a 13th-century error.

One of the few works that can be said to have sought to overcome the fragmentation of the law of property is Lawson's *Introduction to the Law of Property*.<sup>67</sup> The manifesto of the second edition by Rudden and the late Lawson (1982)<sup>68</sup> insists that 'the time has come to emphasize the parts of the law which apply with more or less uniformity to land and chattels, and to relegate as far as possible to the background those which are peculiar to each'.<sup>69</sup> Thus, stocks and shares are part of sections dealing with the classification of things, the protec-

<sup>63</sup> Ibid 1089–92. There is a third category of rules, those on 'inalienability', which are concerned with the third frontier of property, that between wealth and non-wealth, on which more below Ch 8 text from n 47.

<sup>64</sup> P Birks *An Introduction to the Law of Restitution* (OUP Oxford 1985) 52–53.

<sup>65</sup> Calabresi and Melamed (n 62 above) 1092, 1125.

<sup>66</sup> Text to nn 36–38 above.

<sup>67</sup> FH Lawson *Introduction to the Law of Property* (Clarendon Press Oxford 1958).

<sup>68</sup> FH Lawson and B Rudden *The Law of Property* (OUP Oxford 1982).

<sup>69</sup> Ibid 19–20.

tion of property interests and the tracing of trust property, the fragmentation of ownership (the idea of shares in a company exemplifying a tenancy in common), the idea of limited interests (possible in moveables, and therefore shares, behind the curtain of a trust as a substitute for the doctrine of estates). They are finally analysed as marketable commodities and in the perspective of the control of the ownership of capital and income.<sup>70</sup> The book has the merit of overcoming the old habit of sidelining the law of personal property. However, it does not remedy the disorder. The episodes not being woven into a coherent web, they leave the external boundaries of property out of sight.

True to the original spirit, the third edition, entirely rewritten by Professor Rudden, continues to present itself as ‘a portrait, or at least a sketch, of the law of property as a whole, eschewing the familiar divisions into land on the one hand and everything else on the other’.<sup>71</sup> The observation of the ‘great deal of doctrine common to both [the law’s treatment of immovable property on the one hand and movable on the other]’ is not impeded by their ‘irreducible differences’.<sup>72</sup> The quest for a unitary approach may account for the limited attention devoted to the internal frontier of property law, which is briefly introduced and then taken for granted.<sup>73</sup> However, there is still a certain reluctance to engage with the second frontier, that between property and obligations. The introduction of the equation ‘real right as property or proprietary right’ usefully includes the assertion that ‘the expression “real right” can be used with regard to any type of property (movable or immovable)’.<sup>74</sup> However, the notion of real rights is expounded without ever explicitly founding on it the categorical differentiation of property and obligations.<sup>75</sup> Finally, the author’s detailed consideration of ‘property as wealth’ abstains from consideration of what we will come to define as the third frontier of the law of property, that between wealth and non-wealth.<sup>76</sup> Professor Rudden is content to equate property and the layman’s idea of wealth.<sup>77</sup> Coherently with this notion, shares can without difficulty appear not only in the classification of things,<sup>78</sup> but also within the notion of ‘wealth . . . invested . . . in a fund which might be land one day and shares the next’.<sup>79</sup>

In summary, personal property has failed to define its outer boundaries. More jurisprudentially oriented works on the theory of property have been, for the

<sup>70</sup> Ibid 14, 35–37, 59–60, 83, 95, 113 and 176.

<sup>71</sup> B Rudden *Lawson & Rudden on the Law of Property* (3rd rev edn OUP Oxford 2002) viii.

<sup>72</sup> Ibid viii. The spelling of ‘movable’ and ‘immovable’ reflects here Rudden’s preference and diverges from the one adopted in the remainder of the book.

<sup>73</sup> Ibid 13–14.

<sup>74</sup> Ibid 14.

<sup>75</sup> Ibid 14–15, except for the counter-example of a contractual right to leave one’s car in next door’s yard, which, however, is not made to elicit any taxonomical consequences. ‘Obligations’ as such are altogether absent from the index to the book, while the entry ‘right, personal’ limits the renvoi to the treatment of ‘receivables’: ibid 36–37, 205.

<sup>76</sup> Ibid pt v. On the third frontier and on the relationship between this frontier and the cherished Ruddenian distinction between ‘things as thing and things as wealth’, see Ch 8 text to nn 48–61.

<sup>77</sup> Ibid 20.

<sup>78</sup> Ibid 33–36.

<sup>79</sup> Ibid 192, 169–71.

purposes of this analysis, excluded from consideration.<sup>80</sup> What has been said on the disorder of the field must not be taken to have asserted that no theorist has considered what the law of property is and is not about.<sup>81</sup>

Two conclusions may be ventured. One is that the treatment of personal property through imperfectly related episodes in the life of moveables is intellectually unsatisfactory. Secondly, while personal property appears to be less maltreated in works which attempt an integrated account of property, the outer boundaries have to be more precisely identified. This is not mere pedantry.

(b) *'Property' matters*

Practical questions make it impossible to rest content with a category which centres on a core case and shades off into an indeterminate periphery. The core case of 'property' is the relation between an individual and a corporeal thing. Any dictionary will show that 'property' in the sense of 'that which one owns' punctuates everyday speech.<sup>82</sup> The category which centres on that case and has no defined outer boundaries turns out on reflection to correspond to 'assets' or 'wealth'. In the layman's mouth that is the loosest sense of 'property'. The law has to be more precise. This book is concerned to discover whether there is one narrower sense or more. Whatever the final answer, the contrast between property and obligations suffices to prove that there is at least one narrower meaning. For obligations, viewed from one end (as rights *in personam*), are assets, so that, in that opposition, property cannot include every item of wealth.

A few concrete examples will hopefully serve both as an antidote against the kind of scepticism that sometimes undermines determined efforts to establish the meanings of even important words and as a defence against the temptation to dismiss this exercise as merely academic in the pejorative sense of that word.

(i) *Insolvency* The law relating to insolvency reveals a constant interplay between broad and narrow senses of 'property'. Insolvency Act 1986 s 436, which lists a series of 'Expressions used generally', provides as follows:

In this Act . . .

'property' includes money, goods, things in action, land and every description of property wherever situated and also *obligations* and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property . . .<sup>83</sup>

<sup>80</sup> SR Munzer *New Essays in the Legal and Political Theory of Property* (CUP Cambridge 2001); RA Epstein *Private and Common Property: Liberty, Property, and the Law* (Garland New York 2000); JW Singer *Entitlement: The Paradoxes of Property* (Yale University Press New Haven 2000).

<sup>81</sup> Some of this work will be encountered below, Ch 5 text to nn 22–44 and nn 62–73.

<sup>82</sup> *Oxford English Dictionary* (2nd edn OUP Oxford 1989) entry 'property, n 1'.

<sup>83</sup> Emphasis added. A guide to the provision is in LS Sealy and D Milman *Annotated Guide to the 1986 Insolvency Legislation* (CCH Editions Bicester 1999) 481. This statutory definition of property has been held to encompass things as diverse as a company's interest as lessee under a lease of an aircraft (*Bristol Airport v Powdrill* [1990] 1 Ch 744 (CA)) and a waste management licence (*Environment Agency v Stout* [1998] Bankruptcy Personal Insolvency R 576). Cf Theft Act 1968 s 4(1): "Property" includes money and all other property, real or personal, including things in action and other intangible property'.

In *Bristol Airport plc v Powdrill*<sup>84</sup> Browne-Wilkinson J rightly observed that ‘it is hard to think of a wider definition of property’. The fact that obligations expressly figure within the category demonstrates that ‘property’ is taken to mean ‘wealth’. This definition underpins many sections of the Act. The insolvent’s estate consists essentially of his property in this sense, that is, of his wealth. Thus s 283, which is concerned to define the bankrupt’s estate, draws on the definition in s 436. It provides as follows:

283(1) [A] bankrupt’s estate . . . comprises—  
all property belonging to or vested in the bankrupt at the commencement of the bankruptcy . . .

In simple terms, the breadth of property in this context tells us that the estate of the bankrupt is to include everything that makes a person well-off and can therefore be turned to the benefit of his creditors. In other words the Act uses the word in much the same way as the layman who thinks of property as wealth. But there is a difference, for the law’s version comes under examination in a way that the layman’s version never will. Challenges force the law to reflect on the line between wealth and non-wealth. Items either do or do not fall into the insolvent’s estate. For example, in *Patel v Jones*<sup>85</sup> the question was whether the insolvent’s pension entitlements would vest in his trustee. On the employee appellant’s side it was argued *inter alia* that the inalienability of the pension benefits meant that they could not be property within s 436.<sup>86</sup> In the event the court held that the entitlement was a chose in action at the date of the bankruptcy order. It was therefore expressly covered by s 436.<sup>87</sup> It also found that there was in fact no express provision for non-assignability.<sup>88</sup> Hence it was not necessary to settle the question whether alienability was essential to even the widest notion of property. This is a question to which we will return in Part III.

While s 436 uses a wide conception of property, insolvency law, in the context of priorities, makes a strong distinction between property and obligations. It is broadly true that those who can claim only in the law of obligations—the unsecured creditors—come last in the queue. Very frequently those with proprietary claims will by that time have taken everything. For example, in *Chase v Manhattan Bank NA v Israel-British Bank (London) Ltd*,<sup>89</sup> the claimant bank would probably have obtained nothing if it had been confined to its personal claim in the law of obligations. The bank had accidentally made a payment of \$2,000,000 twice. The defendants were under an obligation to repay the second payment. But they had in the meantime gone into liquidation. The claimant bank succeeded in persuading the judge that the effect of a mistaken payment

<sup>84</sup> [1990] 1 Ch 744 (CA), 759D.

<sup>85</sup> [2001] EWCA Civ 779, [2001] Pension LRep 217(CA).

<sup>86</sup> *Ibid* [30]. There were ancillary arguments that pension benefits, being formally discretionary, could not be said to be property [34].

<sup>87</sup> *Ibid* [36].

<sup>88</sup> *Ibid* [40].

<sup>89</sup> [1981] Ch 105.

was to turn the recipient into a trustee, so that it could be said that the payor obtained an equitable proprietary interest in the money and in its traceable proceeds. Goulding J held that ‘a person who pays money to another under a factual mistake retains an equitable property in it, and the conscience of that other is subjected to a fiduciary duty to respect his proprietary rights’.<sup>90</sup> The defendant was thus declared constructive trustee for the plaintiff of the sum mistakenly paid.<sup>91</sup>

More recently this case has been subjected to criticism and must now be regarded as somewhat fragile.<sup>92</sup> Nevertheless it still serves to provide a vivid illustration of the recurrent struggle by personal creditors to move their claims out of the law of obligations and into the law of property. Another such case on a larger and more tragic scale is *Re Goldcorp Exchange Ltd (in Receivership)*, where hundreds of New Zealand investors lost all their savings because they could not advance proprietary claims, as opposed to personal claims, in the assets held by the Goldcorp liquidator.<sup>93</sup>

(ii) *Equitable proprietary interests and equitable personal claims* A similar interplay between wide and narrow senses of property is found in the case which has become the *locus classicus* on the difference between trustees and executors. In *Commissioner for Stamp Duties (Queensland) v Livingston*<sup>94</sup> the question was whether the death of a certain Mrs Coulson in New South Wales meant that a second tranche of succession duty had to be paid in respect of the estate of her deceased first husband which was still being administered in Queensland. Mrs Coulson had been the legatee under her first husband’s will of one-third of his residuary estate. The widow had survived her first husband by only two years, so that at the time of her death his estate was still largely unadministered, and no clear residue or final balance payable to the residuary beneficiaries had been ascertained.

Under the Succession and Probate Duties Acts of Queensland 1892–1955 s 12, duty was levied in respect of every ‘succession’. According to s 4 a ‘succession’ was:

<sup>90</sup> Ibid Ch 119.

<sup>91</sup> P Birks *Introduction to the Law of Restitution* (OUP Oxford 1985) 377–79, 383–84.

<sup>92</sup> The case was criticized by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 714–15: ‘I cannot agree with this reasoning. First, it is based on a concept of retaining an equitable property in money where, prior to the payment to the recipient bank, there was no existing equitable interest. Further, I cannot understand how the recipient’s “conscience” can be affected at a time when he is not aware of any mistake’. Cf the discussion in PJ Millett ‘Restitution and Constructive Trusts’ (1998) 114 LQR 399, 412–13. Cf *Re Dow Corning Corp* 192 BR 428 (1998), reluctantly applying *XL/Datacomp, Inc v Wilson (Re Omegas Group, Inc)* 16 F 3d 1443 (6th Cir 1994), which refused to turn a mistaken payee into a trustee. This hostility is in turn attacked by the reporter of the new Restatement of Restitution: A Kull ‘Restitution in Bankruptcy: Reclamation and Constructive Trust’ (1998) 72 Am Banker LJ 265.

<sup>93</sup> [1995] 1 AC 74 (PC).

<sup>94</sup> [1965] AC 694 (PC).

[e]very . . . disposition of property by reason of which any person . . . shall become beneficially entitled to any property . . . upon the death of any person . . . and every devolution by law of any beneficial interest in property . . . upon the death of any person . . . to any other person.

The meaning of 'property' was laid down by s 3 to include both real and personal property, the latter then being made to include money payable under any engagement and all other property not comprised within the category of real property. The question was whether as residuary legatee Mrs Coulson had already acquired a beneficial interest in the property, thus defined, contained within the unadministered estate. If yes, then the further devolution of that property on Mrs Coulson's death attracted the second tranche of duty.

It is clear that, of that which was taxable, the Act used the word 'property' in the same wide sense as we have encountered in relation to insolvency. 'Property' meant 'wealth'. Throughout the case the word nearly always bears that sense. But in the handling of the phrase 'beneficial interest' the Privy Council needed to invoke a narrower sense of the same word. Viscount Radcliffe complained:

[T]he terminology of our legal system has not produced a sufficient variety of words to represent the various meanings which can be conveyed by the words 'interest' and 'property'. Thus propositions are advanced or rebutted by the employment of terms that have not in themselves a common basis of definition.<sup>95</sup>

It was clear to the Court that Mrs Coulson had in a loose sense had an interest in the property in the estate. She had personal rights against the executors to compel them to administer the estate. Nevertheless, that was not the kind of beneficial interest of which the Act intended to speak. In a stricter sense she had no property interest in any of the wealth in the estate. It is not surprising that in making this point Viscount Radcliffe stopped describing the things in the estate as 'property' and began calling them 'assets'<sup>96</sup> or, in the passage which follows, 'items':

If by 'beneficial interest in the items' it is intended to suggest that such beneficiaries have any property right at all in any of those items, the proposition cannot be accepted as either elementary or fundamental. It is . . . contrary to the principles of equity. But, on the other hand, if the meaning is only that such beneficiaries are not without legal remedy during the course of administration to secure that the assets are properly dealt with and the rights that they hope to accrue to them in the future are safeguarded, the proposition is no doubt correct.<sup>97</sup>

In the result therefore the case stands for the proposition that the residuary legatee has no equitable property right in the assets in an unadministered estate

<sup>95</sup> Ibid 712.

<sup>96</sup> Ibid 712.

<sup>97</sup> Ibid 713. For a critique of the 'feeling of artificiality in a terminology which denies the existence of a beneficial interest to one who is made richer on the testator's death by the possession of protected claims and powers of alienation thereof' see, however, B Rudden's remark in *Annual Survey of Commonwealth Law* 1966, 373.

and to that extent differs from the beneficiary under a trust. Since the Privy Council took the view that ‘beneficial interest’ meant ‘beneficial proprietary interest’ it was able to conclude that no duty was attached upon her death. There had been no devolution of a beneficial proprietary interest in the narrower sense which allows property to be contrasted with obligations. Viscount Radcliffe put this in the unhelpful language of choses in action: ‘What she was entitled to in respect of her rights under her deceased husband’s will was a chose in action, capable of being invoked for any purpose connected with the proper administration of his estate’.<sup>98</sup>

No case could more clearly illustrate the need for a clear and constant awareness of the difference between a larger and a narrower sense of the word ‘property’. The reasoning is evasive, precisely for want of a tradition of analytical clarity in this field. Old Mrs Coulson had a claim which was a valuable asset and hence for some purposes property, but the tax would only have been triggered if her claim was proprietary in a much narrower sense, which it was not.

(iii) *Charge-backs* The language of banking securities sometimes provides for awkward uses of the word ‘property’. The case of charge-backs is particularly significant. The problem is centred on whether a bank can take a charge over its own customer’s credit balance, that is the bank’s own indebtedness. The alternative possibility is that this kind of arrangement amounts to a simple contractual set-off and not a true security. As Professor Goode once put it, ‘a bank as debtor [can] not become its own creditor and . . . for it to be given a charge over its own obligation [is] conceptually impossible’.<sup>99</sup> Although this view was accepted in *Re Charge Card Services Ltd*,<sup>100</sup> it was subsequently rejected in *Re Bank of Credit and Commerce Intl SA (No 8)*.<sup>101</sup> In order to conclude that he saw no objection to a bank taking a charge over its customer’s deposit, Lord Hoffmann had to state that ‘[the asserted charge] would be a proprietary interest in the sense that . . . it would be binding upon assignees and a liquidator or trustee in bankruptcy’.<sup>102</sup> A contractual entitlement which could only be exercised by book-entry and could not be realized in any ordinary way was therefore recognized as a charge, whose proprietary character was derived from its capacity of being opposed to third parties. The distinction between property and obligation was eroded.

Professor Goode has recently accepted Lord Hoffmann’s observations as persuasive in that ‘despite the theoretical difficulties they respond to banking

<sup>98</sup> *Commissioner for Stamp Duties (Queensland) v Livingston* (n 94 above) 717.

<sup>99</sup> R Goode *Commercial Law in the Next Millennium: The Hamlyn Lectures* (Sweet & Maxwell London 1998) 68–71; R Goode *Commercial Law* (2nd edn Penguin Books London 1995) 659. The author appears to have changed his mind in the new edition of his manual, below n 103.

<sup>100</sup> [1987] Ch 150, [1989] Ch 497 (CA). See, approvingly, R Goode ‘Charges over Book Debts’ (1994) 110 LQR 592, 606.

<sup>101</sup> [1998] AC 214 (HL).

<sup>102</sup> *Ibid* 227.

practice'.<sup>103</sup> However attractive that concession might appear, the fact remains that one who 'owns' an obligation still has no more than a right *in personam*, and a debtor who takes an assignment of his debt merely extinguishes the debt. The demon of 'practice' should not too easily be conjured up to redress illogicality.

(iv) *Relief from forfeiture* The instability of the meaning of property has recently emerged in litigation revolving around relief from forfeiture. *On Demand Information plc v Michael Gerson (Finance) plc*<sup>104</sup> was primarily concerned with the question whether a court has jurisdiction to grant relief from forfeiture of a lease of tangible moveable property. One question was whether the jurisdiction extended beyond the forfeiture of property. On that question the defendants, resisting relief, naturally took a narrow view.

Professor Goode's argument as counsel for the defendants insisted on the traditional view that the rights conferred on the lessee of chattels were merely contractual, not proprietary. They were therefore outside the scope of relief from forfeiture, which was confined to property rights. Robert Walker LJ rejected that submission and held that '[c]ontractual rights which entitle the hirer to indefinite possession of chattels so long as the hire payments are duly made, and which qualify and limit the owner's general property in the chattels, cannot aptly be described as purely contractual rights'.<sup>105</sup> In principle, therefore, a finance lease was capable of attracting relief from forfeiture.

Furthermore, the situation was such as the relief from forfeiture would in principle be given, for 'Michael Gerson's real interest in these leases was a financial one and the forfeiture provision was added by way of security for the production of that result'.<sup>106</sup> The appeal was nonetheless dismissed for the different reason that, the subject-matter having been sold, the lease could not be put back in place, not even though the sale had been approved by the court. Here in an entirely practical context, the clash between a narrow and broad sense of property is evident.

The case went to the House of Lords,<sup>107</sup> where the appeal was allowed on the ground that the sale of the equipment did not make it impossible to give relief against forfeiture. A modified order could be made to preserve the parties' rights.<sup>108</sup> There was no longer any dispute that the leases were in principle amenable to relief from forfeiture.<sup>109</sup> Their Lordships nonetheless endorsed the

<sup>103</sup> R Goode *Commercial Law* (3rd edn Butterworths Lexis Nexis London 2004) 611–12; R Goode *Legal Problems of Credit and Security* (3rd edn Sweet & Maxwell London 2003) [3–12].

<sup>104</sup> [2000] 4 All ER 734 (CA), *rvsd* [2002] UKHL 13, [2003] 1 AC 368 (HL), discussed immediately below.

<sup>105</sup> *Ibid* 750.

<sup>106</sup> *Ibid* 758 (Pill LJ).

<sup>107</sup> *On Demand Information plc (in adm rec) v Michael Gerson (Finance) plc* [2002] UKHL 13, [2003] 1 AC 368 (HL).

<sup>108</sup> *Ibid* [39] (Lord Millett).

<sup>109</sup> *Ibid* [5] (Lord Hobhouse).



Court of Appeal's view that the jurisdiction to relieve could not be ousted by appeal to a narrow view of property.<sup>110</sup> That narrow view is property-as-opposed-to-obligations. The broader view was not clearly articulated. It may not be safe to say that property-as-wealth suffices.

The four contexts of insolvency, equitable beneficial interests, charge-backs, and relief from forfeiture exemplify some situations in which clearer thinking and a habit of more precise use of language would have been helpful. Other examples could have been chosen.<sup>111</sup> The law of personal property cannot manage with only the broad concept of property as wealth. Yet it must be admitted that the English attempt to do so is persistent. The roots run back at least to Blackstone. His primary division ran thus: 'Property, in chattels personal, may be either in *possession*; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing; or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment'.<sup>112</sup> This commitment to things in possession and things in action is fatal to the distinction between property and obligations. Nowadays the expression 'thing in action' tends to be invoked precisely in the case in which the speaker desires to obscure that distinction.<sup>113</sup> For Blackstone himself contract was no more than the last figure in the long list of modes of acquiring title, its peculiarity being that it vested a property in *action* rather than *possession*.<sup>114</sup> There was thus no line between the law of property and the law of obligations.

<sup>110</sup> *Ibid* [29] (Lord Millett).

<sup>111</sup> For the purposes of the Human Rights Act 1998, for instance, 'property' has and must continue to have the broader sense. Most recently *Wilson v First County Trust Ltd* (No 2) [2001] EWCA Civ 633, [2001] 3 WLR 42 (CA); revd [2003] UKHL 40, [2004] 1 AC 816 (HL) raised the question whether the 'property' there safeguarded included contractual rights, a sense of property incompatible with the opposition of property and obligations. Cf *Ashdown v Telegraph Group* [2001] Ch 685; [2001] EWCA Civ 1142, [2001] 3 WLR 1368 (CA) which turned on the question whether property (in the form of copyright) should be inhibited in the interest of freedom of expression. Another example is the confusion surrounding the nature of a lease as a merely contractual arrangement (a view expressed in *Bruton v London Quadrant Housing Trust* [2000] 1 AC 406 (HL)) as opposed to a proprietary right in land (an idea favoured in *PW & Co v Milton Gate Investments Ltd* [2003] EWHC 1994 (Ch)). The confusion, described in MPawlowski 'Contractual Intention and the Nature of Leases' (2004) 120 LQR 222, has no hope of being dissipated without observing a narrow notion of property-as-opposed-to-obligations.

<sup>112</sup> W Blackstone *Commentaries on the Laws of England. Volume II. Of the Rights of Things* (Oxford 1766) (facsimile of 1st edn of 1765–69, University of Chicago Press Chicago and London 1979) 389.

<sup>113</sup> As in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) 573–74, where for the first time Lord Goff initiates a tracing exercise from a bank account depleted by a third party and characterizes that personal claim against the bank as a chose in action:

The relationship of the bank with the solicitors was essentially that of debtor and creditor; and since the client account was at all material times in credit, the bank was the debtor and the solicitors were its creditors. Such a debt constitutes a chose in action, which is a species of property; and since the debt was enforceable at common law, the chose in action was legal property belonging to the solicitors at common law.

For a criticism of this analysis, P Birks 'At the Expense of the Claimant: Direct and Indirect Enrichment in English Law' in D Johnston and R Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP Cambridge 2002) 493, 519.

<sup>114</sup> Blackstone (n 112 above) 440.

This way of thinking persists. So, for example, in the latest *Lawson & Rudden on the Law of Property* the warning that ‘choses in action’ is ‘not a very helpful or informative designation’<sup>115</sup> does not prevent the following from being included: documentary intangibles such as those represented by commercial paper (ie negotiable instruments and documents of title); documented intangibles such as investment securities and especially shares; undocumented intangibles among which receivables and ‘contracts as assets’; intellectual property; money; funds; capital and income; and so on. This inclusive approach need not be repudiated and is anyhow so ingrained that it could not be eliminated. But lawyers have to be alive to different conceptions of property.

### C THE ITALIAN PERSPECTIVE

There are no exact Italian translations for the English ‘personal property’. One roughly equivalent phrase is *proprietà mobiliare*, which means ‘moveable property’. The same ambiguities which inhere in ‘property’ trouble the understanding of *proprietà*, which evokes the broad idea of wealth (*ricchezza*) as well as the narrower sense of ‘ownership’ of physical things, that is, the highest form of right to a thing (*in rem*).

In one respect there is a marked difference from the English situation. Property in moveables does not suffer from a lack of scholarly attention either in law teaching or in the literature. Fundamentals of *proprietà mobiliare* are part of the institutes of private law from the early stages of the syllabus of all law schools. Legal literature on the subject takes a number of diverse forms. Countless *manuali* or handbooks on the institutes of private law contain a general introduction to the law relating to moveables.<sup>116</sup> Other literary genres include *monografie* or monothematic works centring on the law of property;<sup>117</sup> the comprehensive *commentari* on the Italian Civil Code, which contain, among others, commentaries on the provisions relating to moveables;<sup>118</sup> and the *enciclopedie del diritto* or *digesti*, juristic encyclopaedias which contain authoritative treatments of the law of moveables in the form of stand-alone dictionary entries.<sup>119</sup>

<sup>115</sup> B Rudden *Lawson & Rudden on the Law of Property* (3rd edn OUP Oxford 2002) 29.

<sup>116</sup> Eg F Gazzoni *Manuale di diritto privato* (9th edn ESI Napoli 2001) pt IV on ‘Beni e diritti reali’; M Bessone (ed) *Istituzioni di diritto privato* (Giappichelli Torino 2000) pt IV on ‘Beni, diritti reali e possesso’.

<sup>117</sup> A Gambaro *La Proprietà. Beni, proprietà, comunione* (Giuffrè Milano 1990); U Mattei *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Greenwood Press Westport CT 2000).

<sup>118</sup> OT Scozzafava *Artt 810–821. Dei Beni* in P Schlesinger (ed) *Il Codice Civile Commentato* (Giuffrè Milano 1999) 49–52.

<sup>119</sup> S Pugliatti ‘Beni (Teoria Generale)’ in *Enciclopedia del diritto* (Giuffrè Varese 1959) vol V 164–88; B Biondi ‘Cosa (diritto civile)’ in *Novissimo Digesto Italiano* (UTET Torino 1959) vol IV 1007–13.

It does not follow from the existence of a copious literature that the outer boundaries of the subject are better defined. The truth is that they tend to be dissolved by the promiscuous use of one or other of the Italian words for ‘thing’. Moveables are always dealt with under a broader rubric. Thus, the adjective *mobili* is often juxtaposed to the nouns *beni* and *cose*. When scholars speak of *mobili*, they nevertheless mean it to be short for *beni mobili*. *Beni* and *cose* derive from the Latin *bona* and *res*. *Bona* was a term whose juridical usage was traditionally plural and indicated the assets, wealth or patrimony of a person.<sup>120</sup> *Res* indicated either generally that which existed or, more technically, that which was the object of juridical relations.<sup>121</sup> *Bona* were therefore a category of *res*, that category which represented economic advantage and wealth.<sup>122</sup> Linguistic analogies and phonetic resemblances, however, must not be relied upon as a rule. *Cosa* may be trusted to mean much the same as the English ‘thing’. Its juridical sense or senses will not be completely clarified until the outward-looking definition of the frontiers of property has taken place.<sup>123</sup> The notion of *beni* is more of a lawyers’ creation and its utility in the classification of objects has been endlessly debated in the doctrine. In illustrating its meaning our aim is to suggest classifications of wealth which are of some use for the purpose of defining property in a way which encompasses shares.

According to the Italian Civil Code ‘[*b*]eni are the things which can form the subject-matter of rights’.<sup>124</sup> This definition is highly uninformative and of no normative value. It is incapable of defining any specific category of things. Scholars have tried to explain the significance of *beni* by resorting to various criteria. It has been suggested that they include all things that are scarce and therefore in demand, or all things that are useful, or endowed with distinct physical identity. None of these criteria has proved satisfactory. The prevailing view is that the definition of *beni* supposes the contrast between things which may belong to (*appartenenza*) or be enjoyed by (*godimento*) a person, and things which may not, that is, between things which can be appropriated, and those which cannot. ‘Appropriated’ is often read as ‘owned’, so that *bene* would seem to be any appropriable resource.<sup>125</sup> This interpretation, however, is of little help in the sub-classification of things, for only such segments of non-wealth which are things but not things to which a right attaches, such as stars or fish while still swimming freely in the sea, would fall outside the catch-all category of *beni*. It has thus been concluded that in the law it is fictitious to distinguish between *beni*

<sup>120</sup> Pugliatti (previous n) 167–68.

<sup>121</sup> B Biondi ‘Cosa (Diritto Romano)’ in *Novissimo Digesto Italiano* (UTET Torino 1959) vol IV 1006, 1007.

<sup>122</sup> Biondi (n 119 above) 1010; Justinian *Digest* 50.16.48 (Ulp): ‘Naturaliter bona ex eo dicuntur quod beant, id est beatos faciunt; beare est prodesse’.

<sup>123</sup> Ch 5, 8, and 10 below progress in the definition of that frontier by asking whether property coincides with the law of *locanda*, *alienanda*, and *vindicanda*.

<sup>124</sup> CC art 810: ‘Sono beni le cose che possono formare oggetto di diritti’.

<sup>125</sup> Scozzafava (n 118 above) 3–33.

and *cose*, and that we should accept that the code speaks promiscuously of both.<sup>126</sup>

The attempt to read *bene* as ‘that which is or can be owned’ has often been supposed to exclude the proposition that rights *in personam* could satisfy the criteria which identify *beni*, although it is conceded that there is usually a thing in the background of a right *in personam*, for a personal right is a right against a person and the person in question is under an obligation to do something to or with a thing. Therefore, the traditional doctrine would presumably have wished to interpret the statement to the effect that such and such a share was mine—‘*il mio bene*’—in the sense of my having in respect of it a proprietary as opposed to a personal right. In reality, such a statement means that there exists a relationship of ‘belonging’ and ‘being enjoyed’ between me and my share, according to which that item of wealth is ascribable to me. Hence those relationships of *appartenenza* and *godimento* which would seem to ground the qualification of something as *bene* can be established with any item of wealth. The notion of *bene* is therefore of no utility in the drawing of the line between property and obligations.

Another approach can be attempted through the proposition that personal property is concerned with moveables. But ‘moveable’ also turns out to have no natural outer boundary. The Civil Code provides a residual or negative definition of *beni mobili*, for all things are moveable which are not immoveable.<sup>127</sup> Shares, being for the most part rights circulating on the face of chattel paper, are moveables.<sup>128</sup> Our classificatory purposes, however, are then no better satisfied by this residual notion of mobility. All that can be inferred from the vagueness of *beni*, coupled with the adjective *mobili*, is that shares are wealth studied within the law relating to moveables. While this may matter when discussing the first or internal frontier of property, that between moveables and immoveables, and the third frontier of property, that which divides wealth from non-wealth, it leaves us at a loss as to the line between property and obligations.

## D CONCLUSION

In conclusion, while the boundary between moveables and immoveables is more or less settled, no bright line has been drawn around the outer edge of personal property. Part II will re-establish one unequivocal but narrow version of property. In that version, property is distinct from obligations.

<sup>126</sup> Biondi (n 121 above) 1011.

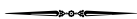
<sup>127</sup> CC art 812 para 3: ‘Sono mobili tutti gli altri beni’; discussed in B Biondi ‘Cosa mobile ed immobile (diritto civile)’ in *Novissimo Digesto Italiano* (UTET Torino 1959) 1024, 1028. Immoveables are land, sources of water, and that which is attached permanently to land.

<sup>128</sup> Repealed CC art 418 said expressly that shares were moveables, whereas the current CC art 812 para 3 leaves it to inference.



### 3

## Terminology



NEW KINDS OF assets have been brought into being by the revolution in the way in which securities are traded. The shift to mechanisms which originated to facilitate the trading of shares has generated by-products which are no longer shares. No discussion can be conducted, and no analysis worked through, without a suitable vocabulary to describe these practices and assets.<sup>1</sup>

#### A PERSONAL WEALTH OLD AND NEW

The early inclusion of shares and other well-known securities such as debentures in the literature bears witness to the assumption that they always belonged in the law of personal property, notwithstanding that the analytical basis of their inclusion was left unexamined.<sup>2</sup> Having conceded the initial foothold, the law of personal property has absorbed their increasingly greedy demand for more attention.<sup>3</sup> The availability of analogies between shares in heaps of coal or horses<sup>4</sup> and shares in a company rendered the language of property apt.<sup>5</sup> By contrast, the literature of personal property has proved slower to welcome the novel derivatives from traditional securities with which the modern investor may now have to be content. Nowadays, for a number of reasons the investor is likely to have a remote relation to the issuing company, thus having an interest in the share but not quite the share itself. A pyramid often forms, so that there are

<sup>1</sup> Further discussion of nomenclature takes place elsewhere: for Latin etymology as foundational to the tripartite structure of this book, Ch 1 text to nn 11–19; for the binomial ‘real/personal’ and the multiple meanings of ‘real’, Ch 2 text to nn 21–23; for the etymological origin of ‘share’, Ch 4 text to n 1 ff.

<sup>2</sup> J Humphreys *Observations on the Actual State of the English Laws of Real Property with the Outlines of a Code* (J Murray London 1826) 172, 202 discussed Ch 1 text to n 7 above; J Crossley Vaines *Personal Property* (4th edn Butterworths London 1967) 200–1 and 263–64.

<sup>3</sup> R Chambers *An Introduction to Property Law in Australia* (LBC Information Services 2001) 193–203.

<sup>4</sup> Entry ‘Gift of an Undivided Share in a Racehorse’ in P Millett (ed) *The Encyclopaedia of Forms and Precedents* (5th edn Butterworths London 1998) vol 42(1) 288.

<sup>5</sup> For this analogical approach and its limits, B Rudden *Lawson & Rudden on the Law of Property* (3rd rev edn OUP Oxford 2002) 33–34.

interests in and below other interests, until, at the peak, is finally found the old-fashioned share.

Chapter 7 will show that these structures owe their existence to the needs of the new technological sophistication of the securities markets. This chapter anticipates just enough of the modern scenario of shareholding to allow the reader to see the context in which the terminological problems arise.

## B INTRODUCTION TO INTERMEDIATION

‘Intermediation’ is now ubiquitous. It is the key to these new forms of wealth and hence the first term that must be explained. The way shares are held has changed over the years. Long past is the time when an investor would employ a stockbroker to buy his small quantity of shares from his chosen company, have his name put on the company register and receive in exchange colourful certificates to be jealously kept in some safe place.<sup>6</sup> That model is obsolete. Even the role of the broker as adviser-salesman to whom the investor would resort to take care of his interests now needs revising. These days professionals who would once have been stockbrokers have been absorbed by institutions which perform a wider range of tasks: whilst some of them continue to trade in shares, others merely advise on investments; while some look after shares in a static situation of custody and gather together the certificates in one place, others set off debt and credit situations in which shares are owed and assign them to their new master. Dealers have thus diversified into investment agencies, custodians, depositaries<sup>7</sup> and clearing houses.

There are various ways in which modern shareholders may hold their shares. It is possible to distinguish ‘direct’ and ‘indirect’ shareholding.<sup>8</sup> Shares are held directly when no one stands between the issuer of the shares and their owner. The word ‘owner’ is for the moment used in an untechnical, colloquial sense. The issuer is the company itself. Direct holding is holding the legal title to the shares immediately from the company itself. Such a direct holder may or may not own in his own interest *pleno iure*.<sup>9</sup> If he does not, he will be an intermediary for an indirect holder, thus holding on behalf of another. Shares are held

<sup>6</sup> C Chapman *How the Stock Markets Work* (7th edn Random House London 1999) 51 ff; Ch 6 text from n 65 below. A collection of these can be admired in M Bollen (tr) U Drumm A Henseler and E May *Actions et obligations anciennes* (Duculot Paris and Gembloux 1981). The original edition was called *Alte Wertpapiere* (Harenberg Kommunikation Dortmund 1979).

<sup>7</sup> There does not seem to be significant difference in meaning between the two spellings ‘depository’ and ‘depository’. The latter seems to be the American equivalent of the former. A depository is often spoken of in the neuter pronoun ‘it’, perhaps referring to the institutional, as opposed to individual, nature of such intermediary.

<sup>8</sup> Indirect holding is reviewed in J Benjamin *Interests in Securities: A Proprietary Law Analysis of the International Securities Markets* (OUP Oxford 2000) [1.96–100].

<sup>9</sup> To hold *pleno iure* is to hold the full right, the *plenum ius*, which contrasts with holding the bare right, the *nudum ius*. One who has the legal title, with no equitable interests outstanding, holds *pleno iure*.

indirectly when one or more persons are placed between the issuer and the investor and thus interrupt and mediate the ownership relation between the shareholder and his shares. Only the latter phenomenon is correctly spoken of as intermediation.

## 1 Models of Intermediation

One basic English example of indirect holding is when a trustee holds the shares on trust for his beneficiary. In the absence of further tiers, the trustee then holds directly, the beneficiary indirectly. In fact, scholars often tend to resort to the trust to explain how an investor may hold his shares beneficially without being legally entitled to them. When there is more than one tier of intermediation, the trust, or rather series of trusts operating together, seems to offer an attractively familiar account of the pyramid of legal relations, not least through the analogy of sub-trusts.<sup>10</sup> However, alternative explanations of the phenomenon have also been attempted. Bailment has been invoked under English law, although it is only capable of explaining some forms of intermediation, where the intermediary takes no title and performs no more than the function of custody of the securities.<sup>11</sup> In Italy deposit and mandate, or combinations of the two, perform the same function. There is also the trust-like device known as *intestazione fiduciaria*, which will be encountered below.

In establishing the words most apt to describe intermediation, however, it is convenient to concentrate on the facts whilst avoiding legal labels specific to one or more legal system. This is a recurrent problem in comparative law. The comparatists of the Trento school have put to the test the fact-based method.<sup>12</sup> Our final choice of terminology will conform to that method: the wealth held by modern investors must be described as ‘factually’ as possible and independently of existing national labels and analyses. A preference for a ‘functional approach’ which uses language as neutral as possible has also been expressed by the Unidroit Study Group on Harmonised Substantive Rules Regarding Indirectly Held Securities.<sup>13</sup>

<sup>10</sup> See text from n 88 below.

<sup>11</sup> The exception is a deposit of fungibles or irregular deposit, where title to the deposited things does pass to the depositary, who can dispose of them and replace them with equivalents in number and *in specie*. *Contra*, however, see *Mercer v Craven Grain Storage Ltd* [1994] Current L Cases 328 HL, noted L Smith ‘Bailment with Authority to Mix—and Substitute’ (1995) 111 LQR 10–18, where the legal title to the mixed grain remained vested in the farmers-depositors, for the storage society had simply undertaken to store the wheat and could not by any logical reasoning have a right thereto.

<sup>12</sup> M Bussani and U Mattei ‘The Common Core Approach to European Private Law’ <<http://www.jus.unitn.it/dsg/common-core/home.html> (Approach)> (accessed 30 Sept 2004).

<sup>13</sup> Unidroit Study Group on Harmonised Substantive Rules regarding Securities Held with an Intermediary *Position Paper* (August 2003), part of Study 78 <<http://www.unidroit.org/english/workprogramme/study078/item1/main.htm>> (accessed 31 Oct 2004) [2.2].



Thus, the trust is a characteristic institution of the Anglo-American common law, but the intermediation which it facilitates is no less necessary in jurisdictions which have had no law of trusts as such. In Italy, as elsewhere, the possibility of adopting the trust in the financial services context has been studied by scholars in the past few decades<sup>14</sup> and is at present vigorously recommended in some quarters, but the legislation has hitherto not adapted to the form which is familiar to English law.<sup>15</sup> However, notwithstanding the absence of a trust, under Italian law it is still possible to hold shares in one's own name and for the benefit of someone else. It would be a misperception of our terminological proposal to think that it only works in a trust-shaped environment.<sup>16</sup>

The Italian mechanism seems at first sight to resemble the English trust, at least in as far as it suggests the idea of split ownership,<sup>17</sup> but on closer examination turns out to be markedly different. It is known as *intestazione fiduciaria* (fiduciary 'entrustment'). The contractual framework surrounding it is sometimes known as *negozio fiduciario* (fiduciary transaction), although Maurizio Lupoi has recently suggested that the terminology of *situazione affidante* (situation of entrustment) should be preferred as identifying all those situations, not necessarily contractual, in which someone is asked to perform the role of a fiduciary.<sup>18</sup> Not unlike what happens in the case of the trust, more complex investment schemes can be built around the figure of *intestazione fiduciaria*. The

<sup>14</sup> R Lener 'La circolazione del modello del "trust" nel diritto continentale del mercato mobiliare' *Rivista delle Società* 1989, 1050.

<sup>15</sup> M Lupoi *Trusts* (2nd edn Giuffrè Milano 2000) 687–98. The most recent M Lupoi *I trust nel diritto civile* in R Sacco (ed) *Trattato di diritto civile* (UTET Torino 2004) omits the treatment of trusts in financial contexts, perhaps because in Italy their use appears to be limited to ensuring either the enforceability of shareholders' agreements (so-called *patti parasociali*), especially voting ones (on which A Tucci 'Contratti parasociali e trust nel mercato finanziario' in E Gabrielli and R Lener (eds) *In contratti del mercato finanziario* (UTET Torino 2004) vol ii, 897, 933–48) or the destination of ring-fenced corporate funds to a specific enterprise (on which B Inzitari 'I patrimoni destinati ad uno specifico affare (art. 2447 bis, lettera a, c.c.)' *Contratto e impresa* 2003, 164; F Galgano and R Genghini *Il nuovo diritto societario* in F Galgano (ed) *Trattato di diritto commerciale e diritto pubblico dell'economia* (2nd edn CEDAM Padova 2004) vol I, 17–21; GE Colombo 'La disciplina contabile dei patrimoni destinati' in Banca Borsa Titoli di Credito 2004 I 30, 31–32. On the use of this device by a company to elude its liability as a debtor pursuant to CC art 2740, M Pellegrini 'I "patrimoni destinati" ad uno specifico affare: limiti e prospettive' in F Capriglione *Nuovo diritto societario ed intermediazione bancaria e finanziaria* (CEDAM Padova 2003) 155, 157–60; F Di Sabato 'La disciplina dei patrimoni separati' in M de Tilla G Alpa and S Patti (eds) *Nuovo diritto societario* (Italia Oggi Roma 2003) 439, 442–44; N Rocco di Torrepadula 'Patrimoni destinati e insolvenza', *Giurisprudenza Commerciale* 2004 I 40, 44–48.

<sup>16</sup> Some innuendo to the effect that intermediation must remain irredeemably strange to civilian systems is in Benjamin (n 8 above) [13.11] and 306 fn 13: '[P]roperty rights in intangible assets may only be intermediated under a trust. Thus, the law of property rights in relation to intangibles is the law of trusts. . . . Hence perhaps their strangeness to civil lawyers'.

<sup>17</sup> M Graziadei 'Trusts in Italian Law: A Matter of Property or of Obligation?' in *Italian National Reports to the XV International Congress of Comparative Law—Bristol 1998* (Giuffrè Milano 1998) 189, 213 fn 74, according to whom there is a whole 'catalogue of expressions' conveying this idea: '*proprietà formale* or *legittimazione*, *intestazione*, as opposed either to *proprietà sostanziale* or to *proprietà in senso economico* or to *proprietà effettiva*'.

<sup>18</sup> M Lupoi *I trust nel diritto civile* in R Sacco (ed) *Trattato di diritto civile* (UTET Torino 2004) 13–14, although the terminological suggestion is not specific to the financial sector; M Graziadei, review, in *Rivista di Diritto Civile* 2004 I 349, 350.

fiduciary role is normally carried out by a so-called *società fiduciaria* (fiduciary corporation) rather than an individual.<sup>19</sup>

According to this legal device the *fiduciante* (person entrusting the securities) transfers the formal title to the securities to a *fiduciario* (the person to whom they are entrusted) through an alienation which is merely instrumental and not meant to increase the wealth of the latter. The *fiduciario* merely administers the thing and will re-transfer it to the *fiduciante*, or to a third party, when requested to do so. The effects of the alienation are merely internal to the fiduciary transaction and this limit is laid down in an obligatory agreement called *pactum fiduciae*. The purely personal and internal consequences of what is essentially a contractual relationship constitute the principal difference from the English trust.<sup>20</sup>

The basis for the contractual relationship that is *intestazione fiduciaria* is called *fiducia*. In everyday language the word is understood to mean ‘trust’, in the sense that one party trusts the other to administer his or her goods. In legal terms, however, *fiducia* also indicates each of the mechanisms which make the entrustment of goods possible. There are two types of *fiducia* known to Italian doctrine. They differ according to that which is actually transferred. In the *fiducia romanistica* there is a transfer of ownership, which produces an unequivocal direct holding on the part of *fiduciario* and an indirect holding on the part of *fiduciante*. In the *fiducia germanistica* the transferor remains owner, hence direct holder, but transfers to the *fiduciario* the power to exercise his rights, so that the formal title in the thing and substantial control over it are vested in two separated subjects. The entrustment of shares to a *fiduciario* for administration is often regarded as a transfer of the latter kind.<sup>21</sup> Because only *fiducia romanistica* produces a transfer of title to the fiduciary, it is sometimes thought of as the paradigm of *intestazione fiduciaria* as signifying entrustment. Regardless of the formal vesting of title with the fiduciary, however, the protection of the entrusting person is ensured by the assumption that the two subjects own quite distinct assets or patrimonies.<sup>22</sup>

<sup>19</sup> In this sense of the English and Italian legislation on the identity of modern intermediaries, below text to nn 33–38.

<sup>20</sup> Cf, however, the bill proposing to reform *società fiduciarie* by allowing them to take on a full role of trustee according to the understanding of the trust institution as described in the Hague Convention on the Recognition of Trusts 1985 art 2: Progetto di Legge C5194 of 30 July 1998 in L Corsini ‘La riforma delle società fiduciarie e la disciplina del trust’ Rivista del Notariato 2001, 1351, 1353. The bill was amended on 16 November 1999 to become C5194-ter. The bill’s history is available at <<http://www.senato.it>> (accessed 31 Oct 2004). Cf also Progetto di legge C6547 of 11 November 1999, *ibid*.

<sup>21</sup> F Gazzoni *Manuale di diritto privato* (9th edn ESI Napoli 2001) 956–59. *Fiducia* was known in several forms (in particular in the modalities *cum amico* and *cum creditore*) in Roman law: cf V Arangio-Ruiz *Istituzioni di diritto romano* (12th rev edn Jovene Napoli 1954) 307–9. Indeed the word is responsible for the modern English ‘fiduciary’ which is used to mean ‘trustee-like’ and ‘trust-like’.

<sup>22</sup> According to M Cossu ‘Contratti di gestione di portafogli di investimento’ in E Gabrielli and R Lener (eds) *I contratti del mercato finanziario* (UTET Torino 2004) vol II, 567, 632–35 talk of *patrimonio* is being progressively replaced by talk of *portafogli d’investimento* (investment portfolio). The latter, borrowed from economics, is less reminiscent of civilian dogmatism.

The idea of separate or segregated patrimonies means that the patrimonies held by the *fiduciario*, respectively, for himself and for the benefit of the *fiduciante*, form separate funds.<sup>23</sup> The creditors of each fund do not have claims against assets which are part of the other. The idea of separate patrimonies can be enacted regardless of whether the fiduciary is holding the entrusted assets in his own name—as in the case of *intestazione fiduciaria*—or in the name of the entrusting person, for in both cases he will undeniably be holding them for the benefit of the entrusting person.<sup>24</sup> The implications of this statement are essential for the protection of the beneficiary's entitlement in the event of the insolvency of the fiduciary.<sup>25</sup>

Most importantly, patrimonial segregation is now expressly provided for in the financial sector by article 22 of the 1998 statute on financial intermediation<sup>26</sup> as follows:

1. Within the supply of investment services . . . the clients' financial instruments and sums of money, held . . . by an investment company . . . or by financial intermediaries . . . and the financial instruments of individual clients held by the bank constitute a patrimony to all effects distinct from that of the intermediary and of the other clients. Against that patrimony claims by the creditors of the intermediary or brought in their interest are not permitted, nor may claims be brought by the creditors of the depositary or sub-depositary or in their interest. Claims by individual clients' creditors are permitted within the limits of the patrimony belonging to such clients.

2. Set-off does not apply between accounts concerning financial instruments and sums of money which are deposited with third parties . . ., not can set-off be agreed with regard to the debts owned by the depositary or sub-depositary towards the intermediary or depositary.

3. Unless the client gives his written consent . . . the intermediary may not use, in its own interest or in that of third parties, the financial instruments belonging to clients which it may for any reason detain. Nor can . . . the intermediary employ . . . any money belonging to the investors, which it may for some reason have at its disposal.<sup>27</sup>

<sup>23</sup> M Lupoi and T Arrigo 'National Report for Italy' in DJ Hayton SCJJ Kortmann and HLE Verhagen (eds) *Principles of European Trust Law* (Kluwer Law International The Hague 1999) 123, 126.

<sup>24</sup> A Scots trust is another instance of how the separation of patrimony can exist without a separation of personality, for the trustee may formally own in his name both his private assets, to which he is beneficially entitled, and the assets which he holds for the benefit of someone else. The two sets of assets, although they are owned by the same person, constitute two separate patrimonies: KGC Reid 'National Report for Scotland' in Hayton Kortmann and Verhagen (previous n) 67, 68–69.

<sup>25</sup> Cass 12 maggio 1999 no 4943 *Napolitano c Fidimpresa spa* in *Le Società* 1999, 1330, Ch 9 text to n 80.

<sup>26</sup> D Lgs 24 febbraio 1998 no 58 *Testo unico delle disposizioni in materia di intermediazione finanziaria* ('TUF') discussed immediately below text to nn 34–37. On art 22, P Manes 'La segregazione patrimoniale nelle operazioni finanziarie' in *Contratto e Impresa* 2001, 1363, 1363–68.

<sup>27</sup> Art 22 (Separazione patrimoniale).

1. Nella prestazione di servizi di investimento . . . gli strumenti finanziari e le somme di denaro dei singoli clienti, a qualunque titolo detenuti dall'impresa di investimento . . . o dagli intermediari finanziari . . . nonché gli strumenti finanziari dei singoli clienti a qualsiasi titolo

It becomes essential to re-assert the segregation of the store of wealth held for the benefit of the investor in two cases: first, when the intermediary breaches the situation of *fiducia*, understood as reliance on and confidence in the person of the fiduciary,<sup>28</sup> and misappropriates that wealth; secondly, in the event of the insolvency of the intermediary, to avoid the investor's wealth falling into the hands of the creditors of the fiduciary. Protection of entitlement to shares will be the subject of Chapter 9.

## 2 Direct and Indirect Holding

### (a) *Direct holding ancient and modern*

Traditional shareholders generally held their shares directly through the inscription of their name in the issuer's register. They often resorted to the services of a stockbroker to purchase them. However, this service was not a form of intermediation in the strict sense, since it did not interfere with the relation between the shareholder and the share: a stockbroker would merely help to carry out the transaction at the end of which his client's name, not his own, would be placed on the register of shareholders. Thus, when the broker's work was done, the client would become the direct holder of the shares. Failure to achieve that result would usually be the consequence of some misdealing on the part of the broker.<sup>29</sup>

Large companies' registers are nowadays generally computerized.<sup>30</sup> In itself this changes nothing. It remains true that the only person who can be said directly to hold the share itself is the person whose name appears on the reg-

detenuti dalla banca, costituiscono patrimonio distinto a tutti gli effetti da quello dell'intermediario e da quello degli altri clienti. Su tale patrimonio non sono ammesse azioni dei creditori dell'intermediario o nell'interesse degli stessi, né quelle dei creditori dell'eventuale depositario o nell'interesse degli stessi. Le azioni dei creditori dei singoli clienti sono ammesse nei limiti del patrimonio di proprietà di questi ultimi. 2. Per i conti relativi a strumenti finanziari e a somme di denaro depositati presso terzi non operano le compensazioni . . . e non può essere pattuita la compensazione convenzionale rispetto ai crediti vantati dal depositario o sub-depositario nei confronti dell'intermediario o del depositario. 3. Salvo consenso scritto dei clienti . . . l'intermediario finanziario . . . [non può] utilizzare, nell'interesse proprio o di terzi, gli strumenti finanziari di pertinenza dei clienti, [da esso] detenuti a qualsiasi titolo. . . . [Non può] inoltre utilizzare, nell'interesse proprio o di terzi, le disponibilità liquide degli investitori, . . . detenute a qualsiasi titolo.

<sup>28</sup> PGW Glare (ed) *Oxford Latin Dictionary* (OUP Oxford 1982) entry 'Fidūcia ~ac, f, 2'.

<sup>29</sup> A famous and graphic example is *Taylor v Plumer* (1815) 3 M&S 562, 105 ER 721 discussed in L Smith 'The Stockbroker and the Solicitor-General: The Story behind *Taylor v Plumer*' (1994) 15 *J of Legal History* 1–22.

<sup>30</sup> Nowadays large companies tend to have two registers of shareholders. Alongside the traditional one held by the company and in which holders of certificated shares appear, there exists a computerized register for dematerialized shares, held by the Operator of the computerized system through which shares are held: Uncertificated Securities Regulations 2001, SI 2001/3755 (made under Companies Act 1989 s 207) reg 20(1). See PL Davies (ed) *Gower and Davies' Principles of Modern Company Law* (7th edn Sweet & Maxwell London 2003) 682–83 and Ch 7 below, text to nn 44–46.

ister. Anyone else can at most have an intermediated interest in the share. That is to say, the indirect holders must have either an equitable interest in the share or some other interest in or in relation to it, such as a merely contractual right in respect of it. However, it is impossible to get the best out of computerization without making an assault on another traditional use of paper. Direct holders would expect to hold the paper share certificate. Computers are impatient of paper. One strong and central motive for intermediation is precisely the desire to dispense with share certificates. This does not mean, however, that a person without a certificate must necessarily be an indirect holder. In fact, by virtue of legislation, uncertificated direct holding is possible for English shares thanks to the UK electronic settlement system called CREST.<sup>31</sup> In this case the electronic register is held, on behalf of participating individuals and institutions, by a company called CRESTCo, which acts as operator. Direct uncertificated holding only applies to these subjects, who might in turn be intermediaries for other investors.<sup>32</sup>

*(b) Indirect holding and new intermediations*

Direct shareholding is not necessarily coterminous with traditional modes of alienation. In fact, sometimes computerization merely favours communication between issuers and holders, thereby easing direct holding without strictly speaking constituting intermediation. However, one even more recurrent feature of modern alienation of shares is the presence of intermediaries between the issuer and the investor. The main reason for the rise of intermediation has been the desire to speed up trading and to make dealing in securities as easy and as rapid as dealing electronically with money, so that securities are dealt with simply as units of account. This streamlining cannot but be bought at the cost of demoting the investor from holder of shares to holder of some intermediated interest in shares or relating to shares. The demotion carries with it the obligation to ensure that it is a demotion in name only. Investors must be able to have the same faith in intermediated interests as formerly in shares.

Intermediation can be spoken of from different perspectives. The public law perspective, in particular the regulatory framework of intermediation, can only be noticed *en passant* in that it is not at the core of this study.<sup>33</sup> Thus, Italian law has recently consolidated and advanced the law regulating the market in the light of its relatively short acquaintance with the features of intermediation in financial matters. The new statute on financial intermediation (*Testo Unico*

<sup>31</sup> <<http://www.crestco.co.uk> (CREST membership)> (accessed 31 Oct 2004). CREST has over 52,000 members, of which over 50,000 are individuals.

<sup>32</sup> See Ch 7 text to nn 22–25.

<sup>33</sup> It is, however, at the core of others: F Sartori *Le regole di condotta degli intermediari finanziari* (Giuffrè Milano 2004).

della Finanza)<sup>34</sup> entered into force in 1998. Prior to that date the rules governing financial markets were spread in as many as 12 different statutes.<sup>35</sup> A rationalization of the legislative scenario was therefore welcome.<sup>36</sup> Its provisions define in great detail the entities which are entitled to hold securities on behalf—and sometimes in the name—of someone else. The public exercise of professional investment services is now the exclusive prerogative of those banks, investment enterprises, and corporate securities intermediaries which are thought to be of sufficient patrimonial solidity.<sup>37</sup> A similar regulatory task is performed in English legislation by the Financial Services and Markets Act 2000, which introduces a system of authorised persons who may carry out certain regulated financial activities and whose conduct is defined in the statute.<sup>38</sup>

The legislators' preoccupation with regulating financial services in such detail reflects a well-founded fear that abuses may be perpetrated. The language of this financial legislation is punctuated with awareness that those offering financial services are dealing on a large scale with people's 'property', using that word in the broad sense of wealth.<sup>39</sup> While this remark is unsurprising, it leaves open the question at the heart of this book. The process of defining whether the wealth traded by intermediaries is also property in a stricter sense will be concluded in Chapter 10.

That very process begins here by observing how intermediation is a structure for the holding of wealth in general and shares in particular. This structure can take a number of forms,<sup>40</sup> which grow more complex as the number of intermediaries between the issuer of the security and the person who is beneficially

<sup>34</sup> D Lgs 24 febbraio 1998 no 58 *Testo unico delle disposizioni in materia di intermediazione finanziaria* ('TUF' or 'Decreto Draghi'), made under L 6 febbraio 1996 no 52 arts 8 and 21. The decree must nowadays be read in the light of the provisions for its enactment: *Regolamento di attuazione Consob* (Commissione per le Società e la Borsa), *delibera* (decision) no 11522, 1° luglio 1998, as amended by *delibere* no 11745, 9 dicembre 1998; no 12409, 1° marzo 2000 and no 12498, 20 aprile 2000. Two detailed commentaries of the text of the statute have been consulted in drafting this Part: C Rabitti Bedogni (ed) *Il Testo Unico della Intermediazione Finanziaria. Commentario* (Giuffrè Milano 1998); G Alpa and F Capriglione (eds) *Commentario al Testo Unico delle disposizioni in materia di intermediazione finanziaria* (CEDAM Padova 1998).

<sup>35</sup> An overview of the legislative experiments on the matter of professional investment services (*gestioni professionali*) is in Lupoi *Trusts* (n 15 above) 687–98.

<sup>36</sup> Although it still relies on a cumbersome body of secondary legislation which has led scholars to speak of 'administrativization' of the law in this sector: A Arrigoni 'Intermediari finanziari "atipici" e regolamentazione a tasselli' *Giurisprudenza Commerciale* 1999 I 530.

<sup>37</sup> A description of all authorized *intermediari mobiliari* and their services is in R Costi and L Enriques *Il mercato mobiliare* in G Cottino (ed) *Trattato di diritto commerciale* (CEDAM Padova 2004) 269–78.

<sup>38</sup> Financial Services and Markets Act 2000 Pts II–III.

<sup>39</sup> Eg *ibid* s 26(2), according to which the party who has transferred 'property' or paid money under an agreement made by an unauthorised person is entitled to recover any such money or property, and to receive compensation for any loss sustained.

<sup>40</sup> CW Mooney 'Practising Safer Lex: The Proper Domain of Property, Secured Transactions and Insolvency Laws in the Regulation of Securities Intermediaries' in G Ferrarini (ed) *European Securities Markets: The Investment Services Directive and Beyond* (Kluwer Law International London 1998) 85, 86–87.

entitled to it grows bigger. Finance lawyers often speak in terms of ‘tiers of intermediaries’. The ensuing intermediation is then single-tiered or multi-tiered depending on there being one or more intermediaries between the issuer and the investor.

In a single-tiered intermediation the intermediary holds the securities directly as they are issued, no one standing between himself and the issuer, while the investor will only do so indirectly as against the intermediary. When the intermediary is a depository holding the securities permanently, rather than trading them, they are said to be ‘immobilized’ with the intermediary-depository. The depository owns the securities directly, but not beneficially.<sup>41</sup> Instead, it holds them for clients, who are participants in the system in which the securities are deposited.<sup>42</sup> From the standpoint of shareholding technique, to ‘immobilize’ something means to hold it still in a fixed place. Here the something immobilized is usually the paper certification of the share issue. As long as the securities are immobilized within the system, transfers are effected through book-entries in the records of the depository. Such book-entries are nowadays electronic, whereas traditional circulation of securities required transfer of certificates and signing of transfer forms.<sup>43</sup> Here what is transferred is not actually the share, only the new kind of asset below the immobilized share.

In multi-tiered indirect holding, an issuing company has its register of shareholding recording the names of one or more depository intermediaries, who will hold the shares directly. These will have brokerage firms or banks as their clients, whose names they will record as holding some interest in those shares. In their turn, the brokers will record the names of final investors as holding some interest, a lower-tier one, in whatever it was that the broker held.<sup>44</sup> The function performed by intermediaries is often that of custody. They are then called custodians, in that they keep the securities safe. This scenario often extends internationally across several jurisdictions. The institutional structure of custodianship arrangements is then referred to as ‘global custody’. A global custodian administers international portfolios of securities. In a global context the central custodian or depository carries out its trading instructions through a network of sub-custodians or depositories located in the jurisdictions where the securities are traded.<sup>45</sup>

<sup>41</sup> In general a depository is a mere bailee without title. However, the word is used here more widely.

<sup>42</sup> J Benjamin *Interests in Securities: A Proprietary Law Analysis of the International Securities Markets* (OUP Oxford 2000) 23.

<sup>43</sup> See Ch 6 text to nn 22–23.

<sup>44</sup> SL Schwarcz ‘Indirectly Held Securities and Intermediary Risk’ [2001–2] *Uniform L Rev* 283, 285.

<sup>45</sup> J Benjamin and M Yates *The Law of Global Custody: Legal Risk Management in Securities Investment and Collateral* (2nd edn Butterworths Lexis Nexis London 2002) [1.3]–[1.7]; AW Beaves ‘Global Custody: A Tentative Analysis of Property and Contract’ in N Palmer and E McKendrick (eds) *Interests in Goods* (2nd edn LLD London 1998) 117, 118.

C SECURITIES AND THE LIKE: ATTEMPTS AT  
A NEW TERMINOLOGY

## 1 Names and Nature

We have been speaking of ‘intermediation’. The focus now moves to the assets themselves. At this stage we are concerned only with terminology and not with the deeper nature of the assets in question and the structures within which they are traded. However, name and nature are of course closely linked. The existing literature on indirect holding is extremely concerned to determine the nature of the shareholder’s interest when situated in a chain of intermediaries. The question is far from being a merely speculative one. On the answer to it seems to depend the priority of the investor’s entitlement over the claims of the ordinary creditors in the event of the insolvency of an intermediary.<sup>46</sup> The question as to nature is thus intensely practical. But the issue of terminology has to be settled first. Cumbersome or misleading terminology undermines the analytical discussion.

Sometimes, however, the process is short-circuited by the imposition of a solution by the brute force of legislation. Name and nature are then imposed together. In 1994 Article 8 of the Uniform Commercial Code (UCC) underwent revision.<sup>47</sup> Article 8-102(a)(17) defines as ‘security entitlement’ the ‘rights and property interest of an entitlement holder with respect to a financial asset’ which is shorthand for ‘the package of rights that a person who holds a securities position through an intermediary has against that intermediary and the property held by that intermediary’.<sup>48</sup>

‘Property’ recurs frequently enough throughout Article 8 to confirm that the draftsman knew what we have already observed, that ‘property’ matters.<sup>49</sup> One essential feature of an entitlement holder’s property interest is that it can be asserted directly only against the entitlement holder’s own intermediary. By statutory assertion a relationship *in personam* is defined as property. A security entitlement, though defined as property, is not a claim to a specific identifiable thing; it is a package of rights and interests against the intermediary and its property.<sup>50</sup> A security entitlement, property *in personam*, acquires nevertheless

<sup>46</sup> R Goode ‘The Nature and Transfer of Rights in Dematerialised and Immobilised Securities’ in F Odith *The Future for the Global Securities Market* (Clarendon Press Oxford 1996) 107, 117–19. On the risk associated with intermediation see SL Schwarcz ‘Intermediary Risk in a Global Economy’ (2001) 50 Duke LJ 1541 esp 1546 ff.

<sup>47</sup> The intuitions which prompted the revision are in CW Mooney ‘Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries’ (1990) 12 Cardozo L Rev 305; the revision is described in JS Rogers ‘Policy Perspectives on Revised UCC Article 8’ (1996) 43 UCLA L Rev 1431.

<sup>48</sup> Package described in Art 8-503–Art 8-508, commented by Rogers (previous n) 1449–53.

<sup>49</sup> Cf UCC Art 8-503 ‘Property Interest of Entitlement Holder in Financial Asset Held by Securities Intermediary’, where the term property appears seven times.

<sup>50</sup> Rogers (n 47 above) 1455–57.



meaning in view of its capacity, in association with a number of mechanisms such as the principle of control, to turn into a secured interest giving priority in the insolvency of the intermediary.

## 2 A Neutral Name

The need for new terminology to describe the investor's interests seems to have been perceived long before the structure of intermediation became dominant. In the 1930s the superimposition of a series of layers of interests upon the same object was held by one ingenious writer to be the distinguishing feature of the modern structure of property.<sup>51</sup> In a somewhat eccentric analysis, this 'lineal'<sup>52</sup> architecture was likened to the English feudal system, which had consisted of estates in land progressively subjoined to existing tenures, and to the more modern system of interests in funds.

The feudal relation 'consisted in passing down from one holder to another the physical control (use) of the land, and in reserving to each in the series some part of the property control and, perhaps, of the benefit'. The partition was 'in some degree successive (temporal) and in some degree coexistent'. Neither of these transfers being complete or permanent, the author regarded them as linked by 'dependence and derivativeness'.<sup>53</sup> The image of a pyramid is often used to represent the structure of feudal tenure. The feudal pyramid has the King at its apex, tenants in possession at its base, and intervening seignories forming the layers between. Alienation was originally by subinfeudation, adding another tier, or by substitution, the alienor being replaced by the alienee. Subinfeudation was then confined to the king alone.

For Noyes the analogy with interests in funds proceeded as follows, and revealed a terminological preoccupation:

The modern system of interests in funds . . . is similar. In this case, too, the power of property control is being passed down from one holder to another—persons or funds—each retaining an interest which, for want of any exact appraisal, is still for the most part relegated to the chaotic region of choses in action—the no-name interests that are at law deemed to be nothing until they require a remedy. But, when they are analysed, we find that this system of interests also consists in essence of a method of delegation under which there is passed down something which at first sight looks like complete property but which is seen, on closer examination, to be in reality a dependent and derivative holding. This system is arranged in series, and consists of interests which are defined as to their duration, which have provisions for their retraction at times certain or uncertain and which have behind them some not yet clearly defined elements of control in all those *of whom* in series the property is held.<sup>54</sup>

<sup>51</sup> CR Noyes *The Institution of Property* (Longmans Green & Co New York 1936) 514–17.

<sup>52</sup> The author's word, probably intended to convey the impression that the superimposition of layers proceeds along a vertical line.

<sup>53</sup> Noyes (n 51 above) 514–17.

<sup>54</sup> *Ibid* 515.

Almost seventy years later, what was true of interests in funds is all the more true for intermediated interests in shares, which, not unlike their predecessors, continue, almost without exception, to qualify as no-name interests surrounded by chaos. The few attempts which have been made to give these interests names must now be illustrated.

Awareness that investors increasingly hold their shares through intermediaries permeates the *Final Report* drafted by the Company Law Review Steering Group charged with the reform of English company law.<sup>55</sup> The report states, among other things, the need to ensure that it is possible for companies

to recognize the rights of persons interested in shares behind the formal legal title of nominees or custodians on the share register, while retaining the integrity of the register of members as the authoritative source of title to shares.<sup>56</sup>

Such persons are referred to as ‘rights-holders’ or ‘beneficial shareholders’ rather than ‘shareholders’, which evidences that what they hold is not a share. Scholars have defined the subject-matter of this modern shareholding in various ways.

(a) *Benjamin’s nomenclature*

An attempt to provide new terminology to describe intermediated interests has been propounded by Dr Benjamin. In her book ‘securities’, understood as any ‘type of transferable financial asset’, are distinguished from ‘interests in securities’.<sup>57</sup> She gives the latter phrase the following meaning, which is of a circular character: ‘interests in securities’ are ‘the assets of a client for whom an intermediary holds (interests in) securities on an unallocated basis, commingled with the interests in securities of other clients’.<sup>58</sup> She coins a compound phrase to encompass both. Thus securities and interests in securities can be comprehended by putting the first half of the phrase in parentheses: ‘(interests in) securities’. Whenever she refers to ‘(interests in) securities’ she means to speak at one and the same time of, for example, shares and intermediated interests in shares.<sup>59</sup>

Benjamin’s attempt to develop a manageable nomenclature for intermediated interests is commendable in being logically rigorous. Its drawbacks, however, are no less worrying. First, her terminology becomes unintelligible when it is

<sup>55</sup> The Company Law Review Steering Group *Modern Company Law for a Competitive Economy. Final Report* (HMSO Department of Trade and Industry London 26 July 2001). The Government’s response to the major recommendations (White Paper ‘Modernising Company Law’ (Cm 5553) 16 July 2002) and early attempts at legislative implementation can be read at <<http://www.dti.gov.uk/cld/review.htm>> (accessed 31 Oct 2004). The final version of a new Companies Bill is awaited.

<sup>56</sup> *Final Report* (previous n) vol I [3.51]. Cf the consultation documents drafted by the Steering Group and preceding the report: *Developing the Framework* (HMSO London March 2000) [4.7–18] and *Completing the Structure* (HMSO London Nov 2000) [5.2–12].

<sup>57</sup> Benjamin (n 42 above) xxv.

<sup>58</sup> *Ibid* xxiv and [1.04].

<sup>59</sup> *Ibid* xxiv.

spoken rather than written. No intonation will recreate the parenthesis, so that the words ‘in parenthesis’ or ‘in brackets’ have to be expressly uttered. That is worse than cumbersome. It is perhaps telling that in her latest book *The Law of Global Custody* the explanation of the notion of interests in securities (*tout court*) is accompanied by the concession that ‘[f]or ease of reference this book will in general refer to the assets of custody clients as securities’.<sup>60</sup> Moreover, any mention of the parenthetical (interests in) securities has disappeared.

Secondly, there is the confusion that arises from the fact that ‘security interest’ is already in common use in a quite different sense, in the context of security taken in respect of credit.<sup>61</sup> The enduring presence of more traditional interests with similarly sounding and therefore competing names cannot be completely displaced. Thus, ‘security interests’ such as pledge, mortgage, charge and lien,<sup>62</sup> survive alongside her more modern ‘interests in securities’, her bracketed ‘(interests in) securities’ and the ‘securities collateral’, more exactly understood as ‘(interests in) securities as collateral’.<sup>63</sup> One comes close to having to speak of ‘security interests in (interests in) securities’.

The commonly accepted view, endorsed in law dictionaries, generally reads ‘security interest’ as a synonym of ‘security’, both being understood as ‘[a] kind of interest, or right, in property owned by another’.<sup>64</sup> This sense has become especially prominent since the publication of Law Commission’s Consultation Paper on *Registration of Security Interests*.<sup>65</sup> In the same semantic field, English law has officially welcomed the American term ‘collateral’.<sup>66</sup> The recent Financial Collateral Directive speaks of both ‘financial collateral arrangement’ and ‘security financial collateral arrangement’ for greater reassurance.<sup>67</sup> Regrettably this is in itself a path to semantic chaos.

Thirdly, the word ‘interest’ is in itself unquestionably generic even in its legal usage, hence also evasive. There is a familiar juxtaposition with ‘interest’ of

<sup>60</sup> J Benjamin and M Yates (n 45 above) [2.17].

<sup>61</sup> Cf Benjamin and Yates themselves, *ibid* [4.10]; PAU Ali *The Law of Secured Finance* (OUP Oxford 2002), esp [2.04]; PAU Ali *Marshalling of Securities* (OUP Oxford 1999).

<sup>62</sup> Benjamin (n 42 above) [5.02] ff.

<sup>63</sup> *Ibid* [4.07].

<sup>64</sup> JE Penner *Mozley & Whiteley’s Law Dictionary* (12th edn Butterworths London 2001) 331–32.

<sup>65</sup> Law Commission’s Consultation Paper *Registration of Security Interests: Company Charges and Property Other than Land* (Law Com 164/2002), on which see L Gullifer ‘The Law Commission’s Proposals: A Critique’ (2004) 15 *Eur Business L Rev* 811. Interestingly, the registration of charges over shares is excluded from the proposed notice filing system (*ibid* [5.21] ff). Disappointingly, see E Johansson ‘The Law Commission’s Consultation Paper No 164: Some Reflections Regarding the Exclusion of Securities’ (2004) 15 *Eur Business L Rev* 835, 854–57.

<sup>66</sup> Financial Collateral Arrangements (No 2) Regulations 2003 SI 2003/3226, implementing the Financial Collateral Directive (n 67 below). The term enjoys variable popularity in the case law. Within the latest case law on fixed charges over receivables, after finding its way into *Agnew and Bearsley v Commissioner of Inland Revenue and Official Assignee for the estate in bankruptcy of Birtwhistle and Birtwhistle (New Zealand)* [2001] UKPC 28, [2001] 2 AC 710 (PC) [23], it disappeared from the most recent *National Westminster Bank plc v Spectrum Plus Ltd* [2004] EWCA Civ 670, noted F Odith ‘Fixed Charges and the Recycling of Proceeds of Receivables’ (2004) 120 *LQR* 533.

<sup>67</sup> Dir 2002/47/EC on Financial Collateral Arrangements (Financial Collateral Directive) [2002] OJ L168/43 art 2(1)(a) and (c).

adjectives such as ‘legal’ and ‘equitable’. Benjamin uses it without making an unequivocal commitment to one or the other. This makes for uncertainty. The reader will want to know whether it is safe to say that these ‘interests in securities’ are indeed equitable interests arising under a trust. This evasion could only be justified as a vehicle for carrying the terminology over to jurisdictions which cannot or do not use the trust to account for intermediated interests. In reality, even in a civilian environment starved of trusts, vagueness is unwelcome. Maurizio Lupoi, who has devoted much work to fertilize the Italian soil for trusts to grow on it, insists that, when talking about interests, one should always distinguish *interessi di credito equitativo* (‘equitable obligatory interests’) from *interessi di credito ordinario* (‘ordinary obligatory interests’), and that both should be kept separate from *proprietà* (property interests in the strict sense).<sup>68</sup> Interests in securities would be too imprecise a translation for that exacting nomenclature.

Despite these criticisms, however, the phrase ‘interests in securities’ has encountered the favour of the Financial Markets Law Committee, who has thought it suitable to describe clients’ interests within the framework of intermediation.<sup>69</sup>

(b) *Austen-Peters’s terminology*

One fairly recent terminological experiment by Austen-Peters has proposed that the distinction should be between ‘rights which constitute the lead custodian’s interest’ and the investor’s ‘proprietary rights with respect to the lead custodian’s interest’.<sup>70</sup> He favours an analogy between the structure of trust and that of intermediary custody. The simplest form is single-tier custody, where only the custodian stands in-between the issuer of shares and the investor. In order to explain the relationship between various tiers in the case of multi-tier custody he resorts to the figure of sub-trust.<sup>71</sup>

However, while this describes well the relationship between the participants to the custody system, their interests are identified by expressions comprising more than one word: while the depository has the straightforward ‘legal title to shares’, the sub-custodian will have a ‘right to benefit from shares’. The lead custodian will then enjoy a ‘right to benefit from the sub-custodian’s equitable interest’, and the final investor will have an incredible ‘right to benefit from the lead custodian’s entitlement from the sub-custodian’.<sup>72</sup> If we take the search to

<sup>68</sup> Conversation with Professor Lupoi, 2 November 2004 (my translation).

<sup>69</sup> Financial Markets Law Committee *Property Interests in Investment Securities: Analysis of the Need for and Nature of Legislation Relating to Property Interests in Indirectly Held Investment Securities, with a Statement of Principles for an Investment Securities Statute* (FMLC c/o Bank of England July 2004) <[www.fmlc.org/papers.htm](http://www.fmlc.org/papers.htm)> (accessed 31 Oct 2004) Principle 2. Dr Benjamin is a member of the Committee.

<sup>70</sup> AO Austen-Peters *Custody of Investments: Law and Practice* (OUP Oxford 2000) [5.17–21].

<sup>71</sup> *Ibid* [4.26–32].

<sup>72</sup> *Ibid* [4.27].

be for economical language capable of recurrent use, Austen-Peters can only be said to have reached the preliminary stage of describing accurately that which ultimately requires to be given a name.

(c) *Penner's approach*

Penner has gone some way towards the description of intermediated interests by speaking of 'second order property rights in the property of others'. Drawing an analogy between funds and the securities with which we are concerned, he has written:

The character of funds goes some way to explaining the proprietary character of many choses in action,<sup>73</sup> such as shares, interests in trusts and even, as we shall see, debts. . . . [A fund] is held by one or more persons, call them Os, to manage or hold for another or others, call them As. The As for whom the fund is held do not, strictly speaking, have any rights to any of the individual component properties of the fund. They only have an interest in the fund itself via their rights against the Os, who actually own the fund. It is the personal legal relation between the As and the Os which determines the rights of the As to the fund properties, so the interests of the As are in this sense choses in action, rights *in personam* against the Os, who actually own the fund. . . . The most common examples of these rights are shares in companies and beneficiary interests in trust funds.<sup>74</sup>

Penner proceeds to call 'second order property rights', on the one hand, those of a shareholder, who has no property rights against the various assets of the company, the company being the legal person who owns them, and, on the other hand, those of the beneficiary under a trust, who has rights against the trustee, who is the legal owner of the trust property, to the benefits deriving from the administration of the trust property. Other rights of the same kind are rights in the property of another (*jura in re aliena*).

However, this analysis does not quite reach intermediated interests, save so far as they can be brought within the category of beneficial interests under a trust. For the kind of interest which is at stake in the case of intermediated holding of securities is of a 'more intermediated' nature than those described by Penner. In the case of shares, the intermediated interest which stretches the traditional language of personal property is not so much an intermediated interest in the company assets as it is an intermediated interest in the security itself. In other words, the 'first order right' in an intermediated context, which is held by the intermediary-trustee, is the very right in the security.

Maintaining Penner's language and assuming that shares and 'plain' beneficial interests are defined as 'second order property rights', we should then envisage third and fourth order rights in order satisfactorily to describe the interests which shareholders hold in the wealth held by custodians and sub-

<sup>73</sup> The phrase 'choses in action' is unsatisfactory due to the exceedingly generic significance of the word, which will be addressed in speaking of shares as things in Ch 4 text to nn 13 ff.

<sup>74</sup> JE Penner *The Idea of Property in Law* (Clarendon Press Oxford 1997) 110.

custodians. Were we to accept that approach, we would anyhow have to confine ourselves to speaking of ‘third order rights’ rather than ‘third order property rights’. Even if these obstacles were illusory, this nomenclature is too cumbersome for any discussion in which these interests must be frequently named.

(d) *The Italian situation*

Notwithstanding the restatement and consolidation of financial legislation in 1998<sup>75</sup> full awareness that the very presence of intermediation in investment practices may provoke some changes in the terminology relating to the traded interests is still to come. The conceptually antecedent terminology relating to ‘first order’ securities, however, has been thoroughly discussed.

Two phrases have competed in Italian law, *valori mobiliari* (moveable values) and *strumenti finanziari* (financial instruments). The former, which Italian legislation adopted in the 1970s after a century’s flirtation,<sup>76</sup> originally referred to all written documents representing some concrete value (*valore*). The phrase signified

any document or certificate which directly or indirectly represents rights in companies . . . or institutions of any sort, including investment funds in Italy or abroad; any document or certificate representing negotiable and non-negotiable credits; any document or certificate representing rights to intangibles or immoveables, as well as any document or certificate conferring rights to the purchase of any of the above mentioned *valori mobiliari*.<sup>77</sup>

The breadth of such definition, encompassing any documentary thing in which people could hope to invest their savings, was such that one scholar spoke of the phrase *valori mobiliari* as ‘a useless supererogation’, ineffectual for the purpose of establishing the field of application of the statute.<sup>78</sup>

In the 1990s statutes<sup>79</sup> and scholars<sup>80</sup> began to speak of *strumenti finanziari* (financial instruments), or, with ever greater complexity, of *prodotti finanziari* (financial products).<sup>81</sup> Some confusion ensued from not completely abandoning

<sup>75</sup> D Lgs 24 febbraio 1998 n 58 *Testo unico delle disposizioni in materia di intermediazione finanziaria (TUF)*, made under L 6 febbraio 1996 no 52, art 8 and 21.

<sup>76</sup> L 7 giugno 1974 no 216 on *sollecitazione del pubblico risparmio* (solicitation of investment of mass savings). The historical evolution of the concept is shown in VV Chionna ‘Le origini della nozione di valore mobiliare’ *Rivista delle Società* 1999, 831.

<sup>77</sup> L 216/1974 (previous note) art 18-*bis*, as amended by L 23 marzo 1983 no 77 art 12.

<sup>78</sup> F d’Alessandro ‘L’attività di sollecitazione del pubblico risparmio’ in *Sistema finanziario e controlli: dall’impresa al mercato. Quaderno di Giurisprudenza Commerciale no 85* (CEDAM Padova 1986) 98; and see GL Rabitti ‘Valore mobiliare ed *investment contract*’ *Contratto e Impresa* 1992, 107, 122 ff. The ever-expanding list included interest swaps: L 2 gennaio 1991 no 1 art 1 para 2 and Council Dir 93/22/EEC of 10 May 1993 on investment services in securities [1993] OJ L141/27 Annex Section B no 5.

<sup>79</sup> D Lgs 26 luglio 1996 no 415; D Lgs 24 febbraio 1998 no 58.

<sup>80</sup> F Carbonetti ‘Dai “valori mobiliari” agli “strumenti finanziari”’ *Rivista delle Società* 1996, 1120.

<sup>81</sup> R Costi and L Enriques *Il mercato mobiliare* in G Cottino (ed) *Trattato di diritto commerciale* (CEDAM Padova 2004) 42–46 and ch 3.

the previous concept of *valori*.<sup>82</sup> The new phrase, which signifies ‘means of financial investment’, can broadly be likened to ‘securities’. The potential inherent in its low degree of specificity has manifested itself on the occasion of the recent reform of company law,<sup>83</sup> which appears to favour the creation of new categories of investment securities endowed with (or deprived of) the most diverse rights.<sup>84</sup> However, with such vague description of securities as the *substratum* in which investors’ interests may subsist, it is little wonder that the intermediated version of such interests—what Benjamin calls ‘interests in securities’—has not as yet found a stable name.

(e) *An American suggestion*

We already noticed the new version of UCC Article 8.<sup>85</sup> American scholarship has shown itself aware of the need for convenient terminology. In a recent description of the indirect holding system Schwarcz proposes that the term ‘investors’ be deemed to include not only investors but also intermediaries having rights in securities held by other intermediaries.<sup>86</sup> He then chooses to ‘refer to a holder of an interest in securities through an intermediary as a lower-tier holder, and to that holder’s interests as lower-tier rights’. Thus, in a succession depository–broker–private investor, the last named would be a lower-tier holder with respect to both securities intermediaries, whereas the broker would be a lower-tier holder only with respect to the depository and, using the large meaning, would be an investor in relation to the depository. This spontaneous use avoids the Benjaminite ‘interests in securities’ which quickly comes to be surrounded by the bracketed ‘interests in (the same)’. ‘Lower-tier interests’ is a good invention, which goes far to meeting the criteria of accuracy and convenience.<sup>87</sup>

#### D NEW TERMINOLOGY FOR INTERMEDIATED INTERESTS

The vocabulary of intermediated holding of securities must avoid the shortcomings described above: nomenclature which is too obscure or novel, already

<sup>82</sup> Still present in D Lgs 1 settembre 1993 no 385 (Testo Unico Bancario) art 129.

<sup>83</sup> D Lgs 17 gennaio 2003 no 5 and 6 (made under L delega 3 ottobre 2001 no 366) and in force since 1 January 2004.

<sup>84</sup> F Galgano and R Genghini *Il nuovo diritto societario* in F Galgano (ed) *Trattato di diritto commerciale e diritto pubblico dell’economia* (2nd edn CEDAM Padova 2004) vol II, 729–57. Examples are shares without voting rights and financial instruments entitling the holder to the profits or, as the case may be, burdening him with the liabilities which arise from one specified corporate undertaking, to which a separate fund is destined: F Di Sabato ‘Strumenti di partecipazione a specifici affari con patrimoni separati e obbligazioni sottoscritte dagli investitori finanziari’ in Banca Borsa Titoli di Credito 2004 I 13.

<sup>85</sup> See text to nn 47–50 above.

<sup>86</sup> SL Schwarcz ‘Indirectly Held Securities and Intermediary Risk’ [2001–2] *Uniform L Rev* 283, 284.

<sup>87</sup> *Ibid* 286.

in technical use, lengthy, or totally unfamiliar, is unlikely to win the assent of a generally conservative profession.

These being the criteria, the name for intermediated interests in securities which seems to satisfy all the tests is ‘sub-securities’. That is the term used in this book as the general expression—it can be made more specific. Thus, an investor whose share is vested in a custodian would then have a sub-share. ‘Sub-debentures’ is equally viable. Where there is multi-tiered intermediation, if it is necessary to emphasize the existence of the pyramid it will be possible to speak of sub-sub-shares, and so on.

The phrase ‘sub-share’ possesses all four desirable linguistic features listed above. The first three—simplicity, euphony and brevity—are self-explanatory. The fourth criterion, that the phrase should not seem outlandish is met through the analogous expression ‘sub-trust’.<sup>88</sup> Maitland, in lecturing on trusts, more than once spoke of ‘sub-settlement’ as a declaration of a trust of an interest held under a trust, although he did not expressly mention sub-trusts:

Let us say that one set of trustees is holding land upon trust for A during his life with remainder to B in fee; B is going to marry; it is possible that he will convey his rights to another set of trustees upon certain trusts for himself, his wife and children. But the rights that he can convey are themselves merely equitable rights, and the second set of trustees therefore will have merely equitable rights. It not unfrequently happens that you will find one set of trustees standing behind another set. There has been a settlement and then a sub-settlement.<sup>89</sup>

A sub-trust is usually thought of as one of several ways in which the beneficiary of trust property in the hands of a trustee may dispose of the equitable interest in favour of a third party. That is, he may declare himself to be a trustee of it.<sup>90</sup> It is important, however, to emphasise immediately that, while the expression ‘sub-trust’ tends to show that ‘sub-share’ is in harmony with wider legal usage, that legitimation does not depend on proof that the sub-trust is the absolutely correct solution to the analytical problem of sub-securities.

The effect of the sub-trust, where A is trustee for B, who is trustee for C, is sometimes said to be that A holds in trust for C, and must convey as C directs. B disappears from the picture and C becomes beneficiary.<sup>91</sup> However, it is not

<sup>88</sup> Of sub-trustees and sub-beneficiaries speaks B Rudden *Lawson & Rudden on the Law of Property* (3rd rev edn OUP Oxford 2002) 181 in describing the ‘market in beneficial interests’. Sub-contract as the situation where a third party acquires a legal position which is derived from that of one of the original contractors is found in R Sacco and G De Nova *Il contratto* in R Sacco (ed) *Trattato di diritto civile* (3rd edn UTET Torino 2004) vol II 756–57.

<sup>89</sup> J Brunyate (ed) FW Maitland *Equity: A Course of Lectures* (2nd rev edn CUP Cambridge 1936) 50, cf 85. Maitland did not seem to think that a sub-settlement collapsed. That is, the head trustee did not automatically become a trustee for the sub-cestui que trust.

<sup>90</sup> *Timpson’s Exors v Yerbury (Inspector of Taxes)* [1936] 1 KB 645 (CA) 664 (Romer LJ).

<sup>91</sup> *Grainge v Wilberforce* (1889) 5 TLR 436, 437; *Grey v IRC* [1958] Ch 375, 382 (Upjohn J), both discussed in JE Martin *Hanbury & Maudsley Modern Equity* (16th edn Sweet and Maxwell London 2001) 88. The view that this chain constitutes a disposition seems to prevail in the case when, under the trust, B has no duty to perform. In as far as a sub-trust is a disposition of the equitable interest the requirement of writing described in Law of Property Act 1925 s 53(1)(c) seems to apply.



clear that the intermediate trust must collapse and drop away.<sup>92</sup> Nevertheless, one well-known critique of the sub-trust as applied to security entitlements comes from Professor Roy Goode. The gist of his critique follows:

The disconnection between the investor and the underlying security, which precludes any 'look-through' to the issuer, becomes even more pronounced where his security intermediary does not hold directly from the issuer but has a security entitlement against a higher-tier intermediary who is the direct holder. In this case there is no relationship between the investor and the higher-tier intermediary, and the investor's co-ownership rights subsist not only in the pool of securities themselves but rather in such part of his intermediary's own security entitlement as that intermediary is holding for its investor rather than on its own account. Again, there can be no look-through to the higher-tier intermediary. As under Article 8 of the Uniform Commercial Code, the investor's rights are available only against the securities intermediary with which he has the account. There is no ability to leap-frog as there might be in the case of a bare sub-trust of an asset to which the beneficiary had an in specie entitlement. Accordingly the investor's interest is best seen as an original trust interest created by his agreement with his intermediary rather than a derivative interest arising by way of sub-trust.<sup>93</sup>

This may turn out to be no more than a semantic disagreement as to the scope of the term 'sub-trust'. Professor Goode is right to say that, so far as it were true that sub-trusts must collapse, in the sense of eliminating the intermediate sub-trustees, the sub-trust would be impracticable as an explanation of a pyramid of intermediated holdings. But he himself contemplates a pyramid of trusts, and there seems no pressing reason why the use of 'sub-trust' should immediately precipitate collapse. At all events we must assert that when we use the term 'sub-trust' we exclude the phenomenon of collapse. This should suffice to displace fears of 'upper tier attachment' recently expressed by Unidroit and the Financial Markets Law Committee.<sup>94</sup> By this phrase is meant the risk that a securities account held with an intermediary at a higher tier in the holding pattern may be subject to freezing in order to enforce claims against those who hold an interest through an intermediary at a lower tier. We mean the pyramid to be a stable hierarchy of trust and under-trusts, the subject-matter being different at each tier.

<sup>92</sup> Cf the discussion in Austen-Peters (n 70 above) [4.28] and [4.31] rejecting 'the theory that extended trusts may be collapsed' and suggesting that 'each tier in a structure of sub-trusts must be respected, with each (sub-)trustee holding exclusively for his direct beneficiary'.

<sup>93</sup> R Goode 'Security Entitlements as Collateral and Conflict of Laws' in *The Oxford Colloquium on Collateral and Conflict of Laws* (special supplement to [1998] Butterworths J of Intl Banking and Financial L) 22.

<sup>94</sup> Unidroit Study Group on Harmonised Substantive Rules regarding Securities Held with an Intermediary *Position Paper* (August 2003), part of Study 78 <<http://www.unidroit.org/english/workprogramme/study078/item1/main.htm>> (accessed 31 Oct 2004) [3.1], recommending a free-standing rule expressly prohibiting upper tier attachments; FMLC 'Property Interests in Investment Securities—Analysis of the need for and nature of legislation relating to property interests in indirectly held investment securities, with a statement of principles for an investment securities statute' (c/o Bank of England July 2004) <[www.fmlc.org/papers.htm](http://www.fmlc.org/papers.htm)> (accessed 31 Oct 2004) [7(3)], warning that 'an account holder's rights are solely against its own intermediary, with no look-through to an upper-tier intermediary or the issuer and in consequence no upper-tier attachment'.

However the debate on 'sub-trust' proceeds, the phrase 'sub-share' remains a viable and attractive way of referring to intermediated interests in shares which can be adopted even by those who find themselves averse to 'sub-trust'. The expression has the merit of neatly evoking the idea of the investment ladder or pyramid. Many diagrammatic representations of the structure of intermediation place depositaries at the top and final investors at the bottom of the ladder. It comes naturally, therefore, to speak of higher- and lower-tier intermediaries. As one climbs one step after another down the ladder towards the bottom, where the final investor is to be found, the language of sub-shares is supported by intuition. The sub-sub-sub-sub-share can for most purposes simply be a sub-share.

One serious objection to our terminology might be that it lacks that 'public relations effect' which is probably at the core of the attraction exercised by 'share-ownership' on investors. 'Sub-share ownership' would not attract the man in the street. One answer is that we are speaking the language of technical discourse. In the world outside, sub-shareholders will no doubt continue to be called shareholders. A second is that in time investors must learn what is already true, that strictly speaking they do not own shares. The mortgaged public files technical truths in the back of its mind. Customers of banks claim they own money, but they do not. So here, the truth should be known but need not be dwelt upon. Indeed it must become an element of the financial education which is constantly urged as a necessary element in the formation of the modern citizen.



## PART II

# LOCANDA

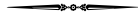
This is the first of three symmetrical Parts which propose to tackle the binomial shares–personal property, according to the method explained in the Introduction. The first Chapter looks inward to shares and asks whether there is any sense in which a share can be called a thing. The second looks outward to the law of personal property and asks whether the external boundary of the law of property might be tied to the notion of a ‘thing’.

The word ‘thing’ can be restricted to corporeals or vastly extended to include all incorporeals. Between these extremes Part II ultimately settles at an intermediate point. The aspect of things on which it finds it possible to rely to define a boundary between property and other areas of law is the capacity to be located in some place. *Locanda* conveniently denotes all things so locatable.



## 4

# *Shares as Things*



IN ORDER TO ask whether shares and sub-shares are or are not property in any but the broadest sense, the inward-looking preliminary of asking what they are must be completed. Attention centres on the question whether a share can be contemplated as a corporeal thing. The relevant conclusions turn out to apply a fortiori to sub-shares. It can be said without prejudice to the later discussion that the more certainly a given thing can be said to be corporeal the easier will be its inclusion within the strict sense of ‘property’.

### A ETYMOLOGY

‘Share’ is a word of multiple meanings. Its significance as each of the equal parts into which the capital of a corporation is divided is metaphorical. Different legal systems use different metaphors. Before the metaphor as a creative exercise in the attribution of meaning comes the original meaning of the word. From this we must therefore start.

The root of the word is cutting. The earliest meaning of ‘share’ was as a ploughshare, or ‘the iron blade in a plough which cuts the ground at the bottom of the furrow’.<sup>1</sup> This is attested in eighth-century sources.<sup>2</sup> The root recurs in ‘to shear’, which means ‘to cut with a sharp instrument’.<sup>3</sup> The first variation took place around the year 1000, when ‘share’ could describe the division or fork of the human body, as though the legs were formed from an originally undivided trunk much as a child makes a plasticine figure. This use disappears in the 17th century.<sup>4</sup> A step towards the modern meaning was an extension of the same metonymy, applying ‘share’ to the result of the cutting operation. In the 14th

<sup>1</sup> *Oxford English Dictionary* (2nd edn OUP Oxford 1989) <<http://dictionary.oed.com>> (accessed 31 Oct 2004) entry ‘share, *n*<sup>1</sup>’. This root seems to be common to Old English (*scear*), Old Frisian (*skere*), Middle Low German (*schar*), and Old High German (*scar*). The gender of the word tends to fluctuate between feminine, masculine and neuter.

<sup>2</sup> JH Hessels *Corpus Glossary* (CUP Cambridge 1890) 8 (attested c 725).

<sup>3</sup> *Oxford English Dictionary* (n 1 above) entry ‘shear, *v*’. Teutonic cognates are the same as for share, whereas outside Teutonic languages the root appears to be found in the Greek word for ‘shave’ and in the Lithuanian and Irish for ‘separate’.

<sup>4</sup> *Ibid* entry ‘share, *n*<sup>2</sup>’.

century a share began to be understood as a portion allotted to an individual in the distribution of a larger mass.<sup>5</sup> Ever since, a share has been viewed as, to use a modern colloquialism, a ‘cut’, not too distant from a slice of cake, attributed to a person. Vice versa, a share can also be a quota contributed, or to be contributed, by an individual.

The modern corporate metaphor emerged from the metonymy around the year 1600.<sup>6</sup> This was the time when merchant adventurers began to organize themselves in companies for trading overseas. ‘The ship, wherein my Father had halfe share’<sup>7</sup> illustrates the metaphor, for the share is in the abstract enterprise or adventure, rather than the ship, and it is measured by the contribution.

While at first companies resembled trade protection associations within which each member carried on trade separately with his own stock, gradually they turned into joint commercial enterprises operating with a joint stock. The origin of the modern concept of share is to be traced in the possibility of varying levels of subscription to this stock.<sup>8</sup> Since then companies have undergone considerable evolution. Registration under the Companies Act and alternative incorporation procedures now differentiate companies from unincorporated partnerships and associations.<sup>9</sup> What remains unchanged is the idea that a company, however it is conceptualized, supposes a plurality of people interested in a quantum of wealth. The numerical expression of this aggregate of wealth is the corporate capital and the units into which the capital is divided are the shares.

The English language adopts this metaphor, almost oblivious of its being one. It is most interesting that Italian and German equivalents of the word ‘share’ do not immediately suggest the idea of a portion of something. The Italian and German words for ‘company share’ are, respectively, *azione* and *Aktie*. The common etymological root, which also encompasses the Dutch *aktie*, the French *action* and the Spanish *acción*, is the Roman *actio*. In Latin *actio* bore diverse meanings but in the law it meant ‘claim’ in a procedural sense.<sup>10</sup> Thus *actio furti* was the claim in respect of theft, and *actio empti* was the claim in respect of a purchase, and so on.<sup>11</sup> The modern derivatives all contemplate the

<sup>5</sup> *Oxford English Dictionary* (n 1 above) entry ‘share, n’<sup>3</sup>.

<sup>6</sup> On 31 December of that year the East India Company, formally the Governor and company of Merchants Of London Trading into the East Indies, received its first charter and was thus granted a monopoly of trade within the Indies.

<sup>7</sup> F Brooke (tr) *The World Surveyed: or, the Famous Voyages and Travailles of Vincent Le Blanc, or White de Marseilles* (J Starkey London 1660) 4.

<sup>8</sup> P Ireland ‘Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Corporate Personality’ (1996) 17 *J Legal History* 41.

<sup>9</sup> PL Davies (ed) *Gower and Davies’ Principles of Modern Company Law* (7th edn Sweet & Maxwell London 2003) ch 1.

<sup>10</sup> G Frè *Società per azioni: Art. 2325–2461* in A Scialoja and G Branca (eds) *Commentario del codice civile* (5th edn Zanichelli Bologna 1982) 170 fn 3.

<sup>11</sup> The passage from the generality of *agere* (to do) to this specialized meaning is historically and linguistically complex: H Heumann and E Seckel *Handlexikon zu den Quellen des römischen Rechts* (Fischer Jena 1907) 9–10.

share as a claim or entitlement to exercise certain rights against the company and possibly see the shareholder as playing some active role within the corporate framework.<sup>12</sup>

The linguistic assumption in continental Europe that the essence of a share lies in the shareholder's claim against the company has an echo in the English classification of a share as a 'chose in action'.<sup>13</sup> The key to the meaning of this phrase lies in the contrast between 'in possession' and 'in action'. Choses in action are, by definition, things which are not in possession. Abstract personality of this kind cannot be physically enjoyed because it consists of an entitlement accessible only by legal action. For Blackstone the nature of property in action is such 'where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law . . .'.<sup>14</sup> For purposes of classification, however, choses in action are best encouraged to slip into obsolescence. They form a catch-all category<sup>15</sup> encompassing all that remains after the elimination of corporeal moveable things, or 'chattels'. But when chattels are subtracted from things, the taxonomical utility of a category of 'all the rest' is marginal.<sup>16</sup> The resonance between share as 'action' and share as a thing 'in action' and not 'in possession' remains.

The English word 'share', with its embedded metaphor of cutting, suggests that there are, or at least there were at the time when the usage originated, corporeal things to be shared. A 'corporeal' is a thing which has 'a body' (*corpus*) and can be perceived with the sense of touch (*tangi potest*). By contrast, the Italian word *azione* is entirely abstract and indicates a shareholder's claim deriving from participation in the company. Therefore, it is from the outset meaningless to speak of 'azione in a corporeal thing'. The idea of claim or action cannot be employed to paraphrase the concept of portion.

<sup>12</sup> In T Ascarelli *Studi in tema di società* (Giuffrè Milano 1952) 4 fn 5 the origin of this idea is attributed to K Lehmann *Geschichtliche Entwicklung des Aktienrechts* (Heymann Berlin 1895).

<sup>13</sup> *Humble v Mitchell* (1839) 11 Ad & El 205, 209, 113 ER 392, 395 (Lord Denman CJ); *Re Bainbridge, ex p Fletcher* (1878) 8 ChD 218, 220–21 (Bacon CJ); cf C Sweet 'Choses in Action' (1894) 10 LQR 303 and (1895) 11 LQR 238; S Worthington *Personal Property Law. Text and Materials* (Hart Publishing Oxford 2000) 302–5.

<sup>14</sup> W Blackstone *Commentaries on the Laws of England* (facsimile of 1st edn 1765–69, University of Chicago Press Chicago 1979) vol II *Of the Rights of Things* (1766) 396–97, 442.

<sup>15</sup> CR Noyes *The Institution of Property* (Longmans Green & Co New York 1936) 396–406.

<sup>16</sup> *Gower and Davies' Principles of Modern Company Law* (n 9 above) 615 refers to 'choses in action' as a 'notoriously vague' category, 'used to describe a mass of interests which have little or nothing in common except that they confer no right to possession of a physical thing, and which range from purely personal rights under a contract to patents, copyrights and trade marks'. The confusion surrounding the category is witnessed by some rather abrupt changes in its content. For instance, according to the Patents Act 1977 s 30(1), unmodified by the Patents Act 2004: 'Any patent . . . is personal property (without being a thing in action) . . .'. By contrast, according to the Patents Act 1949 a patent was a chose in action, as was implied by the identical formulation of ss 38(5) and 54(5): '[T]he rules of law applicable to the ownership and devolution of personal property generally shall apply in relation to patents as they apply in relation to other choses in action . . .'.



## B SHARES AS CORPOREAL THINGS

The distinction between corporeal and incorporeal things dominated the Roman *ius rerum* (the law of things). What follows is structured on that distinction, which remains important even today in the understanding of the different senses of ‘property’.

The Roman institutional scheme which underlies all systematic thinking in the western legal tradition divided private law into three: the law of persons, things (*res*), and actions. As for *res*, according to Justinian:

Some things are corporeal, some incorporeal. Corporeal things can actually be touched—land, a slave, clothes, gold, silver, and of course countless others. Incorporeal things cannot be touched. They consist of legal rights—inheritance, usufruct, obligations however contracted.<sup>17</sup>

Differently from the Latin *res*, the words employed in some modern languages to signify ‘thing’ are not neutral as to the physical dimension. Thus the Italian *cosa* (plural: *cose*) is commonly thought of as a concrete entity.<sup>18</sup> Hence the quality of ‘incorporeal’ tends to be attached to *beni* (singular: *bene*) rather than *cose*.<sup>19</sup> Again, the German for ‘thing’ (*Sache*, often in the plural form, *Sachen*) is concrete: ‘Only corporeal objects are things for the purposes of the law’.<sup>20</sup>

All shares are essentially incorporeal. However, in the course of their four-century existence company shares have conducted two flirtations with the category of corporeal things. One, true to the English etymology, attempted to see the share as corresponding to a portion of the corporeals which constituted the company’s underlying assets. The other focused on the share certificate, the paper which has traditionally been viewed as embodying the share.

## 1 Underlying Assets

The pre-modern perception seems to have had two bases. First, there was initially no firm distinction between a company’s assets and the corporate

<sup>17</sup> Justinian *Institutes* 2.2 pr –2:

Quaedam praeterea res corporales sunt, quaedam incorporales. Corporales hae sunt, quae sui natura tangi possunt: veluti fundus homo vestis aurum argentum et denique aliae res innumerabiles. Incorporales autem sunt, quae tangi non possunt. qualia sunt ea, quae in iure consistunt: sicut hereditas, usus fructus, obligationes quoquo modo contractae’.

P Birks and G McLeod (trs and eds) *Justinian’s Institutes* (Duckworth London 1987) 61. Cf Gaius *Institutes* 2.12–14 in F de Zulueta (tr and ed) *The Institutes of Gaius* (Clarendon Press Oxford 1946) 67–69.

<sup>18</sup> V Zeno-Zencovich ‘Cosa’ in *Digesto delle Discipline Privatistiche (Sezione Civile)* (UTET Torino 1993) vol IV, 438.

<sup>19</sup> A definition of *beni* is found in Ch 2 text to nn 124.

<sup>20</sup> BGB § 90: ‘Sachen im Sinne des Gesetzes sind nur körperliche Gegenstände’.

capital as a number expressing the value of the resources. Secondly, the assets being preponderantly corporeal, it was easy to overlook their not being exclusively so.

(a) *Shares in the assets*

There is hard evidence that pre-modern shares were indeed equated with fractions, albeit undivided fractions, of the company's assets. The conception that the economic return to be associated with shares lay rather in the profits deriving from the undertaking of the company than the patrimony owned by the company itself is fairly recent.

Until well into the 19th century the notion persisted that when the material substratum of the company was *terra firma* its shares were themselves realty. A share in the navigation of the river Avon was realty.<sup>21</sup> No stable distinction was taken between the land itself and an interest, itself incorporeal, in that most corporeal of things.<sup>22</sup> This was also the case for the 72 shares in the New River Company, which started with an aqueduct to bring a fresh stream of water to the City of London and endured to become the oldest surviving business corporation in the country. It is worth pausing on this, for the history of this company is an account in microcosm of the evolution of shares.<sup>23</sup>

In the first decade of the 17th century the business of bringing water was assigned by the City Fathers to Hugh Myddleton and his heirs by means of an indenture couched in the language of real property, the substratum of the whole enterprise being a watercourse. Ownership of the bed of the river initially remained in the landowners, who were subjected to a compulsory servitude *aquae ductus*. Later the company bought parts of the bed and some land, which was held to belong to the shareholders rather than the company. Hugh Myddleton proved the right man to fight land-owning opposition to the project and raise further capital. He did so by issuing shares, notwithstanding that the enterprise was still unincorporated.<sup>24</sup> The Charter of incorporation preserved the original numbers, providing for only 29 members who would hold a moiety divided into 36 transferable shares, whereas the other moiety, also consisting of 36 shares, was the King's half. Subsequent transfers of shares took place in the manner of a conveyance of land, which treated the share as the interest

<sup>21</sup> W Cruise *Cruise on Real Property (A Digest of the Laws of England Respecting Real Property)* (2nd edn London 1818) I 58.

<sup>22</sup> This distinction was taken later: WB Lindley (ed) *Lindley on Companies* (N Lindley *A Treatise on the Law of Companies, Considered as a Branch of the Law of Partnership*) (6th edn London 1902) I 630.

<sup>23</sup> The complete story of the founding, governance, and finance of the company is in B Rudden *The New River* (OUP Oxford 1985). On another note, the ingenious technology which enabled the water to be distributed through an aqueduct of elm (later, iron) is the subject matter of R Ward *London's New River* (Historical Publications London 2003), rev B Rudden 'The Purchas'd Wave' in *London Rev of Books*, 22 July 2004, 28. In Ward's book shares are only dealt with in an appendix.

<sup>24</sup> Rudden *The New River* (previous n) 1–19.

of a tenant in common in fee simple absolute in possession of a corporeal hereditament.<sup>25</sup>

Three 18th-century cases show the application of the rules for realty to the New River shares.<sup>26</sup> In *Drybutter v Bartholemew*,<sup>27</sup> which is authority for the statement that the transfer of the New River shares took place by fine or recovery, Jekyll MR accepted that the shares, although in themselves incorporeal, were realty.<sup>28</sup> In *Townsend v Ash*<sup>29</sup> Lord Hardwicke LC was confronted with the problem of what amounts to disseisin of a share, which the parties agreed to consider as real estate. He concluded that neither the defendants' taking out water nor digging the soil would have been sufficient to enable them to levy a fine. To obtain seisin they needed to show prior receipt of the dividends.<sup>30</sup> Although he treated the share as an interest in the river, he held that only reception of the dividends could count as adverse possession, for the only revenue inherent in shareholding was the dividends. The availability to the shareholder of ejectment and the use of the machinery of conveyance by fine and recovery proved that the shares conferred the right to the possession of the land. In 1778, in establishing the entitlement of a putative shareholder, *Sandys v Sibthorpe* ruled that 'New River shares [are] real property and descendible to the heir'.<sup>31</sup>

(b) *Separate assets*

Modern law has separated the company from the shareholders and hence the assets of the company from the assets of the shareholders. Ubiquitous incorporation is a fairly recent statutory phenomenon.<sup>32</sup> With few exceptions, 18th-century commercial associations were not incorporated. Their members were unlimitedly liable.<sup>33</sup> The company was not conceptualized as an entity distinct from the body of shareholders.<sup>34</sup> In the 19th century the separate identity strengthened, and the notion that shares gave their owners a direct property interest in the company assets was gradually abandoned.<sup>35</sup> Incorporation by registration became more common alongside those by charter and statute, and

<sup>25</sup> *Ibid* 44–47.

<sup>26</sup> *Ibid* 53–57.

<sup>27</sup> (1723) 2 P Wms 127, 24 ER 668.

<sup>28</sup> *Ibid* 128; 669.

<sup>29</sup> (1745) 3 Atk 336, 26 ER 995.

<sup>30</sup> *Ibid* 339; 996.

<sup>31</sup> (1778) Dick 545, 21 ER 382.

<sup>32</sup> P Ireland 'Company Law and the Myth of Shareholder Ownership' (1999) 62 MLR 32, 41–44, 52–54; P Ireland 'Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality' (1996) 17 J Legal History 41, 45–48, 67–69.

<sup>33</sup> C Mitchell 'Companies and Other Associations' in P Birks (ed) *English Private Law* (OUP Oxford 2000) 133 [3.54], and see the *Second Cumulative Updating Supplement* to the work (2004).

<sup>34</sup> Mitchell (previous n) [3.56]. See *Sutton's Hospital Case* (1612) 10 Co Rep 1a and 23a; 77 ER 937 and 960.

<sup>35</sup> *Ibid* [3.57]. See *Bligh v Brent* (1836) 2 Y & C 268, 160 ER 397.

lawyers slowly came to understand that its effect was to create a reified abstract entity.<sup>36</sup>

*Salomon v Salomon & Co Ltd* was the landmark.<sup>37</sup> The House of Lords held that a trader could lawfully sell his then solvent business to a limited liability company. The company held its own rights and bore its own duties. It was not a mere alias for the vendor. Nor need there be any natural ‘company’ in the sense of a plurality of people in operating partnership. Modern law takes the separate personality of companies and even of partnerships for granted.<sup>38</sup> Shareholders will commit theft if they deprive the company of its assets.<sup>39</sup>

(c) *Separate loss?*

A fairly novel context has allowed for a particular reaffirmation of the principle that a company and its shareholders are separate entities. In *Pilmer v The Duke Group Ltd (in liq)*,<sup>40</sup> the High Court of Australia held that if a company is induced to issue shares for value in kind which turns out to be woefully inadequate, the shareholders suffer a loss by the dilution of their shareholding, but the company itself suffers no loss at all beyond the cost of the issue and some deterioration of its power to raise more capital.<sup>41</sup>

The same logic, applied to the reverse case, underlies recent English case law limiting the notion that shareholders will suffer ‘reflected loss’ where the fortunes of the company worsen. Reflective loss is loss which would be made good if the company had enforced its rights against the defendant wrongdoer. Whilst it is uncontroversial that the mere fact that a company has a cause of action against a defendant does not mean that the shareholder has one,<sup>42</sup> the ambit of the rule denying recovery of reflective loss when the defendant has not only

<sup>36</sup> Mitchell (n 33 above) [3.58].

<sup>37</sup> [1897] AC 22 (HL).

<sup>38</sup> The idea of separate legal personality has crept into the recent proposal for the reform of the law of partnerships, which otherwise survives almost unmodified from the Partnership Act 1890 and the Limited Partnerships Act 1907. The main thrust of the reform is to encourage continuity of business by avoiding dissolution upon any change of partners. After two joint consultation papers, in November 2003 the Law Commission and Scottish Law Commission published their final report *Partnership Law* (Law Com No 283/Scot Law Com No 192) <<http://www.lawcom.gov.uk/files/lc283-2.pdf>> (accessed 31 Oct 2004). In it is recommended that ‘[a] partnership should have legal personality separate from the partners but should not be a body corporate’ ([5.40] and Draft Bill cl 1(3)). One of the consequences would be the capacity of the firm to hold property in its own name, as opposed to that of the partners ([9.51(1)] and Draft Bill cls 7(1) and 18(1)). Rather incoherently, limited partnerships may still opt out of acquiring legal personality (Draft Bill cl 73). As at 18 October 2004, the Commissions are still awaiting a response from Government. Against formalizing the constitution of partnerships is *Phillips v Symes* [2002] 1 WLR 853.

<sup>39</sup> *R v Phillipou* [1989] Crim LR 559 (CA).

<sup>40</sup> [2001] HCA 31, 180 ALR 249 (HCA).

<sup>41</sup> *Ibid* [48], [64].

<sup>42</sup> This is known as the rule in *Foss v Harbottle* (1843) 2 Hare 461, on which AJ Boyle *Minority Shareholders’ Remedies* (CUP Cambridge 2002) 1–10. For authority that a duty owed by a director to its company does not translate into a fiduciary duty owed directly to the shareholder, see recently *Peskin v Anderson* [2001] 1 BCLC 372 (CA).

broken a duty owed to the company, but also to the shareholder, is less clear. The English debate has spanned at least 20 years.<sup>43</sup> *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*<sup>44</sup> was concerned with a shareholder's right to bring proceedings against a defendant who had harmed the company, thereby causing the shareholder's shares to drop in value. The Court of Appeal, oblivious to economic considerations, maintained the view that, shares being a mere right of participation in the company on the terms of the articles of association, such right of participation could not be affected by a loss of the company. The shareholder's loss was a mere reflection of that suffered by the company, hence recovery was debarred.

A more authoritative justification for the bar to recovery came from the House of Lords in *Johnson v Gore Wood and Co.*<sup>45</sup> In this case the claimant majority shareholder could not recover the loss of profits, salary, and pension contributions following the failure on the part of his company promptly to exercise a lucrative option for the purchase of land, since the claimed loss was but a reflection of the loss suffered by the company. However, Lord Bingham and Lord Millett conceded that a shareholder could recover loss which was separate and distinct from the company's.<sup>46</sup> The Court of Appeal elaborated on this proposition in *Giles v Rhind*.<sup>47</sup>

Most recently, the ambit of the rule against reflective loss was rediscussed by Court of Appeal in *Gardner v Parker*.<sup>48</sup> Mr Parker was the sole director of both BDC and Scoutvale. BDC owned part of Scoutvale and was owed a considerable sum by it. Mr Parker owned most of the issued capital of both. He permitted Scoutvale to enter into some transactions at a substantial undervalue, thus causing BDC to go into liquidation. Mr Gardner, as beneficial owner of the minority of the capital, was assigned all rights of action of BDC in liquidation. He sued alleging that Mr Parker had acted deliberately in breach of his fiduciary duty towards BDC and in furtherance of his own interests at its expense, had thereby caused the company great loss. He sought to recover such loss together with interests and costs. Neuberger LJ, dismissing the appeal, denied, on the one hand, that a claim for breach of fiduciary duty should be treated any differently from other claims for the purposes of the application of the rule against reflective loss, whose *raison d'être*, namely to avoid double recovery, remained unaltered.<sup>49</sup> On the other hand, he did not think that the case fell within the

<sup>43</sup> C Mitchell 'Shareholders' Claims for Reflective Loss' (2004) 120 LQR 457. See eg *Ellis v Property Leeds (UK) Ltd* [2002] EWCA Civ 32, [2002] 2 BCLC 175 (CA); *Giles v Rhind* [2002] EWCA Civ 1428, [2003] Ch 618 (CA); *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452, [2003] Ch 350 (CA).

<sup>44</sup> [1982] Ch 204 (CA).

<sup>45</sup> [2000] UKHL 65, [2002] 2 AC 1 (HL).

<sup>46</sup> *Ibid* 35–36, 64–65. Different criteria apply in Italian law. For instance, with regard to those decisions of the general meeting of shareholders which are contrary to law or to the company articles, any shareholder may sue for compensation of the loss derived to him, howsoever caused: revised Italian CC art 2377 para 4. However, uncertainties remain as to what loss is successfully actionable.

<sup>47</sup> [2002] EWCA Civ 1428, [2003] Ch 618 (CA) [61]–[62] (Chadwick LJ).

<sup>48</sup> [2004] EWCA Civ 781.

<sup>49</sup> *Ibid* [49].

exception to the bar set out in *Giles v Rhind*, according to which the loss was recoverable by the shareholder where, by reason of the wrong done to it, the company was so denuded of funds as to be unable to pursue its claim against the wrongdoer.<sup>50</sup> The company's inability to pursue a claim was interpreted very restrictively.<sup>51</sup>

Thus, the rule against reflective loss confirms that, although a company and its shareholders are still sometimes referred to promiscuously,<sup>52</sup> the conception of shares as specific portions of the assets belonging to certain shareholders has been completely abandoned.<sup>53</sup>

(d) *Survival of the old notion*

The old notion survives in unincorporated associations that there is no separate person apart from the members.<sup>54</sup> The association acquires funds by subscription or through donations, legacies, and fund-raising activities. An unincorporated association does not have the capacity to hold property. If the association is charitable, trustees may hold property on trust for the purposes themselves. If it is not charitable the members must one way or another hold the property themselves, whether or not behind the curtain of a trust. The interpretation which has in general proved satisfactory is that the members hold the property as joint tenants subject to the contract between them which is embodied in the rules. Hence the element of dedication to the purposes of the society is achieved through that contract. Thus, in *Re Recher's Will Trusts*<sup>55</sup> a testatrix had chosen to make a gift of her residuary estate to a non-charitable unincorporated association which pursued anti-vivisection. Brightman J explained:

In the absence of words which purport to impose a trust, the legacy is a gift to the members beneficially, not as joint tenants or as tenants in common so as to entitle each member to an immediate distributive share, but as an accretion to the funds which are the subject-matter of the contract which the members have made inter se.<sup>56</sup>

The rise of incorporation has excluded the possibility of any flirtation between the shares and the underlying assets. The only qualification is that a shareholder will be able to lay hands on the residue of value or any residual assets in certain remote and undesired contingencies, such as after the company is liquidated.<sup>57</sup>

<sup>50</sup> *Giles v Rhind* (n 43 above) [66] (Chadwick LJ).

<sup>51</sup> *Gardner v Parker* (n 48 above) [62]–[64].

<sup>52</sup> Mitchell (n 33 above) [3.61].

<sup>53</sup> For the philosophical origins of the shareholders' ownership of the company as mere 'control at extreme arm's length' see A Ryan *Property and Political Theory* (Blackwell Oxford 1984) 127.

<sup>54</sup> Mitchell (n 33 above) [3.115].

<sup>55</sup> [1972] Ch 526.

<sup>56</sup> *Ibid* 539.

<sup>57</sup> But even then creditors are entitled to be paid ahead of shareholders: cf the distinction between 'equity' as the capital held by shareholders and 'debt' as the funds the company borrows from lenders in R Goode *Principles of Corporate Insolvency Law* (2nd edn Sweet & Maxwell London 1997) 2–3.

*(e) Civilian shares and underlying assets*

Civilian jurisdictions follow the same rule.<sup>58</sup> Under Italian law it is equally clear that, in normal conditions, no equation can be established between the value of an arithmetical fraction of the corporate capital and a right in *rem* in the corresponding part of the company patrimony.<sup>59</sup> The shareholder's right to have his contribution to the assets (*conferimento*) reimbursed will only materialize in the event of liquidation of the company or capital decrease, and even then only after the company's creditors have been paid.<sup>60</sup> While the company is existing, the assets back up the capital and on no account can the shareholders appropriate them.<sup>61</sup>

Italian courts constantly reaffirm the difference between shares or quotas in a company and the corporate assets. The occasion for distinguishing the two entities often arises in the context of alienation of shares.<sup>62</sup> In a case about the sale of the shares of a building society, the Court of Appeal of Milan had occasion to underline the principle. The appellant company claimed to be the owner of all shares in the respondent company, hence entitled to dispose of a garage belonging to the respondent, which the latter company had leased to the appellant. The court held that the share transfer would not have transferred title to any moveables or immoveables which constituted the corporate assets. The status of member conferred no right in the building. The alienor shareholders had no such right to sell. The building belonged to the company as a quite distinct entity.<sup>63</sup>

In slight counter-tendency, the *Cassazione* has recently conceded that there is a special link between shares and underlying assets in the event of alienation of the entire capital, for the existence of a solid underlying patrimony is no secondary consideration to a buyer who has relied on it in good faith.<sup>64</sup>

<sup>58</sup> Similarly, in German law in the event of liquidation (*Auflösung*) of the company the shareholders are entitled to the assets left after all the company's debts have been paid (*Verteilung des Vermögens*) (AktG § 271).

<sup>59</sup> G Frè *Società per azioni: Art. 2325–2461* in A Scialoja and G Branca (eds) *Commentario del codice civile* (5th edn Zanichelli Bologna 1982) 169.

<sup>60</sup> MS Spolidoro 'I conferimenti in denaro' in GE Colombo and GB Portale (eds) *Capitale: Euro e Azioni. Conferimenti in denaro* (UTET Torino 2004) 247, 266.

<sup>61</sup> For the relationship between erosion of the capital and losses on the part of the company so great as to attribute a negative value to the company assets see Trib Napoli 1 ottobre 1998 *IMER CM3 Group srl* in *Rivista del Diritto Commerciale* 1999, 129.

<sup>62</sup> Eg Corte d'Appello di Roma 29 maggio 2001 in *Le Società* 2001, 1354, noted GM Zamperetti *ibid* 1355. The decision follows Cass 23 gennaio 1986 no 423; Cass 17 febbraio 1984 no 1190.

<sup>63</sup> Corte d'Appello Milano 9 settembre 1994 *Nescar v Giardino De Sanctis* in *Le Società* 1995, 531, noted A Pagliani *ibid* 533.

<sup>64</sup> Cass Civ sez I 20 febbraio 2004 no 3370 *Giacomelli/Mottini v Fin Recos srl* in *Giurisprudenza Italiana* 2004, 997, 998 [6.2]. Cf the ambiguous Trib Napoli 11 marzo 2002 *Marigliano v Russo e Apicella* in *Banca Borsa Titoli di Credito* 2004 II 64, 65. Along similar lines, G Ragusa *Maggiore Trattato delle società* (CEDAM Padova 2003) vol II 323 ff speaks of a share as a 'res . . . which gives right to a part of the corporate patrimony' (341).

In conclusion, with the modern orthodoxy and its clean separation of the assets of the shareholder from the assets of the company has thus disappeared the flirtation with the notion that the shares are interests in corporeal things. However much land a company owns, shares in an English company are personalty. Section 182(1)(a) of the Companies Act 1985 expresses this idea in both positive and negative terms, by stating that shares ‘are personal estate or, in Scotland, moveable property and are not in the nature of real estate or heritage’.

## 2 Documents

The alternative association between shares and corporeals is through paper, or the share certificate. The onset of a paperless market, to which we will return in Chapter 7, means that the debate around whether any share can qualify as a documentary intangible is fading into history. It will be swiftly dealt with.

### (a) *Documentary intangibles*

A documentary intangible is a mere right which is enclosed in and represented by a paper. The right is patently intangible, the paper tangible. The phrase ‘documentary intangibles’ classifies such rights as tangible, on the strength of the tangible document, in contrast to ‘pure’ intangibles.<sup>65</sup> Strictly speaking, an intangible is something which is not cognizable with the sense of touch.<sup>66</sup> Logically, there cannot be different degrees of intangibility. However, gradations may be acceptable on the empirical level. A true documentary intangible is one in which the paper is seen as having the value of the right in which it is embodied, while a documented intangible is a right merely evidenced in the paper. We can say that documentary intangibles are corporeals in a diluted or extended sense. English law has long engaged in this extension. As early as the Middle Ages the first intangibles to be made tangible were *créances* (debts) represented by wooden tallies.<sup>67</sup> A tally was a ‘wooden’ intangible and as such a ‘documentary’ intangible *ante litteram*.

A synonym of ‘documentary intangible’ is ‘document of title’. Such title is either to goods or to the payment of money.<sup>68</sup> Thus, various instances of

<sup>65</sup> R Goode *Commercial Law* (3rd edn Butterworths Lexis Nexis London 2004) 47–50.

<sup>66</sup> *Oxford English Dictionary* (n 1 above) entry ‘intangible, *a* and *n*’. The word comes from the Latin *in-tangibilis*, ie ‘non-tangible’, stemming on its turn from the verb *tangere*, ‘to touch’.

<sup>67</sup> Tallies were a widespread means of proving indebtedness but lost some of their attraction when they were held, even when sealed, not to displace wager of law: TFT Plucknett *A Concise History of the Common Law* (Butterworths London 1956) 633; *Anon* (1378) in JH Baker and SFC Milsom *Sources of English Legal History: Private Law to 1750* (Butterworths London 1986) 254–55; SFC Milsom (ed) F Pollock and FW Maitland *History of English Law* (CUP Cambridge 1968) vol II 215; B Rudden *The New River* (OUP Oxford 1985) 211.

<sup>68</sup> The last edition of Goode (n 65 above) above has added to these a third category of documents of title to negotiable securities (48).



documents of title are bills of lading, negotiable instruments, negotiable certificates of deposit, bearer bonds, and other bearer securities. When the document is equated with and embodies the right to the goods it behaves like a chattel. Delivery, with any necessary endorsement, will transfer to the deliverer legal title to the embodied right. Misappropriation of the document falls within the tort of conversion, just in the same way as misappropriation of a bicycle.

(b) *Shares as documentary intangibles*

Shares have traditionally presented themselves in the form of certificates. While shares are intangibles, certificates are tangible documents. The phrase ‘documentary intangibles’ has sometimes been used to describe share certificates.<sup>69</sup> Extreme caution is necessary in this regard. So far as ownership of a share implies rights against the company, those rights are intangible. The same is true of a share viewed as a unit of the corporate capital, which is a rigid numerical entity whose amount is stated, depending on the type of company, in the memorandum of association or in the articles.<sup>70</sup> As an intangible fraction of capital a share may have a nominal value, distinct from the market one or the one paid for the share on the stock exchange.<sup>71</sup>

Paper can perform different functions. It can embody a right and it can evidence a right. When it embodies the right it bears the value of the right. Otherwise it has only its own negligible value, as a piece of paper. In the case of English shares the certificate is generally confined to the purely evidential role. Hence in the common case it is not correct to refer to shares as documentary intangibles. They are at most documented intangibles. This being the general situation, there is one exceptional but unimportant case.

(c) *Bearer shares*

Bearer shares are not issued very frequently in either English or Italian companies. Despite their lack of importance, a study of personal property would be incomplete if it entirely neglected to consider the very category of shares in relation to which some major concepts of this area of law, such as possession and

<sup>69</sup> MG Bridge *Personal Property Law* (3rd edn OUP Oxford 2002) 74.

<sup>70</sup> CA 1985 s 2(5)(a), s 15(2), s 7(2).

<sup>71</sup> The aggregate of fully paid shares is called ‘stock’. Portions of this aggregate can split up into fractions of any amount, without regard to the original nominal value of the shares. *Morrice v Aylmer* (1875) LR 7 HL 717, 724; Lord Hailsham of St Marylebone (ed) *Halsbury’s Laws of England* (4th edn Butterworths London 1996 reissue) vol 7(1) 166 [173] (capital), [210] (stock), [430] ff (shares). Italian CC art 2346 para 3 allows for shares to be issued without a nominal value, in which case the ‘dimension’ of the shareholding is measured by comparing the number of shares held by each shareholder with the total number of shares issued: G Figà-Talamanca ‘Le azioni senza valore nominale’ in GE Colombo and GB Portale (eds) *Capitale—Euro e azioni. Conferimenti in denaro* (UTET Torino 2004) 218, 221–22. On similar lines, cf the *Stückaktie* introduced by the German *StückAG* in 2003. CC art 2348 dissociates the content of a share from the equality of nominal value, for different categories of shares may enjoy different rights.

negotiability, do operate, by virtue of the paper. Bearer shares constitute the only category of English shares which can be described as documentary intangibles. The function of the certificate issued in respect of bearer securities in general is that of document of title. The word 'bearer' signifies that the rights and the value vest in the bearer—the person currently in possession of the paper.

(i) *English bearer shares* Bearer shares are closely analogous to documents of title to money, or 'instruments'. Together with bearer bonds (ie debentures) and certificates of deposit, share warrants-to-bearer are undertakings on the part of the company to pay sums of money.<sup>72</sup>

In the traditional picture, the acquisition of title to company shares normally takes effect by entry of the holder's name in the register of shareholders and of shareholdings. Bearer shares are the exception. A company limited by shares may, if so authorized by its articles, issue a warrant stating that the bearer is entitled to the fully paid-up shares specified in it. Paper coupons will entitle the bearer to the payment of the future dividends on the shares included in the warrant.<sup>73</sup> These then become bearer securities. The bearer of the warrant is unquestionably a shareholder but his name does not appear on the register of shareholders.<sup>74</sup> His title to the shares is inherent in the physical control of the warrant. Possession of the paper establishes the entitlement and substitutes for the register as prima facie evidence of title.

(ii) *Italian bearer shares* Similarly, Italian bearer shares (*azioni al portatore*) are distinguished from nominative shares (*azioni nominative*), which are issued in the name of a specific shareholder and registered. The name of the holder of *azioni nominative* appears both on the body of the document and in the company register.

Revised article 2354<sup>75</sup> of the Civil Code provides that shares can be issued in either bearer or nominative form, the choice being left to the shareholder, unless the law or articles of association of the company establish that the shares must be nominative. On no account can shares be issued in bearer form until they are fully paid up. This provision has been in existence for over 60 years. That it should have been left untouched by the 2003 reform of company is somewhat surprising given the unimportance of bearer shares as a form of investment. Indeed, before the 1942 version of the provision was even enacted, tax legislation had established that shares must be issued as nominative and not to bearer.<sup>76</sup> Since then, shares could no longer freely pass from hand to hand

<sup>72</sup> Rather than orders to another to pay that sum: Goode (n 65 above) 477.

<sup>73</sup> CA 1985 s 188, as substituted by CA 1989 sch 17(6).

<sup>74</sup> P Davies (ed) *Gower and Davies' Principles* (7th edn Sweet & Maxwell London 2003) 640.

<sup>75</sup> Before the reform of company law (D Lgs 17 gennaio 2003 no 6; D Lgs 6 febbraio 2004 no 37), the numbering of this article was CC art 2355.

<sup>76</sup> RDL 25 ottobre 1941 no 1148, converted into L 9 febbraio 1942 no 96 esp art 1; L 29 dicembre 1962 no 1745 art 13.

without the register mirroring all these changes. Nowadays bearer shares are only admitted for certain types of companies and their importance is marginal.<sup>77</sup>

(d) *Registered shares*

Shares other than bearer ones cannot be accommodated with ease under the heading of documentary intangibles. Moreover, in this case the analysis works out differently for English and continental shares.

(i) *English registered shares* Paper, now disappearing from the market altogether, has always had a less important role in relation to registered as opposed to bearer shares. Title to registered shares, unlike other items of personal property, is acquired through entry in the register of shareholders.<sup>78</sup> A certificate makes its first appearance alongside a share as soon as the purchaser's name is entered in the register of shareholders. Upon registration he is entitled to the delivery of a certificate. This piece of paper is evidence of the shares held by a member.<sup>79</sup> It declares that its holder is the registered owner of the shares mentioned in it and to the extent mentioned in it.<sup>80</sup> The certificate is the only documentary evidence of legal title in the possession of a shareholder,<sup>81</sup> but the requirement of registration remains obligatory and no shareholder will be issued with a certificate before having complied with it.<sup>82</sup> Thus, possession of the certificate as evidence of a member's title to the corresponding shares must yield to that offered by the register of shareholders, which is the only reliable source of information as to all the matters authorised to be inserted in it.<sup>83</sup>

*Re Baku Consolidated Oilfields Ltd*<sup>84</sup> is authority for the limited weight of certificates as evidence of title. Baku was a company incorporated for the purposes of acquiring and exploiting oil concessions in Russia. The Russian government having seized the company's assets, Baku was wound up before it could even commence trading. A claim for compensation that was lodged in the 1920s failed, but in the 1980s an agreement was reached between the Soviet and

<sup>77</sup> L 7 giugno 1974 no 216 and TUF arts 145 ff (*azioni di risparmio*) (on pros and cons of which see F Galgano *Le nuove società di capitali e cooperative* in F Galgano and G Genghini *Il nuovo diritto societario* (2nd edn CEDAM Padova 2004) vol I, 109, 111–12); D Lgs 25 gennaio 1992 no 84 (*società di investimento a capitale variabile*); L 31 gennaio 1992 no 59 art 5 (*azioni di partecipazione cooperativa*).

<sup>78</sup> CA 1985 s 22.

<sup>79</sup> CA 1985 s 185, s 186 (as amended by CA 1989 s 130(7) sch 17 para 5).

<sup>80</sup> *Re Babia and San Francisco Railway Co Ltd* (1868) LR 3 QB 584, 594–95 (Cockburn CJ); cf *Webb v Herne Bay Comrs* (1870) LR 5 QB 642; *Balkis Consolidated Co v Tomkinson* [1893] AC 396 (HL); *Dixon v Kennaway & Co* [1900] 1 Ch 833.

<sup>81</sup> *Shropshire Union Railways and Canal Co v R* (1875) LR 7 HL 496, 509; *Société Générale de Paris v Walker* (1885) 11 App Cas 20 (HL) 29.

<sup>82</sup> *Wilkinson v Anglo-Californian Gold Mining Co* (1852) 18 QB 728.

<sup>83</sup> CA 1985 s 361. In so far as it displays the holders of the legal title to the shares, whilst concealing the identity of the beneficiaries of such holding, even the register is only 'prima facie' evidence.

<sup>84</sup> [1994] 1 BCLC 173.

British Governments for the payment of compensation. In the case the liquidator sought directions as to how the sum received by way of compensation should be distributed. The identification of members entitled to the money proceeded fairly smoothly as regards those whose name appeared on the register of shareholders and their beneficiaries under a will or personal representatives.

However, it turned out that some claimants had purchased the colourful pieces of paper for their aesthetic and ornamental value. They were collectors of share certificates as objects of art, otherwise known as ‘scripophiles’.<sup>85</sup> Clearly, such claimants had not envisaged the certificates as having value attributable to the underlying obligations. Chadwick J said, rejecting the claims of the scripophiles, ‘[P]ossession of a share certificate made out in the name of another is, of itself, no evidence against the company of any title in the possessor to the shares to which the certificate relates’.<sup>86</sup>

The litigation concerning the fraudulent acquisition of certificates proves that a certificate, unlike a share warrant to bearer, is not a document of title to money or negotiable instrument, at least under English law.<sup>87</sup> In itself, it does not entitle the shareholder to claim any performance from the company.

In *Royal Bank of Scotland v Sandstone Properties*<sup>88</sup> an unknown fraudster, pretending to be the holder of a substantial amount of shares in a public company, had contacted the claimant bank in its character as share registrars. He alleged that he had lost the certificates relating to his shareholding in the company and applied for a duplicate certificate. Once he obtained it, he instructed his brokers to sell the shares and enabled them to do so by providing them with the duplicate certificate. The bank received from the innocent brokers the forged transfer form purporting to be in the name of and signed by the shareholder. Being indemnified against any consequence of permitting a transfer of shares without production of the original certificates, the bank amended the share register. After the shares were sold in the market the true shareholder discovered the fraud and the bank had to restore his position by buying replacement shares and paying him lost dividends. The bank sued the innocent brokers on the ground that, by asking the bank to act on the transfer form, they had impliedly warranted that it was genuine. Tuckey J held the brokers liable to indemnify the bank on the ground, among others, that they should not have relied on the certificate as a representation that the person in possession of it was

<sup>85</sup> The International Bond & Share Society, founded in 1978 to promote the study and collection of historic stocks, bonds and shares, maintains a website: <<http://www.scripophily.org>> (accessed 31 Oct 2004) and publishes a quarterly magazine. Similarly, the society *Freunde Historischer Wertpapiere* (Friends of Ancient Documents of Title), based in Frankfurt, publishes the *Zeitung für Historische Wertpapiere*. The founders have published U Drumm A Henseler and E May M Bollen (tr) *Actions et obligations anciennes* (Duculot Paris and Gembloux 1981), original edition *Alte Wertpapiere* (Harenberg Kommunikation Dortmund 1979).

<sup>86</sup> *Re Baku* (n 84 above) 177.

<sup>87</sup> *Longman v Bath Electric Tramways Ltd* [1905] 1 Ch 646 (CA); *Halsbury’s Laws of England* (n 71 above) vol 7(1) 356–57 [487].

<sup>88</sup> [1998] 2 BCLC 429.

the true shareholder.<sup>89</sup> Nor was the bank estopped from denying the validity of the duplicate certificate to anyone who relied on it, including the brokers. In fact, a share certificate issued under the seal of the company is no more than *prima facie* evidence of a member's title to the shares specified in it. It is not a negotiable instrument or a warranty of title by the company.

The conclusion must therefore be that registered shares are not documentary intangibles. Accompanied, as they traditionally have been, by their certificates, they are not more than documented intangibles. The paper does not carry the value of the intangible rights which it evidences. We will come later to paperless modern shares. It need hardly be said that with them the last trace of tangibility disappears.

(ii) *Italian registered shares* Italian registered shares are known as *azioni nominative*, for their holder's name is inscribed both on the certificate and in the register of the issuer. Two fundamental facts have to be reconciled in the attempt to understand their nature. On the one hand, their essence is intangible. The very information which appears on the face of each share certificate relates to matters manifestly intangible, such as its nominal value, the overall value of the capital, the extent to which the share has been paid for (if not in full) and the rights and obligations inherent in it. On the other hand, the share certificates do qualify as documents of title or *titoli di credito*.<sup>90</sup>

A *titolo* (singular form of *titoli*) is in law an entitlement expressed in a document. The physical document is a *chartula* (approximately equivalent to 'certificate' in English). *Titolo* is the entitlement as embodied in the *chartula*. The phrase *di credito* means 'of credit', so that a *titolo di credito* is a documentary entitlement to credit. However, 'credit' has to be understood in a wide sense. It extends beyond money due. It includes any performance which is due. Hence a *titolo di credito* is a documentary entitlement to some performance due to the person entitled. Thus defined, the category encompasses a great variety of documents ranging from cheques to corporate bonds and to the bills representing goods.

Within this broad category, shares qualify, more specifically, as *titoli di partecipazione* (documents of participation), in that they express the complex status of member of a company. Shares are causal, as opposed to abstract, documents of title.<sup>91</sup> A causal document of title is governed by and expressly

<sup>89</sup> [1998] 2 BCLC 434.

<sup>90</sup> CC art 2354 '*Titoli azionari*' ('Shares as Documents of Title'). Before the reform this article was called '*Contenuto delle azioni*' ('Content of Shares'), on which: C Angelici *Le azioni* in P Schlesinger (ed) *Il Codice Civile Commentato* (Giuffrè Milano 1992) 251–306. According to Trib Milano 14 luglio 1988 in *Le Società* 1989, 32, for the legal existence and validity of shares as *titoli di credito* it is not necessary for all the information listed in CC art 2354 to appear on the body of the document, provided that the identification of the shares remains possible.

<sup>91</sup> B Libonati *Titoli di credito e strumenti finanziari* (Giuffrè Milano 1999) 24–27; A Azara and E Eula (eds) *Novissimo Digesto Italiano* vol II entry 'Azioni di società' (UTET Torino 1957) 184.

mentions in its body the legal relationship from which it stems.<sup>92</sup> In the case of shares this relationship is the corporate contract.<sup>93</sup> The content of an abstract document, on the contrary, is effective as it appears without going behind the face of the document. Shares are not abstract documents in that, unlike cheques, they cannot circulate regardless of the legal relationship underlying them: a transfer of shares signifies a transfer of the corresponding status of shareholder.<sup>94</sup>

Thus, in the case of shares, the analogy with chattels, and consequently the inclusion of shares to the category of *titoli di credito*, encounters one limit in the underlying corporate contract, which will attribute the quality of shareholder to the person who has contributed to the capital rather than to the possessor of the piece of paper that is the certificate. Doctrine in the post-war years was indeed preoccupied with preventing the conclusion that ‘incorporation into the document’ would subvert and stultify the underlying substance based on the contractual framework.<sup>95</sup>

The category of *titoli di credito* can be likened to English documentary intangibles (or documents of title). However, it would be rash to make an exact equiparation. One authoritative text draws attention to the complexity of *titoli di credito* and takes pains to emphasize that the single name belies the heterogeneity of the category.<sup>96</sup> In the case of share certificates there is no escaping the fact that they are *titoli di credito*. Yet, in English terms, it is doubtful that this means much more than that they are documented intangibles. According to traditional legal theory, characterization as *titoli di credito* serves the important commercial purpose of allowing the law to treat intangible rights in some respects as though they were corporeal chattels. It justifies the recognition of easier, speedier and more secure means of circulation of moveable wealth.<sup>97</sup> The *chartula* thereby becomes transferable according to rules similar to those dictated for moveables.<sup>98</sup> Also, original title to the document can be acquired, free from previous outstanding interests, on conditions a good deal less rigorous than are required for full negotiability in English law.<sup>99</sup> However, this transferability *inter partes* does not alter the fact that title as against the world rests on endorsement and registration.<sup>100</sup>

<sup>92</sup> The same idea is expressed under German law through the so-called *Kausal- or grundgeschäftbestimmte Wertpapiere* (documents ‘determined’ by the underlying contract).

<sup>93</sup> One radical scholarly view, mirrored in a line of cases, sees the whole life of the company as subject to the principles of the law of contract. A discussion is in F Galgano ‘Contrattualismo e no per le società di capitali’ *Contratto e Impresa* 1998, 1. Cf Cass 26 ottobre 1995 no 11151 in *Giurisprudenza Commerciale* 1996 II 329, noted PG Jaeger *ibid* 334–38, applying *contrattualismo* to company law, and Cass 10 dicembre 1996 no 10970 in *Società* 1997, 539, disapplying it.

<sup>94</sup> F Galgano *Diritto commerciale. L'imprenditore* (8th edn Zanichelli Bologna 2001) 283–84.

<sup>95</sup> G Ferri *I titoli di credito* (2nd edn UTET Torino 1965) 106–9.

<sup>96</sup> Libonati (n 91 above) 26.

<sup>97</sup> F Galgano *Diritto privato* (11th edn CEDAM Padova 2001) 425.

<sup>98</sup> CC arts 1992–2002.

<sup>99</sup> Cf Cass 26 marzo 1980 in *Massimario Giustizia Civile* 1980, 871, 872.

<sup>100</sup> Cass 25 ottobre 1982 no 5567.

The analogy between the Italian and the English taxonomy cannot be carried much further. In fact, in English law only bearer shares, or share warrants-to-bearer, come within the category of documentary intangibles. By contrast, Italian scholars are quite comfortable labelling all types of *azioni*, not only *azioni al portatore* (bearer shares), as *titoli di credito*. But this is a misleading semantic contrast. The term ‘*titoli di credito*’ is neutral as to the precise role played by paper in relation to the share. This explains how Italian law manages, for classificatory purposes, to place all shares under that heading.

(iii) *German Wertpapier* All German shares, whether bearer or registered,<sup>101</sup> are a species of the broader genus of *Wertpapier* (paper bearing value) as Italian shares are part of the category of *titoli di credito*. *Wertpapierrecht*<sup>102</sup> is the ‘law relating to valuable paper’, or, more clearly, to all those documents which embody a patrimonial right.<sup>103</sup> According to the *Wertpapierhandelsgesetz* (statute on the trade in valuable paper) § 2 Abs 1:

*Wertpapiere* . . . whether or not the corresponding documents have been issued, include 1) shares, certificates representing shares, debentures . . . and 2) other valuable pieces of paper that may be comparable to shares or debentures, whenever they can be traded on a market. . . .<sup>104</sup>

Certificates are sometimes called *Effektenurkunden*. Two ideas are run together in that word. *Effekten* are securities and *Urkunden* are the documents. The rights inherent in the security cannot be exercised in the absence of the latter, thus highlighting the importance of possession of the document in the legislation relating to shares, at least in the traditional conception.<sup>105</sup>

As documents, German shares belong to the particular category of documents of title which express participation in a legal institution (*Beteiligungspapiere*). In relation to such documents the right originating out of the legal relationship underlying the paper (*Recht aus dem Papier*) is said to ‘follow’ the right indicated on the face of the paper (*Recht am Papier*). Possession of the paper suffices to acquire a real (*sachlich* or *in rem*) entitlement to exercise such right, although possession is not always enough to infer where the property title lies.<sup>106</sup> Again, it is in the end not possible to say that the paper has more than evidentiary force. The right is not embodied in the certificate, but only evidenced by it. Any doubts on this score will be buried with the certificates themselves, now rapidly becoming obsolete.

<sup>101</sup> AktG § 10(1), ‘Die Aktien können auf den Inhaber oder auf Namen lauten’.

<sup>102</sup> E Schwark ‘Einführung’ in *Bankrecht* (28th edn Beck München 1999) ii–iii.

<sup>103</sup> The *Deutsches Universalwörterbuch* (2nd edn Dudenverlag Mannheim 1989) entry ‘Wertpapier’ defines it as ‘Urkunden über ein privates . . . Vermögensrecht’.

<sup>104</sup> WpHG § 2 Abs 1: ‘Wertpapiere . . . sind, auch wenn für sie keine Urkunden ausgestellt sind, 1. Aktien, Zertifikate, die Aktien vertreten, Schuldverschreibungen . . . und 2. Andere Wertpapiere, die mit Aktien oder Schuldverschreibungen vergleichbar sind, wenn sie an einem Markt gehandelt werden können’.

<sup>105</sup> D Einsele *Wertpapierrecht als Schuldrecht* (JCB Mohr (Paul Siebeck) Tübingen 1995) 10–11.

<sup>106</sup> BGH XI ZR 321/95 v on 25.2.97.

In conclusion, the answer to the question whether shares in their traditional form are or are not corporeal things is that, subject to very limited exceptions, they are not. It is indisputable that the paper certificate is corporeal. Bearer shares apart, we concluded that English shares could not be described as corporeals but at the most as documented incorporeals. Although the terminology points the other way and the conclusion is not beyond argument, the same conclusion appears to be correct for Italian and German shares. If that is correct, even discounting dematerialization, the great majority of shares are incorporeals even if still supported by documentary evidence.

### C SHARES AS INCORPOREAL THINGS

However slender their claim to be corporeal, shares and sub-shares can still be, and indeed are, things. The Roman law of things, the *ius rerum*, included both *res corporales* and *res incorporales*. An incorporeal thing is one which lacks a *corpus*. Incorporeals are synonymous with intangibles.<sup>107</sup> ‘Intangibility’ expresses the impossibility of touching a thing that has no *corpus*. That shares are incorporeals is stated with singular emphasis in the French Civil Code which, introducing *biens incorporels*, expressly includes in their number ‘*parts d’intérêt dans les sociétés de finance*’ (shares in companies).<sup>108</sup> The doctrine then underlines this, saying that such shares are ‘absolute’ incorporeals, entirely detached from any material support.<sup>109</sup>

#### 1 Rights *In Personam*

The incorporeal nature of a share cannot be discussed without invoking the concept of rights *in personam* or personal rights. Of these we shall have to say more in Chapter 5 in drawing the contrast between them and rights *in rem*. Briefly, rights *in personam* are rights held by one person against another, that that other make some performance. Seen from the standpoint of the person against whom they are asserted rights *in personam* are obligations. They bind the person obliged to perform an action in favour of the holder of the right. In the words of the familiar Roman definition: ‘An obligation is a legal tie which binds us to the necessity of making some performance in accordance with the laws of

<sup>107</sup> B Rudden ‘Things as Thing and Things as Wealth’ (1994) 14 OJLS 81, 93.

<sup>108</sup> French Civil Code art 529, discussed by J Carbonnier *Les Biens* (19th rev edn Presses Universitaires de France Paris 2000) 83.

<sup>109</sup> Ibid 93: ‘Les parts sociales appartenant aux associés, soit dans une société de personnes (parts d’intérêt), soit dans une société de capitaux, sont biens incorporels absolus, droits détachés de tout support matériel’. On the extension of the *droit de propriété* to *biens incorporels*, see the texts by L Josserand and A Rouast in F Chabas (ed) H and L Mazeaud J Mazeaud and F Chabas *Leçons de droit civil. Tome II. Biens* (8th edn Montchrestien Mazeaud Paris 1994) 18–23.



our state'.<sup>110</sup> In the Roman institutional scheme obligations formed the largest class of incorporeal things.<sup>111</sup> They often, though not always, arise from a contract.<sup>112</sup>

## 2 English Shares

The memorandum and articles of association of English companies constitute a contract between the company and its members. Issuing shares is a way for the company to raise money. In return for their contribution of cash or non-cash assets, shareholders receive from the corporation certain rights in accordance with that contract. Each share is a bundle of these contractual rights. It entails for its holder a right to dividends, the right to capital, and a right to vote. In other words, shares allocate income rights (dividend), the incidence of risk of loss in the form of priority rights (whenever there is a return of capital), and participation in the power of control (voting rights). The first two aspects build up the 'economic' content of a share. The third represents the 'control' aspect.<sup>113</sup> These are all rights *in personam* against the company.

One much cited English definition of the nature of a share is Farwell J's formulation in *Borland's Trustee v Steel Brothers Co Ltd* where he described a share as:

the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with . . . the Companies Act. A share is not a sum of money . . . but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount.<sup>114</sup>

This passage skilfully combines two distinct and equally intangible aspects of a share. A share is 'a series of mutual covenants', and it is an 'an interest in the company measured by a sum of money'. These can be separated, as on the one

<sup>110</sup> Justinian *Institutes* 3.13 pr.

<sup>111</sup> *Ibid* 2.2.2: '[Incorporeal things] consist of legal rights—inheritance, usufruct, and obligations however contracted'.

<sup>112</sup> *Ibid* 3.13.2: 'The next classification is into four: obligations arise from a contract, as though from a contract, from a wrong, or as though from a wrong'. On the complex history of this classification see P Birks 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed) *The Classification of Obligations* (Clarendon Press Oxford 1997) 1, 17–18. CC art 1173 reverts to Gaius's threefold classification. Cf Justinian *Digest* 44.7.1 pr: 'Every obligation arises from a contract, a wrong, or some other kind of event'.

<sup>113</sup> F Oditah 'Takeovers, Share Exchanges and the Meaning of Loss' (1996) 112 LQR 424, 426–27.

<sup>114</sup> [1901] 1 Ch 279, 288 (Farwell J). The reference to measuring a shareholder's interest by a sum of money has lost importance after the abolition, in a number of jurisdictions, of the concept of par value. In Australia this concept was seen merely as an arbitrary monetary denomination, potentially misleading to an unsophisticated investor: *Pilmer v The Duke Group Ltd (in liq)* [2001] HCA 31, 180 ALR 249 (HCA); Corporations Law s 254C and s 1427.

hand a unit of the company's capital and, on the other, a package of contractual rights and duties chiefly in respect of payments. In practice, especially now that shares are always fully paid up, the bundle of contractual rights predominates. A bundle of such rights against the company is necessarily intangible. If it comes to invoking the law to enforce those rights, it may be that what is ultimately obtained will be corporeal, as for instance money in the form of cash, but neither the right itself nor the claim which enforces it can be said to be corporeal.

We must not overlook the fact that most shareholders nowadays hold, not shares, but sub-shares.<sup>115</sup> That is to say, the shares are vested in an intermediary with which the investor holds an account, much as the customer of a bank holds an account with the bank, albeit in units of money, not securities. In this particular context, sub-shares pose no special problem. Our question is whether shares are things, and our conclusion is that they are things but not, or not often, corporeal things. Sub-shares do not in this respect differ from shares. For they too consist in a set of rights *in personam* (or, from the opposite perspective, obligations) subsisting between the sub-share holder and his intermediary. This can be stated upon reliance on the structure of intermediation which we expounded in Chapter 3, without prejudice to the question, still to come, of what sub-shares are and in particular whether they are property.

For symmetrical reasons sub-shares cannot be corporeal things any more than can non-bearer shares. The two flirtations which shares conduct with tangibles hardly apply to them. On the one hand, the obsolete association between shares and company assets would be even more remote in the case of the interest of a shareholder whose distance from the issuer has widened through one or more tiers of intermediaries. On the other hand, it will only be possible for the custodian of the share certificates, provided that they have been issued and exist, to maintain the link between shares and paper. Thus, that flirtation between shares and corporeals, nowadays more and more rare due to the phenomenon of dematerialization,<sup>116</sup> is only possible at one level of the intermediation ladder. That level is found at the top of the ladder, where shares have their being, rather than at the bottom, where sub-shares are placed.

### 3 Italian *Azioni*

Like English shares, Italian shares are arithmetical fractions of the corporate capital, combined with rights and correlative obligations. The picture is somewhat obscured by terminological ambiguities. Within the civil code '*azione*' can signify three distinct things. Firstly, a fraction of the corporate capital of a *società per azioni* (company limited by shares). Secondly, a member's participation in the company or the relationship between the company and

<sup>115</sup> Ch 3 text to nn 87–93.

<sup>116</sup> Ch 7 text from n 6.

the shareholder. Thirdly, the document embodying the *status* of shareholder.<sup>117</sup> The third use of the word is incorrect, for ‘certificate’ would be more appropriate.

Not unlike English shares, the content of Italian ones is contractual. A shareholder has a right to dividends in proportion to his holding in the capital and to a corresponding fraction of the company’s assets after the conclusion of the liquidation proceedings, although this rule of proportionality may be derogated in favour of special classes of shares.<sup>118</sup> In addition, he normally has a voting right, although some shares carry none.<sup>119</sup> The starting point of the code used to be that shares all have the same nominal value and endow their possessors with equal rights. The principle of equality of all shares has now been formally superseded in reformed company law. The *statuto* (articles) can create different categories of shares and shape their content accordingly.<sup>120</sup> Thus, some shares may enjoy greater dividends or a greater portion of residual assets in the event of liquidation. These rights are exigible only against the company and are therefore *in personam*.

A shareholder has the obligation to pay the full value of the share upon purchase or in due course and may have additional duties. To the extent that a share is made of rights and duties, it cannot be categorized as corporeal. It therefore falls by default into the category of incorporeal things.

#### 4 German *Aktien*

The word ‘*Aktie*’ (share) is not an unequivocal indicator of the intangible nature of a share. Like ‘*azione*’, its significance is threefold. ‘*Aktie*’ can mean a fraction of the capital (*Teil des Grundkapitals*), the membership of the company (*Mitgliedschaft*) and the document embodying the membership itself.<sup>121</sup> While the first two uses can be accepted, the correct word to describe the certificate is *Aktienbrief* (document which goes with the share).

The provisions relating to German corporations with a capital divided into shares (*Aktiengesellschaften*) are set forth in the *Aktiengesetz* (AktG).<sup>122</sup> A share is contemplated as a unit of the fixed starting capital (*Grundkapital*).<sup>123</sup> Unsurprisingly, German shares normally originate from the split (*Zerlegung*) of the capital into units, although the words ‘*Aktie*’ and ‘*azione*’ do not suggest this idea as clearly as the word ‘share’.

<sup>117</sup> C Angelici and GB Ferri (eds) G Ferri *Manuale di diritto commerciale* (11th edn UTET Torino 2001) 351–52.

<sup>118</sup> CC art 2350, as modified by D Lgs 17 gennaio 2003 no 6 and D Lgs 6 febbraio 2004 no 37.

<sup>119</sup> CC art 2351, as modified by D Lgs 17 gennaio 2003 no 6. Shares which are ‘of mere enjoyment’ do not entitle their holders to vote: CC art 2353, also in its new version.

<sup>120</sup> CC art 2348, as modified by D Lgs 17 gennaio 2003 no 6.

<sup>121</sup> K Wieland *Handelsrecht* (Duncker & Humblot München 1931) vol II 34–45.

<sup>122</sup> H Schneider and M Heidenhain *The German Stock Corporation Act* (2nd edn Beck–Kluwer München and London 2000) 3–21.

<sup>123</sup> AktG § 1 Abs 2.

A shareholder's rights derive from membership of the company (*Mitgliedschaftsrechte*).<sup>124</sup> Among such rights some relate to the administration of the company (*Verwaltungsrechte*), such as the voting right, the right to participate in the general meeting and to be therein informed and the right to object to the decisions taken within it.<sup>125</sup> Other rights have a more patrimonial content (*Vermögensrechte*), such as the right to the dividends, which, after the decision of the general meeting to distribute it, turns from a simple 'power' to claim into an irrevocable 'right' of the shareholder, a proper creditor's right (*Gläubigerrecht*).<sup>126</sup> It is evident, therefore, that all these rights are *in personam* against the company. The contractual content of a share is confirmed by those cases which state that a shareholder's rights, singularly taken, are indissoluble from the *status* of member. For example, the voting right cannot be isolated from membership or transferred separately from the share to which it relates.<sup>127</sup>

#### D CONCLUSION

This chapter has asked whether shares are things. It has explored two ways in which they might be corporeal things, as an interest in the company's material assets and as a valuable piece of paper. The former was ruled out when the difference between a body corporate and an unincorporated association asserted itself. The latter, even before dematerialization, was only exceptionally true, since in general the paper was no more than evidential. Exceptional cases aside, therefore, neither shares nor sub-shares can be conceived as corporeal things.

Both shares and sub-shares are nonetheless things in the Roman sense, because, as rights *in personam* against the company, they are *res incorporales*. Whether shares are property, however, is an entirely different question which depends on the meaning to be given to that problematic word. The next chapter will show that the conclusion that these assets are in general only incorporeal may have a dramatic impact on the answer.

<sup>124</sup> W Hefermehl 'Einführung' in *Aktiengesetz—GmbH-Gesetz* (31st edn Beck München 1999) xxii–iv.

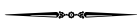
<sup>125</sup> Respectively, AktG §§ 12, 131, and 245.

<sup>126</sup> AktG § 58 Abs 4 and § 174.

<sup>127</sup> BGH II ZR 96/86 v 17.11.86 in *Neue Juristische Wochenschrift* 1987, 780–81.



## *The First External Boundary: Property as Rights In Rem*



THE LAST CHAPTER showed in what sense shares and sub-shares could be regarded as things. This one now explores the thing-related boundary between the law of property and the law of obligations. It has two aims in mind, to achieve a stable view of the territory of personal property and to find shares and sub-shares a secure place in one or other area of the law. If taxonomy could be said to have epochs in the same way that history has, ours would qualify as a post-modern taxonomical interest, in that, after a period in which legal scholarship pursued other interests in new styles, it has more recently been brought back to review and revise concepts and classifications which have been of fundamental importance throughout the history of the western legal tradition.<sup>1</sup>

<sup>1</sup> *Oxford English Dictionary* (2nd edn OUP Oxford 1989) <<http://dictionary.oed.com>> (accessed 31 Oct 2004) entry 'post-modern, a': subsequent to, or later than, what is 'modern'; *spec.* in the arts, esp. *Archit.*, applied to a movement in reaction against that designated 'modern'. . . . Hence post-modernism, post-modernist *a.* and *n.*. Legal post-modernism is in fashion in the United States: SM Feldman *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage* (OUP New York 2000). For an Italian reception: U Mattei and A di Robilant 'The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe' (2001) 75 *Tulane L Rev* 1053. There is evidence of a revival of interest in taxonomy: C Fassberg and I Gilead *The Classification of Private Law* (Sacher Institute Jerusalem 2002), proceedings of a conference held at Columbia University NY in May 2001. In England, most notably: P Birks 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *U Western Australia L Rev* 1; P Birks (ed) *The Classification of Obligations* (Clarendon Press Oxford 1997). Influential in this regard was the appearance of R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP Oxford 1992, originally printed Juta Cape Town 1990). The debate is enlivened by the opposition of sceptics: S Hedley *Restitution: Its Division and Ordering* (Sweet & Maxwell London 2001). For taxonomy pursued through 'law and economics': TW Merrill and HE Smith 'The Property/Contract Interface' (2001) 101 *Columbia L Rev* 773: 'In personam contract rights and in rem property rights can be seen as two different strategies for regulating the use of resources' (790).

## A IN REM AND IN PERSONAM

The Roman law of things did not emphasize the line between property and obligations. Its theme throughout was the acquisition of the entitlement to things, and its central opposition was that between *res corporales* and *res incorporales*.<sup>2</sup> This contrast was known outside the law, though sometimes expressed in other words. Cicero, for example, distinguished between things which exist (*quae sunt*) and things which are imagined by the intellect (*quae intelleguntur*).<sup>3</sup> When the strongest line is drawn in that way obligations appear as a sub-set of incorporeal things. In the institutional system a right of way over your neighbour's land and the right to enjoy and take the fruits of another's *res corporalis* were also incorporeal things.<sup>4</sup> English easements and the English lease would have been classified in the same way.

Modern legal systems have found it more efficient and illuminating to emphasize a different taxonomic line, namely that between proprietary rights (*in rem*) and obligatory rights (*in personam*). To make this the *summa divisio* is to affirm that the affinity between servitudes over things and ownership of things (both being proprietary rights) is much more important than that between servitudes and obligations (both being incorporeal). 'Property' and 'obligation' are categories which arise from dividing rights according to their exigibility—that is, in answer to the question: 'From whom can a right be demanded?'<sup>5</sup> In relation to both property and obligation the dominant taxonomic question can then be addressed: 'From what events do rights arise?'<sup>6</sup> Thus, we use a hierarchical taxonomy which first divides rights between proprietary and obligatory and then asks how these rights arise.

In the Roman institutional system *in rem* and *in personam* were not features of rights or *iura*. The variant *ius in re* did not originate till much later in medieval law.<sup>7</sup> Nor is the phrase *ius in personam* of Roman coinage. Nevertheless, it can be said, with one qualification, that the opposition between *in rem* and *in personam* is a Roman opposition. The qualification is that the two phrases were attributed to actions or claims, not rights. Thus Gaius initiates his discussion of actions: 'If we should ask how many classes of actions there are,

<sup>2</sup> See Ch 4 text to n 17; Justinian *Institutes* 2.2 pr–2 and Gaius *Institutes* 2.12–14. V Arangio-Ruiz *Istituzioni di diritto romano* (12th rev edn Jovene Napoli 1954) 162–63 argues that, outside Gaius, the line between corporeal and incorporeal things had little part to play. This underlines the fact, often not appreciated, that the institutional systematic stood outside the rest of the library. It was not integrated until modern times: P Stein 'The Quest for a Systematic Civil Law' (1995) 90 *Proceedings of the British Academy* 147, esp 155–62.

<sup>3</sup> Cicero *Topics* 5, 27.

<sup>4</sup> Gaius *Institutes* 2.14; Justinian *Institutes* 2.3.2–3.

<sup>5</sup> P Birks (ed) *English Private Law* (OUP Oxford 2000) vii–ix.

<sup>6</sup> *English Private Law* (previous n) xli–xlii. The classical illustration of this approach is P Birks *Introduction to the Law of Restitution* (OUP Oxford 1985) 28–29.

<sup>7</sup> Arangio-Ruiz (n 2 above) 173.

the better view is that there are two, real and personal'.<sup>8</sup> Of the supremacy of procedure in shaping the meaning of the adjectives 'real' and 'personal' even under English law we have already spoken.<sup>9</sup>

The specimen pleadings displayed in the praetorian edict were sometimes framed so as directly to assert an entitlement to a thing, either corporeal or incorporeal. Other actions, by contrast, served to claim a performance by the defendant. Pleadings of the former kind were *in rem* or directed towards things, in the sense that the claim was worded to express that the thing whose recovery was sought was the claimant's. Claims of the latter kind were *in personam* or addressed against persons, in that they contained an allegation that the defendant was under a duty to make a performance.<sup>10</sup>

In a claim of the latter type, the claimant never alleged that anything was his. As we have said, the pleading merely asserted that the defendant should do something. However, the relationship between the claimant and defendant came to be conceived as a thing which, conceptually, was as much his as any other thing. This relationship was given the name *obligatio*. A noun derived from the verb *ligare* ('to bind' or 'tie'), it expressed the idea of 'being bound to someone for a service'.<sup>11</sup> The metaphor recurs several times in the famous definition of 'obligation' used by Justinian: 'An obligation is a legal tie which binds us to the necessity of making some performance in accordance with the laws of our state'.<sup>12</sup> An obligation was conceived as an asset but the 'bound person' in this context was evidently not the claimant to whom the asset belonged. The bound person was the defendant. The person to whom he was bound was the claimant. Nowadays we think of the word as having a natural orientation towards the person bound. The Roman usage made the obligation which formed the subject-matter of the claim *in personam* belong to the claimant, in the same sense that debts even now belong to a moneylender. The idea was and is that 'the obligations of others were assets to those entitled to enforce them'.<sup>13</sup>

The implications were of the greatest significance. The effect was to create the unity which is the *ius rerum*, the law of things. 'Things' is the unity to be subdivided and expounded; without the conceptualization of obligations as things, there could be no unity. In Birks's words:

<sup>8</sup> Gaius *Institutes* 4.1: 'Et si quaeramus, quot genera actionum sint, verius videtur duo esse, in rem et in personam'; translation from the edition by WM Gordon and OF Robinson (Duckworth London 1988).

<sup>9</sup> Above Ch 2 text to n 40; see Justinian *Institutes* 4.6.1–2 and Gaius *Institutes* 4.2–3.

<sup>10</sup> P Birks 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed) *The Classification of Obligations* (Clarendon Press Oxford 1997) 1, 7.

<sup>11</sup> The underlying idea is the same as in 'obligation' as *iuris vinculum* or *lien de droit*: see R Sacco 'A la recherche de l'origine de l'obligation' in *L'obligation* (Archives de philosophie du droit no 44 Dalloz 2000) 33; J Gaudemet 'Naissance d'une notion juridique. Les débuts de l' "obligation" dans le droit de la Rome antique' in *L'obligation* (Archives de philosophie du droit no 44 Dalloz Paris 2000) 19, 27.

<sup>12</sup> Justinian *Institutes* 3.13 pr: 'Obligatio est iuris vinculum quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura'. The translation, somewhat free, is by P Birks and G McLeod (trs and eds) *Justinian's Institutes* (Duckworth London 1987) 105.

<sup>13</sup> Birks (above n 10) 8.



Few steps were more important to the creation of the institutional classification of the law than the insight which allowed obligations to be perceived as the incorporeal assets underlying pleadings *in personam* and, so perceived and named, aligned with the other more obvious incorporeal assets, which themselves so much more easily aligned with corporeal things.<sup>14</sup>

Rights are all incorporeal. Those whose exigibility or demandability is defined by the existence and location of the thing to which they relate are rights *in rem*. *Res* is the Latin for ‘thing’ and right *in rem* means ‘right in the thing’, or ‘to the thing’. A right *in rem* is a right demandable against anyone who holds or is trying to hold the relevant *res*. For the moment it is convenient to assume that in the phrase ‘*in rem*’ the *res* is always corporeal. Hence, under that provisional assumption, rights *in rem* are rights demandable against any person by virtue of that person’s possession of a corporeal thing. It is an important, but separate, question whether ‘thing’ for these purposes can be extended.

Rights *in personam*, by contrast, are rights exigible only against the person against whom they originally arise or someone who is understood to represent that person. Rights *in personam* depend on a person for their exigibility. That is, the fact that the right by definition requires a person to do something necessarily means that that person has to be found in order to exact such a right.<sup>15</sup> We ought not to be misled by the fact that most rights *in personam* will probably relate to a thing, in the sense that the obligatory performance will often be to make or transfer a thing.

Multiple names for a single thing are a source of confusion. For clarity’s sake it is necessary to introduce two equations. The first is that, under the hypothesis of this chapter, the law of property can be cleanly separated from the law of obligations by distinguishing rights *in rem* from rights *in personam*, it follows, tautologously, that rights *in rem* are synonymous with ‘proprietary rights’. Tautologies ought to be obvious to the eye. This one is not, for the reason that users of the language of property do not always attend to the premise. That is, they do not say, and often do not notice, when they switch from a concept of property which is opposed to obligations to one that includes obligations. Rights *in rem* are also synonymous with the Anglicization ‘real rights’, although the latter term is easily destabilized by the multiple meanings of ‘real’.<sup>16</sup>

The second equation is between rights *in personam* and ‘obligatory rights’. Here the Anglicization ‘personal rights’ can be misunderstood as meaning ‘of’ rather than ‘against’ a person. When looked at from the negative end, that of the person who is under a duty to perform in favour of the right-holder,

<sup>14</sup> Ibid 8. Variants of *res* in what linguists call ‘marginal areas’ reach out to ‘wealth’: the corresponding Vedic word *ram* (in the accusative) signifies wealth. In Middle Welsh *rai* has the meaning of ‘wealth’, ‘property’. The Latin *res familiaris* potentially encompassed various types of assets: LR Palmer *The Latin Language* (Bristol Classical Press London 1999 reprint of 1954 edn) 26.

<sup>15</sup> Birks *Introduction* (n 6 above) 49–50.

<sup>16</sup> Ch 2 text from n 21.

rights *in personam* are called ‘obligations’.<sup>17</sup> To speak of ‘*in rem* rights to property’ and ‘*in personam* contract rights’, as has been done recently, is to engage in a potentially dangerous pleonasm.<sup>18</sup> The law of property, when distinguished from the law of obligations, is the law of rights *in rem* or proprietary rights, and the law of obligations is the law of rights *in personam* or personal rights. The insertion of ‘contract’ anticipates a different inquiry, namely the inquiry into the events from which both property rights and obligatory rights arise. As we have seen the distinction between these categories of right turns on exigibility, not origin.

One qualification is essential. The law of property is not the law of ownership. This startling proposition has two aspects. First, ownership of a car is a right *in rem* but, although it may be intelligible to speak of ownership of a claim or right, it does not follow that such an ownership is a right *in rem* or, synonymously, property. This is the matter at issue in the question whether a right *in rem* can subsist in any incorporeal thing, which is discussed in section E below. Secondly, it is tempting, when speaking of rights *in rem*, to isolate ownership. Ownership is the ‘greatest possible interest in a thing which a mature system of law recognizes’, comprising a number of rights, incidents, and liabilities.<sup>19</sup> It is, however, only one of a fixed number of that kind, including, for example, easements (or ‘servitudes’ in civilian language), usufruct, and others. On the idea of the *numerus clausus* of property rights we need not say more in the present context. Here it serves only to break the illusory monopoly of ownership.<sup>20</sup>

The temptation to equate property and ownership is endemic in comparative law, aggravated in Italian law by there being but one word, *proprietà*, to translate the two English terms. Even in a situation of homonymy, however, the two concepts must be kept distinct. Their equation is equally incorrect in both civil and common law. Even attentive theorists sometimes say that ‘[t]he classic example [of a right *in rem*] is a property right’.<sup>21</sup> But property rights and rights *in rem* can never stand in a relationship of approximation or exemplification. They can only stand in a relationship of identity, and ownership of a thing is one example. It is correct to contemplate ownership of a car or a cow as the central or principal property right (or, synonymously, the principal right *in rem*).

<sup>17</sup> P Birks ‘Property, Unjust Enrichment, and Tracing’ [2001] CLP 231, 240–41.

<sup>18</sup> Merrill and Smith (n 1 above) 790.

<sup>19</sup> A classical analysis of the concept and its eleven incidents is in AM Honoré ‘Ownership’ in AG Guest (ed) *Oxford Essays in Jurisprudence* (1st series Clarendon Press Oxford 1961) 107, 108, 112 ff.

<sup>20</sup> The common law literature on the subject is limited: B Rudden ‘Economic Theory versus Property Law: The *Numerus Clausus* Problem’ in J Eekelaar and J Bell (eds) *Oxford Essays in Jurisprudence* (3rd series Clarendon Press Oxford 1987) 239; JH Merryman ‘Policy, Autonomy, and the *Numerus Clausus* in Italian and American Property Law’ (1963) 12 *American J Comparative L* 224; TW Merrill and HE Smith ‘Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle’ (2000) 110 *Yale LJ* 3. An Italian translation of Rudden’s article has appeared as A Fusaro (tr) B Rudden ‘La teoria economica contro la “property law”: il problema del “numerus clausus”’ *Rivista Critica del Diritto Privato* 2000, 451.

<sup>21</sup> JE Penner *The Idea of Property in Law* (Clarendon Press Oxford 1997) 23.

In the above account, rights *in rem*, whether ownership or less than ownership, are inseparable from the notion of a thing, assumed for the time being to be a corporeal thing. In the history of attempts to dissolve the relation between rights *in rem* and things one famous and extreme enterprise was that of Hohfeld who, in effect, repudiated the distinction between *in rem* and *in personam*. He took the relevant difference to turn on the number of people against whom the right is exigible. He did not rely on the location of the thing as opposed to the person. He thus built a new opposition, that between paucital and multital rights:

A paucital right, or claim, (right *in personam*) is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a *few* fundamentally similar, yet separate, rights availing respectively against a few definite persons. A multital right, or claim (right *in rem*) is always *one* of a large *class* of *fundamentally similar* yet separate rights, actual and potential, residing in a *single* person (or single group of persons) but availing *respectively* against persons constituting a very large and indefinite class of people.<sup>22</sup>

*In rem* is thus taken to mean ‘towards persons generally’.<sup>23</sup> While that is not incorrectly said by way of comment upon rights *in rem*, it is impossible to follow Hohfeld in the paradoxical operation of subtracting the *res* from the right *in rem*. Lawson pointed out that a right *in rem* does not imply any person, let alone a plurality of people, at the other end of the relation, because it focuses on the link between a person and a thing. In other words, it is definitively polarized towards things, not persons. The so-called ‘person of incidence’ only becomes essential when the need to protect a right *in rem* asserts itself, in which case legal proceedings may be brought against the subject liable for its infringement.<sup>24</sup>

Propositions such as ‘[a] right *in rem* is not a right “against” a thing’ are unnecessarily paradoxical. It is also unnecessarily literal to state that the expression *in personam* standing alone encourages the erroneous belief that there are

<sup>22</sup> WN Hohfeld ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 Yale LJ 710, 718; reprinted in W Wheeler Cook (ed) WN Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press New Haven CT 1964) 65–114. Additional complications to these ‘two modalities of rights’ are introduced by TW Merrill and HE Smith ‘The Property/Contract Interface’ (2001) 101 Columbia L Rev 773, 778. The authors identify ‘four ideal—typical forms of rights: pure *in rem* rights, availing against a large and indefinite class of persons; pure *in personam* rights, availing against singular, identified persons; compound—paucital rights, availing against numerous identified persons; and quasi-multital rights, availing against singular, unidentified persons’.

<sup>23</sup> Amongst the countless instances of modern support for this proposition, R Nolan ‘Property in a Fund’ 2004 (120) LQR 108, 111 (‘[A]n interest is termed “property” in an asset, or a “proprietary interest” in an asset, when at least one of its features is a claim in respect of the asset against persons constituting a very large and indefinite class of people . . .’); S Van Erp ‘Civil and Common Property Law: Caveat Comparator—The Value of Legal Historical-Comparative Analysis’ (2003) 11 Eur Rev Private L 394, 403; U Mattei ‘I rimedi’ in G Alpa et al *Il diritto soggettivo* in R Sacco (ed) *Trattato di diritto civile* (UTET Torino 2001) 103, 135–36.

<sup>24</sup> FH Lawson *Selected Essays* (North Holland Amsterdam 1977) vol I *Many Laws* 6–7, 12, 21; cf A Kocourek *Jural Relations* (2nd edn Bobbs–Merrill Indianapolis 1928) 201.

such things as rights not against a person. Nor is it necessary to fear that conceiving rights against a thing turns the thing into a sort of juristic person.<sup>25</sup> The fact that even rights *in rem* will ultimately be exacted from a person and that the obligation correlative to rights *in personam* will normally have a thing as its subject-matter does not obliterate the necessity of knowing the location of the thing in the first case but not the latter.

Penner has criticized the Hohfeldian approach on the basis of the very correlation of rights and duties which grounded Hohfeld's view that rights only operate between persons and are, therefore, all *in personam*:

Rights are norms, and the content of a norm must consist in its guidance of the behaviour of those subject to it. The duty not to interfere with the property of others is not owner-specific. We do not need to identify the owner in order to understand the content of that duty. Another way of putting this is that our duty to respect the property of others is not fragmented into a multitude of specific duties, each of which is owed to each owner in respect of each specific item of property he owns. Having said this, we can understand why Hohfeld's analysis of rights *in rem* is likely to leave much to be desired.<sup>26</sup>

. . . Rights *in personam* should apply as relations between individuals where their individuality, i.e. their personality, is relevant to the right. . . . The criterion is whether the duty is in any way specific to particular individuals in terms of its content. The general duties corresponding to the rights to life and bodily security are not. These are rights *in rem*.<sup>27</sup>

The impossibility of subtracting *res* from rights *in rem* is then explained:

'Things', whether physical things or states of affairs such as bodily security, mediate between rights *in rem* and duties *in rem*, blocking any content which has to do with the specific individuality of particular persons from entering the right-duty relation.<sup>28</sup>

The value of Penner's critique lies in re-instating things at the core of rights-to-things, back where they etymologically belong. It would be premature, however, to share all his peripheral remarks as to the *substratum* in which rights *in rem* may exist (in his examples, physical things and bodily security), that is, as to the 'thinghood' of very diverse assets.<sup>29</sup> Those implications can only be accepted after deciding, on the one hand, whether a right *in rem* is especially qualified by its being *in rem corporalem* and, on the other hand, whether any rights may transcend the *in rem/in personam* antithesis, thus acquiring 'superstructural' status.

<sup>25</sup> Hohfeld (n 22 above) 720–21.

<sup>26</sup> Penner (n 21 above) 23.

<sup>27</sup> *Ibid* 29.

<sup>28</sup> *Ibid* 29.

<sup>29</sup> JE Penner 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA L Rev 711, 802–7.

B *IN REM* AND *AD REM*

The association between things and rights is not found only in the phrase ‘rights *in rem*’. *Res* and rights are juxtaposed in a number of superficially similar expressions. For the sake of precision one or two of them must be explained and their usage distinguished from that of ‘rights *in rem*’. So far as what follows deals with linguistic subtleties, it is not for their own sake, but only where noting them helps to eliminate misunderstandings of the law of things.

The first step is to set aside one common variant. The phrase ‘right *in re*’ will not be used in the course of this study. It is superfluous. In the Latin language *re* is the ablative case of the word *res*, *rem* being its accusative. *In* is a preposition which can govern both cases. *In re* means ‘in the thing’ as much as *in rem* does. A semantic nuance differentiates the two: while the ablative in its locative sense indicates ‘place where’,<sup>30</sup> the accusative exhibits ‘the end or goal towards which the action tends or is directed’.<sup>31</sup>

An occasional attempt has been made to distinguish *in rem* and *in re* in a more pregnant way than it is possible to do on the basis of morphology. Hohfeld, for instance, differentiated the meanings of the two. He not only stated that ‘[a] multital right, or claim, (right *in rem*) is not always one relating to a thing, ie, a tangible object’. He also suggested that, by contrast, *in re* could be taken to mean ‘in a specific thing or real’.<sup>32</sup> Mincke has attempted a similar and equally unconvincing differentiation between the ablative and the accusative.<sup>33</sup> The truth is, however, that Latin etymology supports no substantive differentiation between *in re* and *in rem*. In general writers have correctly regarded them as interchangeable. A preference for the latter can rather be justified on the basis of a more common usage.

Next, when ‘right’ and ‘*rem*’ are paired, the link between them is usually the preposition ‘*in*’, but sometimes the preposition ‘*ad*’ is used instead. *Ad* is another way of saying ‘to’. The phrase then becomes ‘right *ad rem*’. In recent times Roy Goode has invoked this phrase.<sup>34</sup> It cannot be explained without first noticing that it is elliptical. In its complete form it reads ‘right *ad rem*

<sup>30</sup> LR Palmer *The Latin Language* (Faber & Faber 1954, reprinted by Bristol Classical Press London 1999) 303. For the presence of the preposition *in*, *ibid*: ‘The ancient locative ablatives were largely replaced in the pre-literary period by prepositional phrases with the ablative, the plain ablatives surviving chiefly with names of towns and with certain nouns denoting locality’.

<sup>31</sup> *Ibid* 286.

<sup>32</sup> Hohfeld (n 22 above) 734.

<sup>33</sup> He argues that the preposition *in* used with the ablative indicates ‘that it is the *res* to which one is entitled,’ while the idea is obscured by *in* with accusative, which stresses ‘a direction and thus a mere relationship’: W Mincke ‘Property: Assets or Power? Objects or Relations as Substrata of Property Rights’ in J Harris *Property Problems: From Genes to Pension Funds* (Kluwer Law International London 1997) 78, 80.

<sup>34</sup> R Goode ‘Property and Unjust Enrichment’ in A Burrows (ed) *Essays on the Law of Restitution* (Clarendon Press Oxford 1991) 215, 221–22; R Goode *Commercial Law* (3rd edn Butterworths Lexis Nexis London 2004) 26.

*acquirendam*' which means 'right to the acquisition of a thing' or, if we give literal effect to the gerundive, 'right to, or for the purpose of, a thing to be acquired'. The meaning of this phrase diverges significantly from that of 'right *in rem*'.

'Right *ad rem acquirendam*' appears in John Austin's lectures, in the part which he devoted to 'analysis of pervading notions' in jurisprudence.<sup>35</sup> He warned that there is a class of cases where 'the same transaction bears the double character of a contract [giving *jus in personam*] and a conveyance [giving *jus in rem*]'.<sup>36</sup> These situations mistakenly lead one to imagine that rights *in rem* proceed from contract, thus obscuring the line of demarcation between the two great classes of rights *in rem* and *in personam*. He elucidated this confusion of thought as follows:

Suppose you contract with me to deliver some movable (a horse, a garment, or what not); but, instead of delivering it to me, in pursuance of the contract, that you sell and deliver it to another. Now, here the rights which I acquire by virtue of the Contract of Agreement are the following: I have a right to the movable in question, as against you specially (*jus ad rem acquirendam*). So long as the ownership and the possession continue to reside in you, I can force you to deliver me the thing in specific performance of your agreement, or, at least, to make me satisfaction, in case you detain it. After the delivery to the buyer, I can compel you to make me satisfaction for your breach of contract with me. But here my rights end. As against strangers to that contract, I have no right whatever to the movable in question. . . . But if you deliver the movable, in pursuance with your agreement with me, my position towards other persons generally assumes a different aspect. In consequence of the Delivery by you and the concurring Apprehension by me, the thing becomes mine. I have now *jus in rem*: a right to the thing delivered, as against all mankind, a right answering to obligations negative and universal. And, by consequence, I can compel the restitution of the subject from any who may take and detain it, or can force him to make me satisfaction for an injury to my right of ownership.<sup>37</sup>

This example appears to suppose that under a contract of sale property does not pass until delivery or other requisite conveyance, which was the Roman rule. For our terminological purpose it does not matter that, except in relation to land and then only at law, that assumption is incorrect and was incorrect even in Austin's time, before the Sale of Goods Act 1893.<sup>38</sup> Our present concern is

<sup>35</sup> R Campbell (ed) J Austin *Lectures on Jurisprudence or the Philosophy of Positive Law* (Linn & Co Jersey City 1874) [408].

<sup>36</sup> *Ibid* [524], cf [535] for the terminology of *modus acquirendi* or *modus acquisitionis* used by the French and Prussian Codes to describe the incident imparting *jus in rem*, as opposed to the name of *titulus ad acquirendum* for the preceding incident imparting *jus ad rem*.

<sup>37</sup> *Ibid* [525].

<sup>38</sup> The statutory rule is that the property passes when it is intended to pass, and the first rule for ascertaining intention is that in the absence of evidence to the contrary the parties intend as follows: 'Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed' Sale of Goods Act 1979 s 17 and s 18 rule 1. T Weir (tr) F Wieacker *A History of Private Law in Europe* (Clarendon Press Oxford 1995) 235 discussing Grotius's doctrine of successive sales.

with the analysis which followed this example, in which Austin unequivocally concluded that the category of rights *ad rem* was no more than a species of the genus of rights *in personam*:

All rights in personam are rights to acts and forbearances and to nothing more. The species of rights which have been termed *jus ad rem* form no exception. . . . That is to say, the person entitled has a right, availing against a determinate person, to the acquisition of a right availing against the world at large. And by consequence, his right is a right to an act of conveyance or transfer on the part or [of] the person obliged.<sup>39</sup>

At this point we encounter a difference of opinion with Austin. He proceeds to reflect on terminology capable of accomplishing '[o]ne of the great desiderata in the language of jurisprudence'. He sets himself the task of finding '[a] pair of opposed expressions denoting briefly and unambiguously the two classes of rights . . . namely, Rights availing against persons generally or universally, and Rights availing against persons certain or determinate'.<sup>40</sup> However, in pursuing this goal he enlarges the scope of the category of rights *in rem* to a quite unacceptable degree, by enlisting that term to embrace all rights 'availing against persons generally'.

For the purpose of comprehending that class Austin reviews several pairs of phrases: *jus in re-jus ad rem*, *jus in rem-jus in personam*, *jus reale-jus personale*, *dominium (sensu latiore)-obligatio*. As for the first term in these oppositions, he says that each is open to the objection that 'none of them denote, without a degree of ambiguity, the entire class of rights which avail against the world at large. For although they are often employed in that extensive signification, they commonly signify such of those rights as are rights to determinate things'.<sup>41</sup> The ideal opposition would be between *jura quae valent in personas generatim* and *jura quae valent in personas certas sive determinatas*.<sup>42</sup> This accurate definition, however, is too long and therefore unfit for ordinary

<sup>39</sup> Austin (n 35 above) [528].

<sup>40</sup> Ibid [533].

<sup>41</sup> Ibid [534–41]. The pair *jus reale-jus personale* has the disadvantage of evoking the binomial *jus rerum-jus personarum*, which is rather a division of the whole law (*corpus juris*) than of rights. *Dominium*, as opposed to *obligatio* embraces *jura in re aliena*, that is, rights or interests in subjects owned by others, whereas, strictly understood, it is directly opposed to these rights, being synonymous with *proprietas*, *in re potestas* or *jus in re propria*. *Obligatio* in the largest sense equals *right in personam*, but it is used in so many narrower senses that it is not technically suited to denote the larger of the rights in question. *Potestas* substituted for *dominium* is liable to one additional objection from which the former is free, for it indicates particular species of rights available against determinate persons, such as the *patria potestas* of the *paterfamilias* over his descendants. 'Absolute' and 'relative' rights is an absurd opposition, for rights of both classes are relative ie correlate with duties or obligations incumbent, in the former case, upon the world at large, and upon determinate individuals, in the latter. 'Law of property' and 'law of contract' do the business wretchedly, for the opposition, instead of contrasting the two classes of rights, contrasts the laws or rules of which those rights are the creatures. Besides, 'property' suffers from the ambiguities to which *dominium* is subject and 'contract' is not a name for a class of rights, but for a configuration of facts by which rights are generated. Finally, rights emanating from contracts are only a portion of the rights which the 'law of contract', in the sense of 'all rights *in personam certam*', is intended to indicate.

<sup>42</sup> Ibid [540].

use. After somewhat agonized discussion, the final preference goes in favour of *jus in rem* as the least bad first term for the opposition. He gives these grounds:

Although [the phrase *in rem*] is nowhere used [by Roman lawyers] for the purpose of signifying briefly and unambiguously rights of every description which avail against persons generally, yet in all the instances in which it occurs, the subject to which it is applied is a something which avails generally: 'quod generatim in causam aliquam valet.' . . . Now the expression *jus in rem* [devised by the Glossators or Commentators] . . . perfectly supplies the desideratum which is stated above. For as 'in rem' denotes generality, 'JUS in rem' should signify rights availing against persons generally. Therefore, it should signify all rights belonging to that genus, let their specific differences be what they may. And that is the thing which is wanted.<sup>43</sup>

He then decides that the second term of the opposition will be best called *jus in personam*, for *jus ad rem*, notwithstanding its obligatory nature, appears to be a weaker candidate to fill the gap:

*Jus ad rem* frequently signifies any right which avails against a person certain. Still it is often and properly restricted to a species of such rights; to those which correlate with obligations 'ad dandum aliquid;' or is properly speaking, *jus in personam ad jus in rem acquirendam*. It is, therefore, ambiguous.<sup>44</sup>

What is worth retaining from Austin is the idea of *jus ad rem* as an obligatory right to the acquisition of a thing and the sense of the utility of *jura in rem* for classificatory purposes. By contrast, it is impossible to applaud his use of *in rem* to denote all rights which are not *in personam*. His rights *in rem* involve an etymological contradiction, for he eliminates the need for any *res*. In this chapter we put the *res* back in rights *in rem*. This means that we have to treat rights *in rem* as a sub-set of the large class for which Austin chose to appropriate that name.

In conclusion, so far as rights *ad rem* are part of the system of rights presented in this book, they count unequivocally as species of rights *in personam*. Rights *ad rem*, more fully rights *in personam ad rem acquirendam*,<sup>45</sup> are a sub-set of rights *in personam*. They tell us that there is nothing implausible in the notion of a right *in personam* the content of which is that the right-holder is entitled to obtain a specific thing from the person under the correlative obligation. This needs to be kept clear. We have noticed the conceptual mistake of equating the

<sup>43</sup> Ibid [542].

<sup>44</sup> Ibid [535].

<sup>45</sup> Further support for the confirmation of idea of a *jus ad rem* as a *jus in personam* comes from Maitland, notwithstanding that his reconstruction of the nature of the rights of a beneficiary under a trust is otherwise debatable: J Brunyate (ed) FW Maitland *Equity. A Course of Lectures* (2nd rev edn CUP Cambridge 1936) 111. In support of his idea that '[t]he law of trusts begins with this, a person who has undertaken a trust must fulfil it' and that the '[r]ight of cestui que trust is the benefit of an obligation' he cites *Coke on Littleton* 272b to the effect that '[a]n use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land, and to the person touching the land. cestui que use had neither *jus in re* nor *jus ad rem*, but only a confidence and trust'.



idea of property in the strict sense with specific recovery. But, whether the law would or would not enforce such an obligation specifically—that is to say, by ordering the transfer rather than by ordering the payment of money by way of substitutionary relief—such a right *ad rem* is and remains a right *in personam*. It belongs in the law of obligations, not in the law of property.

The dissociation between the property and specific recovery was completed in Chapter 2 which highlighted Bracton’s error of inferring the proprietary nature of a claim from the outcome of the action brought to defend it. At that point we also began to free ourselves from the mistaken belief that a right *in rem* such as ownership of a cow, protected by a *vindicatio*, necessarily achieved the recovery of the thing *in specie*. In short specific recovery does not indicate property, and property does not indicate specific recovery. Now, equipped with the plausibility of a right *in personam* aiming at a specific thing through a person, we can proceed further.<sup>46</sup>

### C RIGHTS IN REM AND SUPERSTRUCTURAL RIGHTS

We have expressed a preference for defining rights *in rem* as rights in or to the thing exigible where that thing is found, rather than as multital rights available against the whole world. One more occasion on which such preference proves justified is when the need arises to distinguish rights *in rem* from rights protected towards the generality of mankind. We have just seen how Austin struggled to include all these under the one label. On the position adopted here, ‘the subdivision of rights between *in rem* and *in personam* is not exhaustive, although, possibly, it might be said to be exhaustive of rights “realizable in court”. The category which is omitted is the category of rights which are good against all people but do not follow any *res*’.<sup>47</sup>

Instances of rights available generally are the right to reputation and bodily integrity. The body is not protected as property.<sup>48</sup> Correlative with these rights are certain primary obligations not to infringe them, that is, not to violate another person’s bodily integrity, not to defame another. It is to the infringe-

<sup>46</sup> See the discussion of the positions of Bracton and Calabresi/Melamed in Ch 2 text to nn 62–66.

<sup>47</sup> Birks ‘Property, Unjust Enrichment, and Tracing’ (n 17 above) 240 fn 20.

<sup>48</sup> The human body and its parts are not in general property, although exceptionally (as for instance when treated to become medical specimens) they can support rights *in rem*. Discussion: K Mason and G Laurie ‘Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey’ (2001) 64 MLR 710; P Matthews ‘Whose Body? People as Property’ (1983) 36 CLP 193; RS Magnusson ‘Proprietary Rights in Human Tissue’ in N Palmer and E McKendrick (eds) *Interests in Goods* (2nd edn LLP London 1998) 25; L Skene ‘Proprietary Rights in Human Bodies, Body Parts and Tissue: Regulatory Contexts and Proposals for New Laws’ (2002) 22 Legal Studies 102; I Kennedy and A Grubb *Principles of Medical Law* (OUP Oxford 1998) [15.18–23], [17.39–42]. For the assumption that one’s right to control one’s body and the disposition of its parts is a ‘legally cognisable property right’, LS Underkuffler *The Idea of Property: Its Meaning and Power* (OUP Oxford 2003) 103–6.

ment of such primary obligations that claimants react. That is, these obligations are rarely directly enforced but serve as the superstructure under which it becomes meaningful to speak of a wrong, in so far as every wrong is the infringement of a primary right. Hence '[p]rimary obligations draw the attention of the law only in actions focused on the wrong which consists in their breach' (torts committed against the body, tort of defamation).<sup>49</sup> A similar approach is found in the German Civil Code, which contemplates offences to life, body, health, freedom, ownership, or infringement of other similar rights, and provides that, in the event of such an infringement, an obligation to repair the damage arises.<sup>50</sup>

The word 'superstructural' in the title of this section is used because these multital primary rights, available against anyone and everyone, form the superstructure above all wrongs. A wrong is by definition the infringement of a superstructural right. 'Superstructural' and 'primary' are synonyms, the former merely being more graphic. Rights *in rem* properly so called are a sub-set of superstructural rights. The tort, or family of torts, of trespass *vi et armis* illustrates this. If A strikes B, the superstructural right which is infringed is B's right to bodily integrity. If C takes a short-cut across D's field, the superstructural right which is infringed is D's proprietary right in the field.

There are therefore rights towards persons generally which are not directly to a thing.<sup>51</sup> It is important, to make this category stand out, to hold on to the premise that *in rem* means 'in or to a thing'. Failure to do so generates confusion. It was upon the quite different premise that *in rem* indicated 'not the subject but the compass of the right' and of equating *in rem* with 'availing towards persons generally', Austin produced his wider category, which suppressed the unique character of property rights.

#### D PROPERTY AS RIGHTS IN REM CORPORALEM

Having isolated the category of rights *in rem*, we can see that a coherent view of the boundary of property can indisputably be created by distinguishing rights *in rem* from rights *in personam*. The law of property is then the law of rights *in rem*, of which there is a *numerus clausus*. These rights *in rem*, alias property rights, are themselves incorporeal. However, we have been operating under the assumption that the thing in question must be corporeal. This section considers the implications of that assumption, which will later be challenged and to a limited degree relaxed.

<sup>49</sup> P Birks 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed) *The Classification of Obligations* (Clarendon Press Oxford 1997) 11–12.

<sup>50</sup> BGB § 823(1): 'Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatze des daraus entstehenden Schadens verpflichtet'.

<sup>51</sup> This proposition is developed in A Pretto 'Primary Rights and Rights *in Rem*' in P Birks and A Pretto *Themes in Comparative Law: In Honour of Bernard Rudden* (OUP Oxford 2002).

There is some comparative support for the requirement of a corporeal thing. Thus, the German right of ownership (*Eigentum*) is the most extensive right which a person may have in a thing (*Sache*), which is tangible by definition.<sup>52</sup> Possession, which often creates the conditions for the exercise of rights *in rem*, is defined as physical control over *Sachen*. As such it grounds the association between tangibility and rights *in rem*.<sup>53</sup> Again, Italian doctrine since the 1960s has objected to conceiving absolute rights in incorporeal things as rights *in rem*. The subject of copyright, it has been said, is not a thing. One problem is that standard codified rules on possession<sup>54</sup> hardly apply to intellectual property and are replaced with more specific provisions on, for instance, 'lawful possession of the rights to economic use' (*possessione legittimo dei diritti di utilizzazione*).<sup>55</sup> Because possession is defined as the factual situation corresponding to the exercise of a real right, real rights in something which cannot be possessed have seemed hardly possible. A slightly different view is that the fact that incorporeal things are subject to rules divergent from those on possession does not exclude the possibility of rights *in rem* in them.<sup>56</sup> Hence in Italy the question remains unresolved.<sup>57</sup>

At this point, however, we continue to assume that the doubt must be resolved in favour of corporeal things. On this assumption the law of property is the law of rights in corporeal things, with 'in' being given the meaning which has been discussed above. The immediate purpose is to draw the startling inferences for shares. In one word, if and so far as the law of property is the law of rights *in rem corporalem*, shares cannot in general be described as property.

In the previous chapter we established the extent to which shares could be understood as corporeal things.<sup>58</sup> The starting point was that they are basically incorporeal, but we saw that they have conducted two flirtations with the corporeal world. Nobody any longer thinks that a share can be regarded as a slice of or interest in the company's corporeal assets. However, although paper in this context is rapidly becoming a thing of the past, in their traditional form shares have usually been accompanied by a corporeal certificate. That makes them documented or even documentary intangibles depending on whether the function of paper is that of evidencing or embodying their intangible essence.

A real right in that piece of paper, feasible though it be, is not of any interest if it does not have the value of the rights *in personam* which constitute the share. Very few have. The paper is the share itself only in the case of bearer shares.

<sup>52</sup> Mincke 'Property: Assets or Power?' (n 33 above) 78.

<sup>53</sup> BGB §854(1): 'Der Besitz einer Sache wird durch die Erlangung der tatsächlichen Gewalt über die Sache erworben'. Cf §90 BGB for the definition of thing.

<sup>54</sup> CC arts 1140–57.

<sup>55</sup> L 22 aprile 1941 no 633 art 167.

<sup>56</sup> R Sacco and R Caterina *Il possesso* in A Cicu and F Messineo (eds) *Trattato di diritto civile* (2nd edn Giuffrè Milano 2000) 133–34, 137–38.

<sup>57</sup> Case law discussed *ibid* 139, is to the effect that 'the power of fact over intellectual creations', in one specific case those of a film producer, is possession.

<sup>58</sup> Ch 4 section B 'Shares as Corporeal Things'.

Possession of the bearer document satisfies the premise for the exercise of a real right in the share, for the bearer share is located where the document happens to find itself. The certificate accompanying registered shares, by contrast, merely evidences the intangible rights.

Even Italian law, which pays lip service to the importance of the paper as grounding the entitlement (*legittimazione cartolare*) to exercise the rights inherent in the share, hastens to add qualifications to the possession of that piece of paper.<sup>59</sup> Thus, *possessione qualificata* by registration is again necessary in all cases but the merely hypothetical one of bearer shares. Notwithstanding the prevailing linguistic custom of including registered shares within the category of *titoli di credito*, their quality of *titoli causali* and *di partecipazione* is justified on the basis of ‘extra-documental circumstances’ which prevail on the paper. The latter cannot therefore be said to have *carattere costitutivo* (‘dispositive’, as opposed to merely ‘evidential’, value).<sup>60</sup>

The conclusion must therefore be that, with very few and diminishingly significant exceptions, a share cannot be described as ‘property’ if the law of property is defined as the law of rights *in rem corporalem*. More accurately, if the law of property is so defined anyone who speaks of a share as property must be using the word in a looser sense which does not respect the line between property and obligations. So far, however, all this is said only under the assumption that *in rem* has the meaning *in rem corporalem*. The next section opens that assumption up.

## E PROPERTY AS RIGHTS IN REM LOCABILEM

The taxonomical preoccupation of this book—to identify the law of property without dissolving the distinction between property and obligations—can be placated if the law of property is taken to mean the law of rights *in rem corporalem*. Since that has dramatic consequences for shares and sub-shares, the question arises of whether it is necessary to restrict rights *in rem* to corporeal things. Can the distinction between property and obligations be maintained if *res* is given some larger meaning which in its turn might be able to include shares and sub-shares? The question whether rights *in rem* are bound to be rights *in rem corporalem* encounters some immediately unsatisfactory answers. We will start by ruling out one or two of these.

First, there is a temptation to say that *res* can be extended to all incorporeal things. Rights being among these, the proposition is found that there can be rights *in rem* in all rights. This position, which we are bound to repudiate, can be detected in the work of even the most enlightened British scholars. Birks, exemplifying the category of rights *in rem* for the purposes of the discussion of

<sup>59</sup> CC art 1992; B Libonati *Titoli di credito e strumenti finanziari* (Giuffrè Milano 1999) 10–11.

<sup>60</sup> Libonati (previous n) 24–27.

restitution in the law of property, wrote in 1985: 'Each kind of right can be the subject-matter of the other'.<sup>61</sup> Reid, starting from Gaius's division of things between *corporales* and *incorporales*, has written:

Certain consequences follow from this approach. Since a thing is the object of a (real) right, and since a right may itself be a thing, it must be possible to have (real) right in rights. And since rights may be either personal or real, it follows that one may have (i) a real right in a personal right or (ii) a real right in a real right.<sup>62</sup>

These scholars must be said to have momentarily dropped their guard. Roman law created a single category of things by seeing that whenever a pleading *in personam* arises it implies the existence of the thing which could be identified by the name of *obligatio*. This process is sometimes known as 'reification' of the obligation. There is indisputably a relationship of entitlement between the claimant and this reified obligation, just as there is between an owner and his car. However, this is a *cul-de-sac*. The reification of obligations serves to include obligations in the law of things as the law of wealth (or law of property very broadly understood), not in the law of rights in things (or law of property strictly understood). It destroys the distinction between property and obligations. It is impossible to contemplate a property right in an obligation without dissolving that distinction.

Reid would say that this criticism is overstated and that at least three positive arguments may be made in favour of the ownership of rights—(i) that rights form part of a person's patrimony and that it is odd in the modern world to deny incorporeal assets such as bank accounts, pension rights, stocks and shares, and assurance policies the status of things; (ii) that such a model emphasizes the unity of the law of property; and (iii) that the idea of rights over rights may be found in most legal systems, whatever the theoretical status of right as things.<sup>63</sup> The first two arguments do no more than acknowledge the existence of a broad meaning of property-as-wealth, whereas the third one only makes a virtue of the fact that the blurring of the external frontier of the law of property is a transnational problem. His conclusion inviting a compromise between 'certainty and rigidity' in the preservation of the indisputably necessary border between property and obligations is difficult to calibrate. It is not clear that that compromise is in any way put in issue by insisting that the different senses of 'property', including and excluding obligations, be respected.

Our thesis is that the language of rights *in personam* cannot be used to describe the content of rights *in rem*, and the language of rights *in rem* cannot describe a person's entitlement to his rights *in personam*. The two categories of rights are antithetic. If the antithesis were not respected, it would simply have to be re-invented. That is, if one said that rights *in rem* could subsist in any thing

<sup>61</sup> P Birks *An Introduction to the Law of Restitution* (OUP Oxford 1985) 49. In his last lectures the author was heard to repudiate these lines.

<sup>62</sup> KGC Reid 'Obligations and Property: Exploring the Border' [1997] *Acta Juridica* 225, 230.

<sup>63</sup> *Ibid* 231–33.

at all, corporeal and incorporeal, on the next level down one would immediately have to differentiate rights the burden of which followed things and rights the burden of which was tied to persons.

Another approach which is not satisfactory is that of Mincke, who has attempted a contrast between rights *in rem* and *in personam* by means of a description of the *substratum* of those rights. He draws on an opposition between substance and value. Thus, for him the object of an obligation is always abstract 'value', which would explain why the creditor is enriched by the indebtedness of others towards him. It is as value that obligations are conceived to belong within the English property or French *propriété*.<sup>64</sup> Hence:

The identification of value as the object of obligations suggests that the distinction between rights *in re* and rights *in personam* relates to rights in substance and rights in value respectively. . . . Indeed, rights *in rem* can be seen as rights where the value is of no importance. The right of ownership is not affected at all, if the value of a car or a house declines. . . . Whenever the value of something in law plays a role, it is on the cases of an obligation. That is why all claims for compensation are *in personam*.<sup>65</sup>

This is not acceptable. Asking what rights *in rem* subsist in and answering that they subsist in substance verges on the circular. The contrast between substance and value is not at all illuminating at any jurisprudential level. Nor is it at all clear that the theory fits the empirical data. An obligation to convey a house is specifically performable. It would seem to be concerned with 'substance'. And classical Roman law shows that a system can settle disputes as to proprietary entitlements exclusively in money.

A seemingly well-founded attempt to answer the question of the substratum of property comes from Harris. He does extend the notion of property as rights *in rem*, to incorporeal things. Thus he says that 'property' comprises, among other things, 'ownership and quasi-ownership interests in things (tangible and ideational)'.<sup>66</sup> Copyrights and patents are instances of ideational things. An ideational thing is unequivocally incorporeal. The doubt arises, however, whether Harris does not in the end have to rely on the wider meaning of property as wealth to support his position, for, in his view:

'Property' designates those items which are points of reference within, and therefore presupposed by, the rules of a property institution, *viz*, trespassory, property-limitation, expropriation, and appropriation rules. Such items are either the subject of direct trespassory protection or else separately assignable as parts of private wealth.<sup>67</sup>

Trespassory protection and scarcity appear to Harris as the features which an object must possess in order to be brought within the property institution.<sup>68</sup>

<sup>64</sup> Mincke 'Property: Assets or Power?' (n 33 above) 85–87.

<sup>65</sup> *Ibid* 88.

<sup>66</sup> J Harris *Property and Justice* (Clarendon Press Oxford 1996) 139.

<sup>67</sup> *Ibid* 139.

<sup>68</sup> The potential for defining the proprietary nature of things by reference to the possibility of protecting or trading them will be discussed in Pts III and IV below.

That object needs not necessarily be corporeal. Ideas, although infinite in their totality, are scarce in the sense that more than one person could make use of them. In the case of the ideational entities of which intellectual property consists, law creates artificial scarcity and develops trespassory rules to protect the right of an author to withhold knowledge of it from others.<sup>69</sup> Creator-incentives are therefore the primary justification for ideational entities being brought within property. Thus, the fencing off of intangible subject matter fulfils an economic function equivalent to that of ownership of physical property. The incentive to optimise the value of the information would be otherwise impaired or destroyed, and would-be innovators would content themselves to be imitators.<sup>70</sup> To conceive ownership interests in ideational things is preferable to working out beneficial and detrimental effects of the creation on the community through contractual devices, the costs of advanced-contract being too high.<sup>71</sup> In Harris's words:

The law takes an intangible thing and builds around it a property structure modelled on the structure which social and legal systems have always applied to some tangible things. By instituting trespassory rules whose content restricts uses of the ideational entity, intellectual property law preserves to an individual or group of individuals an open-ended set of use-privileges and powers of control and transmission characteristic of ownership interests over tangible items.<sup>72</sup>

That intellectual property is wealth there is no doubt, for: 'Mechanisms for hiving off wealth-potential, for instance by granting shares in companies in whom ownership interests are vested, apply in much the same way whether those corporate ownership interests subsist in tangible or ideational entities'.<sup>73</sup> However, proceeding to the assimilation of intellectual property with corporeal things through scarcity and trespassory protection does not so much investigate its *substratum* of property as witness its character as wealth.

There is another problem in this approach, which takes the argument back to the need to maintain the contrast between property and obligations. Once we

<sup>69</sup> The potential for defining the proprietary nature of things by reference to the possibility of protecting them will be discussed in Pt IV below. Cf the introduction to the *Vinicanda Part*, below 173–74.

<sup>70</sup> W Cornish and D Llewelyn *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (5th edn Sweet & Maxwell London 2003) [1.41].

<sup>71</sup> *Ibid* 298–99.

<sup>72</sup> *Ibid* 44.

<sup>73</sup> *Ibid* 46. The question of whether a *substratum* can be identified in the case of debts or intellectual property is answered in the negative by B Bouckaert 'What is Property?' (1990) 13 *Harvard J of L and Public Policy* 775, the *substratum* of a real right being exclusively physical and such that property can be described as implying a complete control of the good. But the same question is answered in the positive by Mincke 'Property: Assets or Power?' (n 33 above) who identifies in 'naked value' the *substratum* which justifies inclusion of debts, patents, and intellectual property into property (as opposed to the more limited *Eigentum*). The positions are compared in JW Harris 'Property: Rights *in Rem* or Wealth?' in P Birks and A Pretto (eds) *Themes in Comparative Law: In Honour of Bernard Rudden* (OUP Oxford 2002).

admit ‘ideational things’ as *res* capable of supporting rights *in rem*,<sup>74</sup> we have to face the fact that obligations are also ideational things, at least in the sense that they are abstract conceptualizations. The question therefore arises whether, if we are sympathetic to the Harris position, we can adapt it or develop it in a direction which would preserve that boundary between property and obligations while enlarging the former to include patents, copyrights, and other familiar items of intellectual ‘property’.<sup>75</sup>

This can be done. The word ‘*locanda*’ conveys the essential idea. Rights *in rem* follow a thing. That thing is usually corporeal. Where the corporeal thing is located, there the right can be demanded. The capacity to be located is not exclusive to corporeal things. Ideational entities, such as a patented idea, a sequence of words or musical notes, a shape, or a design, materialize in all things which manifest that same idea. Rights in each such locatable thing appear to be intelligible as rights *in rem*. The idea is not corporeal, but it can be located in all those things which are capable of supporting it. For instance, copyright protects the form of expression of ideas, not the ideas themselves or creativity *per se*.<sup>76</sup> Copyright protects the holder of rights in artistic works against those who ‘copy’—‘those who take and use the form in which the original work was expressed by the author’.<sup>77</sup> There is, therefore, a dimension of spatiality to intellectual property. The spatiality of ideas lies in their expression. On this view that which is in common between cakes on the one hand and copyright and patents on the other is that they are all *locanda*. That is, they are assets which are capable of being located. On that basis intellectual property is not property merely in the loose sense of wealth but also in the narrow technical sense of rights *in rem*.<sup>78</sup>

This leaves a crucial question outstanding. Does the category of *locanda* leave intact the opposition between property and obligations? The burden of a right *in personam* attaches to a person. That is a tautology. There is nothing to find, nothing for the burden to follow, apart from that person. If I find my car in your

<sup>74</sup> Underkuffler *The Idea of Property* (n 48 above) 13 believes that ‘[i]ntellectual property . . . can be easily and productively discussed as “rights” in “things”.’

<sup>75</sup> W Cornish ‘Intellectual Property’ ch 6 in P Birks (ed) *English Private Law* (OUP Oxford 2000) vol I [6.01] notes that the current usage of intellectual property groups together, alongside literary and artistic works, distinguishing signs used in marketing and distribution—trade marks, trade names, get-up and the like. These forms of ‘industrial property’ will not be specifically addressed.

<sup>76</sup> Cornish (previous n) [6.50], [6.62], [6.71].

<sup>77</sup> World Intellectual Property Organization *Introduction to Intellectual Property Theory and Practice* (Kluwer Law International London 1997) [8.2]; <<http://www.wipo.int/copyright/en/faq/faqs.htm#ideas>> (accessed 31 Oct 2004).

<sup>78</sup> Cornish (n 75 above) [6.02] stops at the looser sense of vindicable wealth when he observes that the characteristic which brings intellectual property together is that the rightholder can prevent any authorized person from using the protected subject-matter. Protection is primarily by virtue of a civil action for an injunction and damages. Cf [6.13], [6.92], [6.101]. Within the broad sense of property-as-wealth, intellectual property is also alienable wealth. Cf Copyright, Designs and Patents Act 1988 s 90; *New Zealand Payroll Software Systems Ltd v Advanced Management Systems Ltd* [2003] 3 NZLR 1, noted DFC Thomas ‘Contractual Prohibitions on the Assignment of Copyright’ (2004) 120 LQR 218, esp 222; Cornish (n 75 above) [6.71], [6.106].



garage, I can demand my right from you precisely because I have located the car to which the burden of my right attaches. If I find my idea embodied in your product, I can likewise make you liable, because I have located the idea to which the burden of my right attaches. There is no parallel with rights *in personam*. The burden of a right *in personam* follows nothing but the person against whom it arose.

In conclusion, rights *in rem* do not necessarily have to be *in rem corporealem*. The category of corporeal things as subject-matter of rights *in rem* may be stretched to encompass some incorporeal things. Ideational entities such as patented ideas are one instance. It does not follow, however, that rights *in rem* can exist in all incorporeals. In particular, it does not follow that a right *in rem* may exist in that incorporeal thing which consists in a right *in personam*.<sup>79</sup> The extension from corporeal things is based on an analogy which focuses on the key characteristic of corporeal things. The analogy we have elected to draw is spatial: it is drawn between things which have a *corpus* occupying a portion of space and things which are similarly locatable in space. All these things, in their capacity of supporting rights *in rem*, are *locanda*. The law of property on this view is the law of rights *in rem locabilem*. There is only a narrow difference between *res corporales* and *res locabiles*. All the former are capable of being located. The latter enlarges the category to include the few ideational ideas which, though incorporeal, are naturally capable of being recognized in particular places.

## F CONSEQUENCES FOR SHARES AND FOR PERSONAL PROPERTY

The consequence of the extension to *locanda* is that shares still do not support rights *in rem*. They are not property in the strict sense. Against this conclusion can be advanced one powerful objection. Private international law is sometimes required to give shares a location.<sup>80</sup> If the courts can do this, does it not mean that shares are after all *locanda*? Thus in controversies requiring the application of *lex situs*, the *situs* of shares is sometimes taken to be the place where the register of the company is kept, while some other times it is interpreted as the place of incorporation of the company.

There are two answers to this. First, the attribution of such a location to shares is artificial. It is a matter about which the law chooses and scholars can

<sup>79</sup> Underkuffler *The Idea of Property* (n 48 above) would disagree. Space—together with theory, stringency, and time—is amongst her four dimensions essential for the existence of property. However, space is understood as the ‘area of field’, corporeal or incorporeal and even conceptual, to which a theory of rights must be applied in order to be cognizable as property (21–24). On this notion, here refuted, rights *in personam*, being rights applied to the conceptual field of personal relations, would be property.

<sup>80</sup> Notably for the purposes of the Hague Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary, the text of which can be found at < <http://hcch.e-vision.nl> > (accessed on 31 Oct 2004). The Convention is not yet in force.

argue. There is no natural location in space, as there has to be for all *locanda*. The *situs* is a fiction which serves the purposes of the choice of law.<sup>81</sup> The second answer is that what is located turns out to be no more than the person, that is, the company, against which the rights are exigible. There is nothing to follow, only a person to find. There is no way in which rights implicit in shares can be said to follow the location of the share. Shares other than bearer shares are not *locanda*. Even bearer shares are only *locanda* because they are where their corporeal certificate is.

Sub-shares cannot be *locanda* in any other way than can be shares. Some confusion seems to surround even the artificial locability of securities, almost always dematerialized, held in intermediated form, which is itself an indication of its non-natural character. An artificial location for purposes of private international law is sometimes indicated in the place where the intermediary holds the account to which the securities are credited.<sup>82</sup> An analogy has therefore been drawn between the sub-share account and the share register. Its drawing may reflect increasing awareness that controversial questions of conflict of laws regarding shares would be more correctly spoken of as cases concerning the however fictitious location of sub-shares.<sup>83</sup>

## G CONCLUSION

Our conclusion that shares are not property in the technical sense challenges every natural instinct and all ordinary usage. It is contradicted again and again in the literature. One typical English definition of shares illustrates this. It sees shares as a ‘species of intangible moveable property, which embraces a collection of rights and obligations relating to an economic and proprietary interest *in* a company’.<sup>84</sup> The proprietary assertion in this formulation is misleading. The rights implicit in shares are rights *in personam*. Even though the rights in which

<sup>81</sup> G Panagoupoulos *Restitution in Private International Law* (Hart Oxford 2000) 32–35; A Briggs *Conflict of Laws* (OUP Oxford 2002) 213, cf 193–95; R Stevens ‘The Lex Situs of Shares’ [1999] *Company Financial and Insolvency L Rev* 138.

<sup>82</sup> The so-called ‘PRIMA’ (Place of the Relevant Intermediary Account): J Benjamin and M Yates *The Law of Global Custody: Legal Risk Management and Securities Investment and Collateral* (2nd edn Butterworths Lexis Nexis London 2002) [5.26]. This choice is supported by Dir 98/26/EC on Settlement Finality in Payment and securities settlement systems (Settlement Finality Directive) [1998] OJ L166/45 art 9(2) and by Dir 2002/47/EC on Financial Collateral Arrangements (Financial Collateral Directive) [2002] OJ L168/43 art 10, but not by the Hague Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary art 4(1), which regards the law agreed in the account agreement as the applicable one. For a critique of the private international law aspect, see R Stevens, review of J Benjamin *Interests in Securities: A Proprietary Analysis of the International Securities Markets* (OUP Oxford 2000) (2001) 117 LQR 698–700.

<sup>83</sup> Eg *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978, [1996] 1 WLR 387 (CA), discussed in Ch 9 text from n 25, in which the adoption of that language would be justified on the basis of the line of nominees standing between the claimant and its shares.

<sup>84</sup> R Pennington ‘Can Shares in Companies Be Defined?’ (1989) 10 *Company Lawyer* 140–44. Also, CC art 2350 on the collection of rights to which a share entitles.

shares consist are patrimonial rights—meaning that they are part of an individual’s wealth—it cannot be said that they are *in rem*.

This is true in all European jurisdictions. Examples are the German *Vermögensrechte*, such as the entitlement to receive distributable profit (*Bilanzgewinn*), out of which the general meeting may decide to pay a dividend.<sup>85</sup> What happens is merely that the shareholders’ contingent entitlement to potential dividends is turned into a full right *in personam* against the company to receive them. If dividends can be considered as things, these rights focus on them only in the sense of rights *ad rem acquirendam*. We saw that such rights are unequivocally *in personam*. The same can be said of the right to the purchase of newly issued shares (*Bezugsrecht*) in the event of an increase in the capital.<sup>86</sup> Its function is to prevent a shareholder’s pre-existing position within the company from being watered down and losing value. The purchase of new shares on the part of the shareholder is the exercise of a right inherent in membership. This right *in personam* will not translate into a right *in rem* in the brand new bundles of obligations thus acquired. A shareholder’s patrimonial interests are by no means rights *in rem*. They simply express the idea of his wealth. Incidentally, that both the right to dividends and to newly issued shares lack the solidity of rights ‘in a thing’ is evidenced by the fact that a majority of shareholders may decide to obliterate them.<sup>87</sup>

The shareholders’ rights are thus confirmed to be rights *in personam*. The word ‘property’ constantly creeps in. But when it does so it signifies property in broad colloquial sense. If the boundary of personal property is defined by rights *in rem locabilem*, shares are going to straddle that line. Only a limited number of shares of little importance are capable of supporting a right *in rem*. Those will be ‘property’ in both the technical sense and in the loose colloquial sense. All other shares will be remitted to the law of obligations. This does not mean that the word ‘property’ will cease to be used of them. That cannot happen. But lawyers must not attach consequences to that usage beyond those that attach to ‘asset’ or ‘wealth’. However, for the moment that conclusion is provisional, for Parts III and IV still have to explore the possibility that the boundary of personal property might be differently drawn.

<sup>85</sup> AktG §58 Abs 4, §174.

<sup>86</sup> AktG §186.

<sup>87</sup> AktG §58 Abs 3–4 and §186 Abs 3–5.

## PART III

# ALIENANDA

Alienability and alienation observably preoccupy all treatments of personal property and the periodical literature of the subject, scarce as it is. ‘*Alienatio*’ is an ‘action noun’ derived from the verb ‘*alienare*’, meaning, literally, ‘to make <something> belong to another’.<sup>1</sup> If alienability defines property, the members of that category are *alienanda*, all things capable of alienation. ‘Alienation’ does not include every modality of acquisition (*modus acquirendi*).<sup>2</sup> It takes the standpoint of the *tradens* (he who transfers), whereas ‘acquisition’ looks from the point of view of the *accipiens* (he who acquires).

‘Acquisition’ is more comprehensive than is desirable, for it encompasses situations in which a person becomes entitled by operation of law. By *accessio* or *specificatio*, for instance, one can acquire an original as opposed to derivative title.<sup>3</sup> Again, if a fiduciary receives shares as a bribe, the victim of that wrong acquires them in equity. However, the latter’s ‘acquisition’ can only mean that he has ‘obtained’ such wealth indirectly and by operation of law.<sup>4</sup> ‘Alienation’ maintains a finer focus.

Part III will ask whether alienability can yield an intelligible frontier for personal property, less opposed to ordinary usage than that which we have hitherto examined. The strategy is now familiar. Discussion of the alienation of shares and sub-shares will be followed by consideration of the boundary so defined and its implications. However, rapid recent developments somewhat unbalance the discussion. Two inward-looking chapters are inescapably needed, one on the traditional modes of transfer, another on the technological innovations which have transformed those mechanisms and vastly improved the efficiency of the market.

<sup>1</sup> D Daube *Aspects of Roman Law* (Edinburgh University Press Edinburgh 1969) 19–21. *Alienatio* is of earlier origin than *acquisitio*. The later origin of *acquisitio* is due to the fact that for a long time litigation focused on specific ways of acquiring, or, more frequently, conveying. *Alienatio*, by contrast, was chiefly discussed in connection with restrictions on a man’s power of disposal, irrespective of the specific mode of conveyance. Hence there were fewer obstacles to the generalization of the notion of alienation than there were with regard to acquisition.

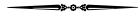
<sup>2</sup> LPW van Vliet *Transfer of Movable in German, French, English and Dutch Law* (Ars Aequi Libri Nijmegen 2000) evidently equates ‘transfer’ and ‘alienation’: see his remark on German *Übertragung* (transfer) being synonymous with *Übertragung* (transfer) and *Veräußerung* (alienation) (31).

<sup>3</sup> This distinction is a common civilian one, eg in U Mattei *La proprietà* in R Sacco (ed) *Trattato di diritto civile* (Utet Torino 2001) 173–78.

<sup>4</sup> *A-G for Hong Kong v Reid* [1994] 1 AC 324 (PC) 334, 336–37 (Lord Templeman).



## *Traditional Modes of Alienation*



IT IS EVIDENT THAT shares, whether or not they are described as property, can be alienated. This chapter and the next assume that foundation.

### A PERFECT ALIENATION

#### 1 Bearer Shares

The alienation of company shares takes place, as a rule, by entry of the new holder's name in the register of shareholders and shareholdings. Bearer shares are, or rather were, the exception.<sup>1</sup> Notwithstanding their disappearance, it is convenient to begin with a discussion of the way in which their alienation differed from that of registered shares.

##### *(a) English bearer shares*

Bearer shares always owe their existence to the fact that a company limited by shares may, if so authorized by its articles, issue a warrant stating that the bearer is entitled to the fully paid-up shares specified in it. These then become bearer securities. Title to these securities is *prima facie* evidenced by possession of the warrant and passes by manual delivery.<sup>2</sup> Bearer securities belong to the category of documents of title to money, otherwise known as 'instruments'. Some such instruments are described as 'negotiable'. 'Negotiable instrument' is an ambiguous phrase.<sup>3</sup> Litigation reflects the ambiguity.

The defendant company in *Webb, Hale & Co v Alexandria Water Co Ltd*<sup>4</sup> supplied water to the city of Alexandria in Egypt. Six of its share warrants each payable to bearer were stolen. They passed through various hands. They finally reached the London Stock Exchange, where they came into the hand of the

<sup>1</sup> Ch 4 text to nn 72–73.

<sup>2</sup> CA 1985 s 188(2).

<sup>3</sup> MG Bridge *Personal Property Law* (3rd edn OUP Oxford 2002) 165.

<sup>4</sup> (1905) 21 Times L Rep 572.

claimants. Even in the teeth of theft from an earlier owner the claimants succeeded in recovering dividends due from the defendant company in respect of the six warrants. It was held that a share warrant to bearer issued by a company registered in England under the Companies Act was by mercantile usage a 'negotiable instrument'. In this context that meant that the claimants were regarded as having a good title despite the intervening thefts. In a strong sense bearer bonds are thus true to their name.<sup>5</sup>

'Negotiability' can be understood in at least two ways, one of which is generic and the other narrower and more technical. In the generic sense it is taken to mean no more than the quality of being transferable. Negotiability in this sense might be thought to suggest the transfer of the underlying sum of money, since the security is deemed to have the value of the money. However, the security cannot transfer the title in unascertained money as such. The court in the *Alexandria Water* case certainly meant its reference to negotiability to indicate the easy transferability of the bearer securities themselves. Delivery of the paper carried with it the claim to the money.

Negotiability, as transferability, reveals nothing as to the requirements for an effective alienation. These vary. An instrument may be alienable merely by delivery, while in other cases delivery must be accompanied by endorsement—inscription of the name of the new holder on the piece of paper, signed. Again, a holder may simply sign a transfer in blank, whereupon the instrument may pass from hand to hand, the bearer being left to complete the transfer by filling in his name and taking care of the registration with the issuer.<sup>6</sup> With bearer shares alienation is achieved by simple delivery of the share warrant. The certificate is treated as a chattel. One consequence is that its transfer does not attract stamp duty, as would, by contrast, a sale of shares recorded or effected by a duly executed document.<sup>7</sup> While bearer shares have fallen out of use, the practice of signing blank transfers is still heard of.

The narrower sense of negotiability implies more dramatic consequences for the interests of previous parties.<sup>8</sup> That is to say, if the instrument is transferred in the manner which is required (be it simple delivery or endorsement plus delivery) and if the transferee is a bona fide purchaser for value (the so-called 'holder in due course'), that transferee will take a good title even though the transferor

<sup>5</sup> Cf *Rumball v Metropolitan Bank* (1877) 2 QBD 194, where the defendant bank, qualifying as bona fide holder for value, successfully resisted an action to recover four scrip certificates of the Anglo-Egyptian Banking Company Ltd, issued by that company to the plaintiff, and which his fraudulent broker had deposited with the defendant as security for the broker's own debt. Also, *Goodwin v Roberts* (1876) 1 App Cas 476 (HL).

<sup>6</sup> Blank transfers, therefore, matter more as regards the relationship between the transferee and the company than between two subsequent transferees.

<sup>7</sup> *Oughtred v IRC* [1960] AC 206 (HL) 227–28 (Lord Radcliffe), 238–41 (Lord Jenkins).

<sup>8</sup> B Rudden *Lawson & Rudden on the Law of Property* (3rd rev edn OUP Oxford 2002) uses the word 'negotiable' only in the narrow meaning, preferring 'tradable' for the broader sense (31–32, 66–67).

has none. Hence interests outstanding in third parties will be destroyed.<sup>9</sup> Instruments which are non-negotiable according to this strict test are governed by the normal rule '*nemo dat quod non habet*'. Bearer shares are negotiable instruments even in the strong sense. Thus, in *Alexandria Water* the interests of the previous owners and victims of the theft were destroyed by an alienation to bona fide purchasers.

(b) *Italian bearer shares*

Italian bearer shares, although provided for in the 1942 Civil Code, almost completely succumbed to the subsequent tax legislation, which imposed a general requirement that all shares be registered. Nonetheless, their mode of transfer merits brief discussion. The fact that they form a bridge to corporeal chattels will be useful when we reach Chapter 8.

All Italian shares of all types, taken in their paper dimension, are classified as *titoli di credito*. These are pieces of paper and, as such, they benefit in principle from a simplified means of circulation. The Code then envisages different modes of circulation for different *titoli di credito*: delivery suffices to transfer *titoli al portatore* (bearer documents);<sup>10</sup> endorsement and signature are required for *titoli all'ordine* (documents containing an order to someone to perform a certain action, such as a cheque);<sup>11</sup> a double inscription of the purchaser's name both on the body of the document and in the register of the issuer is needed to transfer *titoli nominativi* (documents issued in someone's name).<sup>12</sup> The first mode, delivery, is all that is necessary for bearer shares, for they are clearly *titoli al portatore*. Registered shares, as *titoli nominativi*, require the third mode, that is, registration.

A parallel can be drawn between modes of transfer applicable to Italian shares and the various degrees of negotiability applicable to English documents of title. Italian *titoli di credito* are also endowed with something akin to negotiability in the technical sense, for they are subject to the so-called acquisition from a non-owner (*acquisto a non domino*).<sup>13</sup> This exception to *nemo dat quod non habet* empowers the purchaser of a corporeal moveable to obtain good title to it, thus overriding interests of previous parties, provided he obtains possession in good faith and pursuant to a transaction which is valid in all aspects, except for the lack of title in the transferor. Even all *res furtivae* may be acquired in this way.<sup>14</sup> Thus,

<sup>9</sup> R Goode *Commercial Law* (3rd edn Butterworths Lexis Nexis London 2004) 49, 477. Non-negotiable instruments therefore remain transferable *lato sensu*, in contrast to non-transferable shares. For an instance of restrictions rendering shares non-transferable: *Money Markets International Stockbrokers Ltd (in liq) v London Stock Exchange Ltd* [2001] 4 All ER 223.

<sup>10</sup> CC art 2003 ff.

<sup>11</sup> CC art 2008 ff.

<sup>12</sup> CC art 2021 ff.

<sup>13</sup> C Angelici *Le azioni* in P Schlesinger (ed) *Il Codice Civile. Commentario* (Giuffrè Editore Milano 1992) 257.

<sup>14</sup> CC art 1153.



original, not derivative, title to the *chartula* can be acquired through receipt in good faith.<sup>15</sup> This is but one aspect of the fact, recurrent at civil law, that the alienation of bearer securities is modelled on the alienation of chattels.<sup>16</sup>

## 2 Registered Shares

### (a) *English shares and registration*

Legal title to English registered shares is acquired through entry of the name of the shareholder in the register of members and shareholdings, which the company is required to maintain.<sup>17</sup> It is at that moment that the status of shareholder and of member of the company vest in the holder of the shares.

Registration makes shares exceptional, for this mode of alienation differs from that laid down for any other moveable, tangible or intangible. A distinction has to be taken between the transfer of registered shares to their first owner and all subsequent transfers from one owner to another. Only the company and the prospective shareholder will interact in the former case, as opposed to the company and two shareholders, one existing and one prospective, in the latter. These two contexts will now be analysed separately. In relation to both, what follows assumes the standard practice of the stock exchange and of the intermediaries, traditionally stockbrokers, that it involves. In Britain the London Stock Exchange is the official market on which shares in British public companies are bought and sold within a certain regulatory framework of listing rules describing the conditions of admission of the shares to the trade.<sup>18</sup> However, it is still possible for buyer and seller to contact each other directly and exchange even large volumes of securities by dealing ‘over the counter’ (OTC), outside stock exchanges.<sup>19</sup> This book, however, will not deal with the variety of peripheral contexts in which a share can be offered for sale.

On the occasion of a new issue of shares a would-be shareholder will apply in response to the prospectus, which will have listed the details of the shares. If his application is accepted he will be ‘allotted’ the shares by the directors, that is, he will acquire an unconditional right to be included in the company’s register in respect of those shares.<sup>20</sup> In public companies this will be done by means of a formal letter of allotment, whereas in private companies no letter of allotment

<sup>15</sup> CC art 1994 is the application of the rule in art 1153 to *titoli di credito*. The *accipiens* must believe that the *tradens* is the owner (*opinio domini*): Cass Sez I 26 marzo 1980 no 2011 *Sas Ivest c Macchiorlatti Vignat* in *Giustizia Civile Massimario* 1980, 871–72.

<sup>16</sup> Cf the application to German bearer shares of the rules dictated for chattels: BGB §§ 929–35.

<sup>17</sup> CA 1985 s 22, ss 352–62.

<sup>18</sup> E Ferran *Company Law and Corporate Finance* (OUP Oxford 1999) 74–76, 569.

<sup>19</sup> J Benjamin *Interests in Securities: A Proprietary Law Analysis of the International Securities Markets* (OUP Oxford 2000) 10.

<sup>20</sup> CA 1985 s 738(1).

is issued. The agreement between the person and the company as to his becoming a shareholder and a member will then have been completed, but neither quality can vest in the person until he has his name placed on the register. Only then will the shares have been formally issued. As with land, where there is a distinction between contract and conveyance, so here the allotment is a contract for the issue of shares which confers a right to be registered, and registration confers legal title to those shares.<sup>21</sup>

In the case of alienations by an existing member and shareholder, after the agreement is reached the alienor will sign<sup>22</sup> a transfer form and deliver it with the share certificates to the alienee, who will in turn pay the price of the shares. However, notwithstanding the wording of the standard transfer form, which implies that the form itself effects the transfer,<sup>23</sup> these actions will not suffice to transfer legal title to the shares. Registration alone will achieve that result. The company, unless its articles impose restrictions on the alienability, will proceed to amend the register and inscribe the alienee's name in it as soon as he has lodged form and certificates with the company. Again there is a distinction between the contract, this time between the member and the would-be member, and the registration which vests the share in the latter.

(b) *Italian shares and double inscription*

Just as with English shares, Italian shares may be the subject of an 'initial' alienation on the occasion of a new issue as well as an alienation at a later stage.<sup>24</sup> Registration again perfects the twofold status of shareholder and member. Italian companies maintain the so-called *libro dei soci* (register of members), which must indicate the number of shares held by each shareholder and the alienations and charges to which the shares may be subject.<sup>25</sup> Membership and shareholding of registered shares are, therefore, in principle co-terminous. Equally co-terminous will be their alienation: an alienation of shares is an

<sup>21</sup> *National Westminster Bank plc v IRC* [1995] 1 AC 111 (HL) 126 (Lord Templeman). On entry of the applicant's name in the register as a condition precedent to membership, *Nicol's Case* (1885) 29 Ch D 421 (CA). Cf *Re Scottish Petroleum Company* (1882) 23 Ch D 413 (CA). Alongside registration as a *condicio sine qua non*, further minor requirements may be dictated by the company articles of association or statutory legislation: CA 1985 s 183(1).

<sup>22</sup> More precisely, he will only have to sign if the shares are only partly paid: Stock Transfer Act 1963 s 1(4).

<sup>23</sup> The form, set out in Stock Transfer Act 1963 sch 1, speaks of the alienor as 'hereby transferring' the securities. Cf s 1 which lays down that the securities 'may be transferred by means of' the standard form.

<sup>24</sup> F Galgano *Diritto privato* (11th edn CEDAM Padova 2001) 709. As for initial alienation, MS Spolidoro 'I conferimenti in denaro' in GE Colombo and GB Portale (eds) *Capitale—Euro e azioni. Conferimenti in denaro* (UTET Torino 2004) 247, 250 notes that the phrase 'price of issue' is in itself an indication that shares are typically, from a socio-economic standpoint, wealth destined to be traded. However, reference to a 'price' should not be read as suggesting that a common 'sale' is taking place.

<sup>25</sup> CC art 2421 no 1, as modified by D Lgs 17 gennaio 2003 no 6 and D Lgs 30 dicembre 2003 no 394.

alienation of membership in the company,<sup>26</sup> that is, a transfer of the obligations which the status of shareholder entails.<sup>27</sup>

Underlying the alienation of traditional registered shares is an uncomfortable tension between their intangible essence as incidents of the corporate contract and their corporeal appearance as chattel paper.<sup>28</sup> The latter comes to the fore in the concept of *titoli di credito* (documents which represent entitlements). The former dimension is contemplated in the fact that, within this broad category, shares qualify more specifically as *titoli di partecipazione* (documents signifying participation in the company and therefore revealing an obligational content). Both these expressions were explained in speaking of shares as things.<sup>29</sup> However, this tension does not disturb perfect alienations, since Italian and English law are substantially in agreement as to the effects of a completed registration. Both have difficulties with the gap before registration, discussed in section B of this Chapter.

Perfect alienation of *azioni nominative*, both *inter vivos* and *mortis causa*, requires the double inscription (*annotazione*) of the name of the would-be shareholder in the body of the title and in the register of the issuer.<sup>30</sup> This procedure, which it is the responsibility of the issuing company to bring to completion, is known as *trasfert*. Both the alienor and the alienee can solicit it from the company, by producing the share (*rectius*: the document representing the share) and by adducing formal evidence that they are, respectively, the person entitled to dispose of the share or the new owner of the same. After verifying the existence of formal entitlement, the company will inscribe the name of the alienee on the body of the *titolo* and in the *libro dei soci*. Alternatively, the company can issue a new *titolo* to replace the old one. At that point the alienation is indubitably complete, and the alienee will be entitled to exercise all corporate rights.<sup>31</sup>

Finally, as with English registered shares, the alienation of *azioni nominative* can be subject to various restrictions. These may be contained in either statutory sources<sup>32</sup> or in the articles of association (*statuto*)<sup>33</sup> or in other agreements between the members to that effect.<sup>34</sup> In the third case the restrictions bind the parties to the contract on which they rest, whereas restrictions of the two

<sup>26</sup> It is an alienation of patrimonial values only in a subsidiary sense: Cass 27 settembre 1999 no 10669 in Massimario del Foro Italiano 1999 col 1069.

<sup>27</sup> As they are set out in the company articles or in the decisions of the general meeting: Cass 30 marzo 1987 no 3052 in Giustizia Civile Repertorio 1987 Società 105.

<sup>28</sup> Ferri *I titoli di credito* (UTET Torino 1965) 106–9.

<sup>29</sup> Ch 4 text to nn 90–91.

<sup>30</sup> CC art 2022; RD 25 ottobre 1941 no 1148, RD 29 marzo 1942 no 239; L 29 dicembre 1962 no 1745.

<sup>31</sup> C Balzarini *Le azioni di società* (Giuffrè Milano 2000) 269–72.

<sup>32</sup> CC revised arts 2331 para 5 and art 2343 para 3; art 2345 para 2; L 23 novembre 1939 no 1966 art 3 para 2.

<sup>33</sup> Revised CC art 2355 *bis*.

<sup>34</sup> In which case the restrictions are known as *sindacati di blocco*.

former kinds have a ‘real’ effect (*effetto reale*).<sup>35</sup> This can be understood in the sense that they inhere in the *res* itself.

(c) *Novation and alienation*

The terminology in which we have chosen to describe the passing of title to shares is that of ‘alienation’.<sup>36</sup> A question arises whether alienation of shares is more accurately a novation. Although novation strictly speaking implies putting a new and different thing in place of an old one, one scholar has boldly taken the risk of combining the two terms. She lists novation among the techniques of transfer of securities. Novation on this view is one of the means of achieving the economic result of passing title to an asset to a transferee.<sup>37</sup>

(i) *Novation as known to Italian law* It may be helpful to begin from Italian law. Novation is encountered in the law of obligations. Once we know that that is its territory, the word itself tells us that what is involved is a metamorphosis of an old obligation into a new one. Under Italian law *novazione* is a way of extinguishing an obligation, other than by performance of that obligation, in order to replace it.<sup>38</sup> The law distinguishes between *novazione oggettiva* and *novazione soggettiva*.

The so-called *novazione oggettiva* is a contract through which the parties substitute for an old obligation, which is extinguished, a new one in which the *aliquid novi* (something new) is either a different *oggetto* (object, where ‘object’ indicates the performance due) or a different *titolo* (cause, where ‘cause’ indicates the ground of the obligation).<sup>39</sup> A change of *oggetto* thus in effect brings about a quantitative or qualitative change in the obligation (for instance, the new obligation may involve delivery of a different thing under a sale). A change of *titolo* involves a change in the underlying contractual basis (for instance, under the new obligation a sum may be due as a payment under a loan whereas under the original contract the sum was outstanding under a contract of sale). A purported novation is void and without effect if the original obligation did not exist. Conversely, if the novating contract is invalid, the *aliquid novi* disappears and the old obligation remains in place.

Quite different is *novazione soggettiva* (‘subjective novation’),<sup>40</sup> which is simply the substitution of a new debtor for the old one. The mechanism is similar to

<sup>35</sup> C Balzarini (n 31 above) 282 ff.

<sup>36</sup> Introduction to Pt II above.

<sup>37</sup> Benjamin *Interests in Securities* (n 19 above) [3.02].

<sup>38</sup> One way of classifying the means of extinguishing an obligation, distinct from performance, is according to whether the extinction satisfies the creditor’s interest. Among these ‘satisfactory’ means (*modi satisfattivi*) is, for instance, set-off (*compensazione*). *Novazione* appears among the ‘non-satisfactory’ ways of cancelling an obligation: F Gazzoni *Manuale di diritto privato* (9th edn ESI Napoli 2001) 583–85.

<sup>39</sup> CC art 1230.

<sup>40</sup> CC art 1235.

other legal figures which involve a change in the person of the debtor.<sup>41</sup> These are *delegazione*, whereby the debtor delegates to someone else the obligation to pay the debt;<sup>42</sup> *espromissione*, whereby a third party, without being delegated, undertakes to pay the debt;<sup>43</sup> and *accollo*, when the debtor and a third party are agreed that the third party will pay the debt and the creditor accedes to the substitution.<sup>44</sup>

In Italy it is not common to employ the terminology of *novazione* to explain what happens in the alienation of company shares, although the terminology of the ‘replacement of one subject for another’ in the corporate contract has occasionally crept up in the courts.<sup>45</sup> But, most often, the alienation of shares is routinely described, in the general context of contract, as a *contratto di rilascio* or *trasmissione* (transfer). It is anyhow just as new an idea in the common law.

(ii) *Novation in English law* According to Lord Selborne LC in *Scarf v Jardine*, ‘novation’ means that, ‘there being a contract in existence, some new contract is substituted for it, either between the same parties . . . or between different parties; the consideration mutually being the discharge of the old contract’.<sup>46</sup> For instance, when the composition of a partnership changes, it is usually arranged that liability owed by the existing partners should pass by novation to the new partners.<sup>47</sup> *Scarf v Jardine* was itself a partnership case in which a trader had dealt with an old partnership and the new one which had replaced it. The question arose whether the old partners were liable to pay him. The details are not relevant here. The case was ultimately decided on the basis of estoppel and election, not novation.

In the words of *Lindley on Partnership*: ‘In order that one liability may be extinguished by being replaced by another by agreement it is essential that the person in whom the correlative right resides should be a party to the agreement or should, at all events, show by some act of his own that he accedes to the substitution’.<sup>48</sup> Treitel says: ‘Novation is a contract between debtor, creditor and a third party that the debt owed by the debtor shall henceforth be owed to the third party. . . . This is not assignment because the consent of all three parties, including that of the debtor, is necessary’.<sup>49</sup>

<sup>41</sup> Gazzoni (n 38 above) 619–20.

<sup>42</sup> CC arts 1268–71.

<sup>43</sup> CC art 1272.

<sup>44</sup> CC art 1273.

<sup>45</sup> Cass Sez I 6 agosto 1998 no 7683 *Garlasco c UAP Italiana spa* in *Le Società* 1999, 174, 174. Trib Milano 20 giugno 2002 *Petti c Bonaparte spa e Corba Colombo* in *Banca Borsa Titoli di Credito* 2004 II 223, 226 speaks less significantly of ‘consensual contract’ in the case of the purchase of newly issued shares.

<sup>46</sup> (1882) 7 App Cas 345 (HL) 351 (Lord Selborne LC); D Greenbery and A Millbrook (eds) *Stroud’s Judicial Dictionary of Words and Phrases* (6th edn Sweet & Maxwell London 2000) 1732–33.

<sup>47</sup> GH Treitel *The Law of Contract* (11th edn Sweet & Maxwell London 2003) 155–56.

<sup>48</sup> These words appeared up to and in the 15th edn: EH Scamell and RC l’Anson Banks (eds) *Lindley on the Law of Partnership* (15th edn Sweet & Maxwell London 1984) 409. The present editor omits them recalling Lord Lindley’s opinion that ‘nothing is really gained by using [the word] novation’: RC l’Anson Banks (ed) *Lindley and Banks on Partnership* (17th edn Sweet & Maxwell London 1995) [13–101] fn 72 and (18th edn Sweet & Maxwell London 2002) [13–106] fn 2.

<sup>49</sup> Treitel (n 47 above) 673.

Novation is thus quite different from assignment. Assignment, to which we will return when discussing the alienation of shares in relation to the alienation of other species of personal property,<sup>50</sup> transfers a right independently of the consent of the debtor. In the converse case there has to be a tripartite agreement, for the common law cannot recognize the transfer of a contractual liability, as opposed to a right, without the consent of the creditor.<sup>51</sup> This is the job of novation. By novation it is possible to effect a substitution not only of a creditor but also of a debtor. A contractual novation requires the consent of everyone involved in the contract, for liabilities under it are to be transferred. When it was still true that assignment of choses in action could not take effect at common law, it was possible to have recourse to novation.

(iii) *Novation and the alienation of shares* We have already noticed that no Italian court or jurist has sought to explain the alienation of shares in terms of novation. English novation, as now invoked in this context, employs the Italian *novazione soggettiva* rather than *oggettiva*, for it cannot be argued that the inscription of a new shareholder's name causes a change in the *causa* or basis underlying the corporate contract with the members, which is the pursuit of a business. The very purpose of the parties is that the 'alienee' should end up in precisely the same relation with the company as the 'alienor'. What the company faces and agrees to is rather the substitution of a new debtor-creditor, for such is the shareholder, for the previous one.

It will be evident that in the context of shares the analysis in terms of novation offers advantages which a model of simple alienation lacks. If we are to view the company as a debtor of those benefits which accrue to the shareholders from the exercise of the corporate rights (for instance, a debtor of dividends), and concurrently as creditor of the shareholder's obligation to pay for the shares, then the contractual pattern of novation seems to match the alienation of shares in a company, for the model of an assignment has difficulties with liabilities. The consent and even the action of the company directors which is actually needed to complete registration allows the explanation in terms of novation to be invoked and surmounts that problem. It is of course true that since shares are always fully paid-up these days rights of shareholders are much more prominent than liabilities, so that the gain lies chiefly in the field of technical elegance. However, other consequences may follow, as for instance keeping at bay the analogy of assignment with its requirement of writing.<sup>52</sup>

(d) *The register and the duality between equity and law*

An added complexity arises where shares have a beneficial, as well as legal, owner. The main economic consequences are that, while the legal owner

<sup>50</sup> Ch 8 text preceding n 4.

<sup>51</sup> Treitel (n 47 above) 701.

<sup>52</sup> Text to n 100 below.

receives the dividends from the issuing company, he will have to account to the beneficial owner for dividends, as also for the proceeds of any sale. The relationship between the legal and beneficial owner is described as a trust.<sup>53</sup>

The register provides prima facie evidence of any matters directed or authorised to be inserted in it, such as the identity of its members and the size of their shareholdings.<sup>54</sup> Thus, a company's register of members will accurately reflect the legal interests in the shares. By contrast, beneficial ownership will not appear in it: no notice of trust either express, implied, or constructive shall be entered on the register.<sup>55</sup> As Lord Hoffmann expressed it in *Village Cay Marina Ltd v Acland*: 'Shareholders can hold their shares on trust for anyone they like; that is a matter between them and the beneficiaries. Company law is not concerned with trusts of shares'.<sup>56</sup>

Since the modern trend, favoured by the proliferation of intermediation schemes,<sup>57</sup> is for investors to hold their shares in listed companies through nominees, it is almost inevitable that the register will not give anything like the whole picture.<sup>58</sup> The nominee's registered legal title will be a *nudum ius*, for the nominee may be holding for a trustee, who holds for a beneficiary. Here the trustee too will have only an equitable interest, reduced to a *nudum ius*. The person for whom the trustee holds will have the beneficial interest and will in effect be the true owner. Sometimes it will be apparent that shares are held by a nominee, in that some companies are explicitly created to act as nominees and only exist to fulfil that function.

The phenomenon of holding through nominees under English law may appear just as another echo of the interaction between bare and beneficial ownership made possible by the trust. Continental law is equally familiar with ownership for the benefit of a third party. It is therefore not unaware of the register's imperfect picture of the ownership of shares. Under Italian law, where no

<sup>53</sup> The concept of 'trust' adopted here does not match the very narrow view of trust which appears to have been insisted upon by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington* [1996] AC 669 (HL) 706–7. According to this view, the word 'trust' should not be used of the bare proprietary split between the *nudum ius* surviving in the trustee and the competing beneficial interest arisen in the beneficiary. 'Trust' would only be pronounced correctly of the situation in which, in addition to the proprietary split, it was also true that a series of personal obligations—allegedly characteristic but left unspecified—had been imposed on the trustee. This view has been sharply criticized by R Chambers *Resulting Trusts* (OUP Oxford 1997) 208–9 and is rejected in P Birks 'Events and Responses: The Case of Trusts' in C Fassberg and I Gilead (eds) *Classification of Private Law* (Sacher Institute Jerusalem 2002) text to fnn 77–78: '[I]t is almost impossible to imagine how the language of our law could cope with any such refinement of the language of trust'.

<sup>54</sup> CA 1985 s 361.

<sup>55</sup> CA 1985 s 360. The section does not exist in Scots law, where the practice is for trustees to be registered as 'trustee disponees', so that the holding is identified as that of a trust.

<sup>56</sup> [1998] 2 BCLC 327 (PC) 338. Cf *Re Perkins (ex p Mexican Santa Barbara Mining Co)* (1890) 24 QBD 613 (CA); *Société Générale de Paris v Walker* (1885) 11 App Cas 20 (HL).

<sup>57</sup> Ch 3 text from n 10.

<sup>58</sup> PL Davies (ed) *Gower and Davies' Principles of Modern Company Law* (7th edn Sweet & Maxwell London 2003) 592–93.

law of trusts as such exists, the mechanism of *intestazione fiduciaria*, described among the devices facilitating intermediation, performs the function of nominee-ship.<sup>59</sup>

As a general rule, the company shall not be bound by or recognize any interest in a share except for an absolute right to the entirety of the share in the holder, nor will the company be liable to beneficiaries in the case of breach of trust.<sup>60</sup> Although the details lie beyond our purview, it is desirable to note that the inscrutable nature of the register is nowadays qualified, albeit not on the register itself, by rules, reinforced by a European directive,<sup>61</sup> requiring the disclosure of interests affecting the control of listed public companies.<sup>62</sup> The company is then obliged to maintain a record of the information thus disclosed.<sup>63</sup>

(e) *Relationship between register and certificates*

We have seen that registered shares are intangibles traditionally evidenced by a paper certificate. In the simple model of, say, an alienation between members of a family, the transferor will normally sign a share transfer and hand it over to the transferee, together with the share certificate, which the transferee will lodge with the company. The transferee's name will be subsequently entered in the register. Upon registration of the transfer in the register of shareholders the purchaser is entitled to the delivery of a new certificate, which evidences the shares held by a member.<sup>64</sup> Within the more impersonal dynamic of the Stock Exchange, certificates have often been regarded as the major cause of the excessive length of the so-called 'settlement of the transaction'.

'Settlement' is the process by which each party completes his or her side of the bargain, that is, transfer of the purchase price on the part of the buyer and

<sup>59</sup> Ch 3 text from n 15. The question of the transparency of the fiduciary relationship towards third parties is very problematic. In favour of the principle according to which the *società fiduciaria* may legitimately keep the identity of the *fiduciante* on whose behalf it holds from the company in which it holds shares, and indeed from anyone but the public bodies which may be entitled to know (*amministrazione finanziaria*), F Di Maio 'Sul principio di riservatezza delle società fiduciarie' *Le Società* 2001, 777, 782. For a survey of the very contradictory decisions of the Cassazione, F Di Maio 'L'intestazione di beni a società fiduciarie: revirement della Corte di Cassazione?' *Contratto e Impresa* 1999, 1007, 1014–15. One lower court recently held that the fact that *azioni* are nowadays necessarily *nominative* would entail an obligation of the *fiduciaria* to disclose the identity of the *fiduciante* for whom it holds to the issuer of the shares, and indeed to whomever may be interested in such information: Trib Pordenone 9 gennaio 2001 *GU Riccio Cobucci c Pordelettrica spa Delta Erre spa* in *Le Società* 2001, 846.

<sup>60</sup> As for shares held in uncertificated form, a similar rule as to the non-recognition of trusts applies to the operator of an electronic transfer system: USR 2001 SI 2001/3755 reg 40(3).

<sup>61</sup> Directive 88/627/EEC of 12 December 1988 [1988] OJ L 348/62, resulting in amendments to pt VI of the CA 1985 by SI 1993/1819. The rules on major shareholding are now in Directive 2001/34/EC of 28 May 2001 [2001] OJ L 184/1 on the Admission of Securities to Official Stock Exchange Listing and on the Information to be Published on those Securities. The complex law relating to disclosure and transparency is discussed in Davies (n 58 above) ch 23.

<sup>62</sup> CA 1985 pt VI ss 198–220.

<sup>63</sup> CA 1985 ss 202, 211, 217, 218.

<sup>64</sup> CA 1985 ss 185–86.



transfer of the legal title on the part of the seller to the buyer. Due to the complex nature of shares as intangibles evidenced by paper, the transfer of certificates from seller to buyer has been traditionally thought of as necessary, alongside registration, for the successful completion of the transaction. More recently, quick settlement has been facilitated through the introduction of the possibility of dematerializing share certificates and replacing them with an electronic record. Thanks to this device, securities have become ‘uncertificated’ and title to them can be evidenced and transferred without a written instrument. The next Chapter will look at the means to that end in more detail.

Against this background it is necessary to notice the importance which certificates have traditionally had. This can be illustrated from the leading case of *Colonial Bank v Whinney*.<sup>65</sup> The case exemplifies both the use of certificates as collateral and the fact that, quite apart from the possibility of trusteeship, the entry in the register cannot be relied upon as conclusive of unencumbered entitlement.

In the course of their business as stockbrokers in London, the firm of Blakeway and Thomas bought shares in a railway company. The name of Blakeway alone was entered in the register of shareholders and certificates were issued in his name. Blakeway subsequently deposited the certificates with the Colonial Bank as security for a money-owing balance due to the bank, accompanied by a blank transfer form executed by himself. The firm became insolvent, and Whinney was appointed trustee in bankruptcy. The bank maintained that it had a valid security for its lending. Whinney asserted that the shares were an unencumbered part of Blakeway’s estate for distribution to creditors. Whinney relied on the registration in Blakeway’s name as bringing the shares within the doctrine of reputed ownership, which at the time sufficed. The House of Lords held that Whinney could not rely on the register for that purpose. Since Blakeway did not have the certificates, the least inquiry would have revealed that he had used them to transfer an equitable interest by way of security. The bank’s interest thus held good.<sup>66</sup>

## B IMPERFECT ALIENATION

So far the alienation of shares has been considered in the absence of complications. The question inevitably arises whether an alienee can hold any interest before registration or despite failure to register. The position of donees and purchasers for value, as sub-categories of alienees, will be considered separately.

<sup>65</sup> (1886) 11 AC 426 (HL).

<sup>66</sup> A second ground independently supporting this conclusion was that shares were choses in action which, simply as a matter of construction of the Bankruptcy Act 1883, were taken out of the trustee’s hands.

## 1 English Unregistered Gifts

A gift of registered shares is incomplete until the donor's name in the register is replaced by that of the donee, for the donor retains the legal title until that happens. A number of cases have had to consider the gap between the donor's manifestation of intent to give and registration. The question is whether, during that gap, the donor ever holds the shares on trust for the donee and, if so, from what moment. The obstacles are the two propositions that equity will not assist a volunteer, meaning by 'volunteer' a person who has given no consideration, and that a failed attempt to achieve a goal by one means will not be construed as a successful attempt to achieve it by another. It is fairly clear that this area of law is changing. For the moment the most important cases are still two which by coincidence have the same name. We shall refer to them as *Re Rose (1949)*<sup>67</sup> and *Re Rose (1952)*.<sup>68</sup> Under both Italian and English law gifts give rise to numerous peculiarities, for gratuitous intent (*liberalità*) entails numerous deviations from standard contract law.<sup>69</sup> Nevertheless, these two cases provide a good starting-point to assess the courts' attitude to the general requirement of registration.

In *Re Rose (1949)* the donor, intending to make a gift, had completed a documentary transfer form which perfectly complied with the articles of the company and had handed it to the donee. The directors of the company, in the exercise of their discretion, initially refused to register the transfer. Two years later they finally decided to enter the donee's name on the register. The donor had died two months before registration. Jenkins J concluded that the gift had taken effect as an *inter vivos* disposition rather than under the will. The testator having done everything in his power to divest himself of the shares in question in his lifetime, he had succeeded in transferring the property in the shares prior to his death, albeit not at law. Registration of the transfer on the part of the directors was necessary to perfect the legal title, but equity would treat his gift as perfect when nothing remained to be done save the act of third parties and his intention had not been to make the gift conditional on the doing of that act.

In *Re Rose (1952)* the donor executed some transfers of shares in a company to his wife and to trustees, by completing the form required by the company's articles. On the same day possession of the transfers was given to the donees, but it was only three months afterwards that the transfers were registered. Estate duty was payable on assets transferred less than five years before death. On the donor's death, five years had elapsed from the execution of the transfers but not from their registration. The Court of Appeal, including the very same Jenkins LJ, unanimously held that the gift was complete and perfect at the date of

<sup>67</sup> *Midland Bank Exor and Trustee Co Ltd v Rose* [1949] Ch 78.

<sup>68</sup> *Rose v IRC* [1952] Ch 499 (CA); L McKay 'Share Transfers and the Complete and Perfect Rule' (1976) 40 Conv 139–55.

<sup>69</sup> Galgano (n 24 above) 875–81.

execution of the transfer form, since at that date the donor had done all he could do. In the gap before registration the donor had only a *nudum ius*: he was trustee of the legal title for the donees. No estate duty was therefore payable on such property.

The trust evidenced in these cases is a constructive trust.<sup>70</sup> That is, it is not the creature of the intent of the parties but a mere inference of law from the facts. Yet Elias explains it by the ‘perfection’ argument. ‘Perfection’ here means that the tenor of the rule is allegedly to compel the defendant to abide by his choice to benefit the claimant even though his was a gratuitous choice made without the claimant’s intervention.<sup>71</sup> This explanation encounters an acute difficulty if understood as concerned only with donors minded to double back on their expressed intentions, for in these cases the donors were not reneging. The explanation has to be adjusted towards the perfection of the expectations of the volunteer donee, rather than the decisions of the donor.

This constructive trust encounters other serious difficulties, especially with the twin maxims that equity will not assist a volunteer and equity will not perfect an imperfect gift. On the authority of *Richards v Delbridge*,<sup>72</sup> a man may transfer his property without valuable consideration in one of two ways. That is, by completely divesting himself of the legal ownership, or by words amounting to a valid declaration of himself as trustee. But he must do one or the other. This is also the doctrine of the leading case of *Milroy v Lord*<sup>73</sup> where even the facts were very similar to the *Rose* configuration.

In that case the settlor purported to transfer shares to the defendant as trustee by deed. The regulations of the company provided that shares could only be transferred in the books of the company by complying with certain formalities, with which the deed failed to comply. Upon the settlor’s death, the beneficiary under the trust claimed to be entitled to the shares to the exclusion of the settlor’s estate. The Court of Appeal held that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything that had to be done in order to transfer property of that particular nature and render the settlement binding upon him. Because no valid method of transfer had been employed, the gift was held to be ineffective.

The *Re Rose* cases can only be made compatible with this by relying on a slender difference. The settlor in *Milroy v Lord* had failed to comply with the company regulations. He had not used a transfer form at all. He had used a deed. His intention was not less plain, but technically he had not done those

<sup>70</sup> AJ Oakley *Parker and Mellows: The Modern Law of Trusts* (8th edn Sweet & Maxwell London 2003) 440–41.

<sup>71</sup> G Elias *Explaining Constructive Trusts* (Clarendon Press Oxford 1990) 48–49, 58.

<sup>72</sup> (1874) LR 18 Eq 11. Also, *Morgan v Malleon* (1870) LR 10 Eq 475; *Richardson v Richardson* (1867) LR 3 Eq 686. Cf *Anning v Anning* (1907) 4 CLR 1049 (HCA), confirming that a court will normally refuse to give effect to a settlement which was intended to be made in one way by recourse to the other. A failing intention to transfer will not be construed as a declaration of self as trustee.

<sup>73</sup> (1862) 4 De GF & J 264, 31 LJ Ch 798.

things which were for him to do. This can explain the difference of outcome, but it gives little substantial satisfaction.

There are other cases in which even a technical differentiation seems to be impossible. In *Re Fry (decd)*<sup>74</sup> the remarkable level of diligence shown by the donor in putting the donees in a position to complete their title did not seem to matter. An American resident gifted transfers of shares in an English company to his son and to a private company. Despite the transfers being sent to England for registration, the company, by virtue of wartime regulations, could not register the transfer without Treasury consent. The donor signed the declarations necessary to obtain consent and submitted these to the Treasury, but died before permission was obtained. The issue under discussion was whether there had been a complete gift of an equitable interest in the shares. The transferees contended that the absence of registration of the share transfers did not affect the efficacy of the transactions as between assignor and assignees, and that the transactions must be treated as complete assignments of the testator's equitable interest in the shares.<sup>75</sup> Romer J rejected the contention and held that in the absence of Treasury sanction not only the assignment of the legal title, but also the existence of an equitable interest had to be denied.

The *Rose* rule that a gift of shares will be perfected in equity when the transferor has done everything that lies on him to do seemed until very recently to be anomalous and easily defeated. However, in *T Choithram International SA v Pagarani* the Privy Council breathed new life into it and weakened the old rule that failing transfers cannot be construed as self-declarations of trust.<sup>76</sup> Before his death a philanthropist created a charitable foundation and named trustees, including himself. He then declared that he gave all his wealth to the trustees, but he died without doing anything else to convey it to them. It was held that because he himself was one of the named trustees his words could be understood as declaring himself to hold his wealth as a trustee of the foundation. Technically, this case does no more than benignly resolve a doubt as to how the existing rules should be applied to the peculiar facts of the case, where one of several intended trustees was the settlor himself. However, its spirit seems to be summed up in a new maxim: 'Although equity will not aid a volunteer, it will not strive officiously to defeat a gift'.<sup>77</sup>

*Pennington v Waine*<sup>78</sup> confirms that the *Rose* rule is far from being about to wither away. Before she died, an old lady had executed a transfer form in respect of 400 shares, in favour of her nephew. She had given the form to her solicitor, who informed the nephew and told him that there was nothing that he, as donee, need do. The solicitor had put the transfer away in his files and done nothing

<sup>74</sup> *Chase National Exors and Trustees Corp v Fry* [1946] Ch 312.

<sup>75</sup> Cf *Re Williams (Williams v Ball)* [1917] 1 Ch 1 (CA).

<sup>76</sup> [2001] 1 WLR 1 (PC); noted J Hopkins [2001] CLJ 483.

<sup>77</sup> *Ibid* 11 (Lord Browne-Wilkinson).

<sup>78</sup> [2002] EWCA Civ 227, [2002] 1 WLR 2075 (CA).

about it. Encouraged by the *Pagarani* case, the Court of Appeal upheld the first instance conclusion that in her lifetime the donor had already become a trustee of these 400 shares for the nephew.

Clarke LJ went as far as to say that the old orthodoxy about not perfecting imperfect gifts did not apply at all if the court had before it a perfect equitable assignment. That cannot be right. The old orthodoxies told us precisely that you could not spell any kind of equitable assignment out of such an imperfect gift. However, Arden LJ, with whom Schiemann LJ agreed, was slightly less radical. Her view was that the *Re Rose* doctrine required delivery of completed transfer forms to the donee but that the doctrine, even if it had not been satisfied by the solicitor's letter to the nephew, could be supplemented in such a way as to allow the court to perfect a gift if circumstances had supervened which would render it unconscionable for the donor or the donor's representatives to renege. Here, because of the nephew's detrimental reliance, it was unconscionable not to go through with the gift. The risk is that unconscionability is too permissive a judicial criterion, thanks to which an increasingly high number of imperfect transactions might be excused.<sup>79</sup>

## 2 Unregistered Sales

Shares are not 'goods' for the purpose of the Sale of Goods Act 1979 and do not therefore fall within the rules which cause the property to pass when the contract is finalized. As with gifts, a gap can therefore open up between sale and registration. The law on imperfect gifts has had to battle with the maxim that equity will not assist a volunteer, which in this context has the consequence of barring the application of a second maxim to the effect that equity regards as done that which ought to be done. The case of imperfect sales is different. The difference goes beyond the obvious remark that in a sale there is no volunteer in need of assistance.

Despite the differences there is no reason to doubt that the *Rose* doctrine could and would apply to a sale once transfer forms had been completed and delivered. The question is whether other doctrines cut in at an earlier stage. There is for instance a general rule to the effect that the vendor under a specifically enforceable contract for the sale of wealth is a constructive trustee of that wealth for the purchaser until the actual transfer takes place and the contract is thus completed.<sup>80</sup> Specific enforceability compels a defendant to do what he promised to do. Provided that the purchaser is ready and willing to do his part, the vendor will then immediately hold the asset in question on a bare trust

<sup>79</sup> Criticism is expressed by J Penner *The Law of Trusts* (4th edn Butterworths Lexis Nexis London 2004) [8.14].

<sup>80</sup> *Wall v Bright* (1820) 1 Jac & W 494, 503; 37 ER 456, 459–60; *Shaw v Foster* (1872) LR 5 HL 321.

for the purchaser.<sup>81</sup> This reflects the maxim that equity looks on that as done which ought to be done.<sup>82</sup>

When applied to shares, the rule means that, as between the parties to a specifically performable contract for the sale of shares, the purchaser will acquire an immediate equitable beneficial interest in the shares, even before registration takes place. In other words, the contract itself gives rise to a constructive trust.<sup>83</sup> There is, however, a major qualification in that only contracts for the sale of shares in a private company are specifically enforceable. By contrast, contracts for the sale of securities commonly available in secondary markets are not specifically performable and are therefore incapable of supporting a constructive trust under the normal doctrine.<sup>84</sup>

In a case involving sub-shares, where the register has no part to play, the House of Lords appears to have held that it is not necessary to rely on the availability of specific performance to explain the passing of the assets to the purchaser. That was one ground for the decision in *Chinn v Collins*<sup>85</sup> to which we shall return in the next chapter.

Some tax cases have raised the question whether there are any other circumstances, besides the existence of a specifically enforceable contract of sale, in which contractual arrangements can have the effect of creating a 'beneficial owner' other than the registered legal owner. This was thought to be possible in *Wood Preservation Ltd v Prior (Inspector of Taxes)*.<sup>86</sup> A British company, British Ratin Ltd, offered to buy the whole of the share capital of the taxpayer company, Wood Preservation Ltd. The vendor was a company called Silexine, which was the UK distributing agent for a German manufacturer of wood preservation products. Wood Preservation's tax position depended on whether Silexine ceased to be beneficial owner of its share capital on the date of the contract or on the date of the subsequent formal assignment. Somewhat surprisingly, the Court of Appeal held that Silexine ceased to be beneficial owners on the date of the contract. The Court reached this result without treating the contract as specifically performable. Silexine ceased to be beneficial owner simply by reason of the fact that its contractual obligation deprived it of any further economic interest in the shares. Its only interest lay in obtaining the price. It was tied 'hand and foot' and could not deal with the shares in any way. However, the court was not saying that the

<sup>81</sup> *Bridges v Mees* [1957] Ch 475; DJ Hayton *Underhill and Hayton's Law Relating to Trusts and Trustees* (16th edn Butterworths London 2003) 438.

<sup>82</sup> A paradigmatic illustration in the case of land is the doctrine in *Walsh v Lonsdale* (1882) ChD 9, discussed in K Gray and SF Gray *Elements of Land Law* (4th edn OUP Oxford 2005) [9.62–9.76]. According to it informal or incomplete dispositions of interests in land, when made under specifically performable contracts, confer an equitable interest of the relevant kind upon the intended donee. The availability of specific performance caused an imperfect lease to be classified as an equitable fixed term lease rather than a legal periodic tenancy (14–15 Jessel MR).

<sup>83</sup> *Oughtred v Inland Revenue Comrs* [1960] AC 206 (HL) 227–28 (Lord Radcliffe).

<sup>84</sup> J McGhee (ed) *Snell's Equity* (31st edn Sweet & Maxwell London 2005) [15.16] 353; A Burrows *Remedies for Torts and Breach of Contract* (3rd edn OUP Oxford 2004) 465–66.

<sup>85</sup> [1981] AC 533 (HL).

<sup>86</sup> [1969] 1 WLR 1077 (CA).

purchaser had acquired a beneficial interest in equity, only that the alienor's right had been sterilized and was no longer 'beneficial'. In effect, therefore, the Court was creating a special conception of beneficial ownership for taxation purposes.

Two decades later the case was distinguished in *Sainsbury plc v O'Connor (Inspector of Taxes)*<sup>87</sup> in terms which came as close as possible to saying that it was wrong. Here the claimant taxpayer company entered into negotiations with a Belgian company for setting up a joint venture to run a chain of home improvement stores, the shares in the joint company being held in the proportion of 75 per cent and 25 per cent respectively. A mutual option was agreed between the two partners: the taxpayers granted the Belgian company a so-called 'call option' to purchase five per cent of the share capital, while the latter granted the former a 'put option' to require the Belgian company to purchase the same amount of capital. However, neither of the options having been exercised in the prescribed time, the option agreement was cancelled. Subsequently the home improvement company incurred losses, in respect of which the taxpayer company claimed to be entitled to group relief, on grounds that at all times the joint company had been the claimant's subsidiary in the proportion of 75 per cent. The counter-argument that the option had the sterilizing effect, as in the *Wood Preservation Ltd* case, of making it impossible for the owner to claim to be the beneficial owner, was firmly rejected. The Court of Appeal proved exceedingly reluctant to accept any new variety of 'beneficial ownership'. Lloyd LJ observed that the very reason why a precise definition of 'beneficial ownership' was not provided anywhere within this complex statutory framework was that it was well understood as meaning the ownership of the equitable owner, of whom the purchaser under a specifically enforceable contract represented a sub-category.<sup>88</sup>

Nourse LJ's judgment usefully summarizes the effects of a sale on both legal and beneficial ownership in shares. Legal ownership is easily ascertained, since it is invariably vested in the registered holder. Beneficial ownership means 'ownership for yourself as opposed to ownership as trustee for another'.<sup>89</sup> For most purposes this definition makes 'beneficial' equivalent to 'equitable', thus rejecting the over-subtle distinction between the two expressions in the *Wood Preservation Ltd* case. However, the language used in the *Sainsbury* case now requires one further gloss. While it is very helpful to scotch the notion of there being a special taxation version of 'beneficial ownership', it is not perfectly correct to treat 'beneficial ownership' as invariably synonymous with 'equitable ownership'. In a larger sense a legal owner can be a beneficial owner.

Thus in *Westdeutsche Landesbank Girozentrale v Islington London BC*<sup>90</sup> Lord Browne-Wilkinson said: 'A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an

<sup>87</sup> [1991] 1 WLR 963 (CA).

<sup>88</sup> *Ibid* 972 (Lloyd LJ). He relied on Lord Diplock's definition of beneficial ownership as a 'term of legal art': cf *Ayerst v C&K (Construction) Ltd* [1976] AC 167 (HL) 176–77.

<sup>89</sup> *Sainsbury* (n 87 above) 977–79.

<sup>90</sup> [1996] AC 669 (HL) 706 (Lord Browne-Wilkinson).

equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title'. Here 'full beneficial ownership' means legal ownership *pleno iure*. There is a warning against conceiving it as a combination of legal and equitable elements. What is implied instead is that equity has nothing to say most of the time. In particular, when full ownership has the support of a legal title, any equitable explanation of the state of interests in the property appears supererogatory. Hence, 'beneficial ownership' generally means 'equitable ownership' but it can mean, though it is rarely so used, 'legal ownership' in circumstances in which nothing has caused equity to reduce it to a *nudum ius*.

To sum up, we have seen that the device of allowing legal title to be reduced to a *nudum ius* and recognizing beneficial equitable ownership in another person can be employed to achieve order in those situations in which registration has not yet gone through or is delayed for some reason. In the situation of undivided property preceding an alienor's decision to sell or donate or hold on trust for someone else, beneficial ownership is indistinguishable from the legal title. The person entitled simply holds *pleno iure*. Then comes the event which causes beneficial ownership to be separated out. In sales and gifts, the two interests will merge again if things go well, while the same is not true of any express declaration of trust. Registration in the name of the transferee will normally recreate a situation of undivided ownership *pleno iure* in the purchaser or donee. Until such a 'standstill' is achieved, the technical notion of beneficial ownership will meanwhile have made manageable for lawyers a seemingly intractable problem. A notion of beneficial ownership which was neither legal ownership *pleno iure* nor equitable ownership would have made for intolerable complexity. Flirtations with any such *tertium quid* have rightly been rebuffed.

### 3 Italian Ambiguities in the Execution of the Transfer

The Italian picture is if anything more complicated, since Italian law has not acquired the habit of resolving such problems by taking refuge in the duality of law and equity. Yet the same tensions have to be faced. Notwithstanding the importance of registration in creating title to *azioni nominative*, Italian scholars, particularly in the 1950s and 1960s, could not reach agreement as to the moment when an alienation of shares is perfected (that is, as to when title to the share passes). According to some, title would pass on the basis of agreement between the parties and regardless of the annotation in the register of shareholders. Due to the great importance it attaches to consent, this theory is known as *teoria consensuale*. According to others, these formalities would be indispensable for title to the shares to pass. Due to its focus on the supposedly 'real' (*reale*) outcome of transferring the ownership title to the shares, this conception is known as *teoria realista*.<sup>91</sup>

<sup>91</sup> Balzarini (n 31 above) 270–71.



This terminology echoes ‘*in rem*’, as discussed in Chapter 2. A contract with ‘real’ effects is one whose effect is to transfer the title to the alienee. The terminology supposes the constitution of a right *in rem*. However, that assumption must be approached with great caution, for it is central to this book that entitlement to a thing, even ownership of a thing, is not a right *in rem* unless the thing in question is capable of supporting such a right. In Chapter 4 we argued that ownership of an obligation cannot be a right *in rem* and we placed the great majority of shares in that same category.

In the last decade the Italian *Cassazione* (Supreme Court) seems to have emphasized the importance of consent.<sup>92</sup> An alienation of shares has been held effective as between the parties regardless of the annotation in the shareholders’ register. On this view the function of that registration formality is to make the transfer effective as against the issuing company. Registration is then seen to be no more than a task of the company, which should not be allowed to stand in the way of the perfection of the alienee’s title by simply failing to perform one of its duties. The provisions on the alienation of *titoli nominativi* have to be understood as concerned with ‘executing, certifying and advertising the transfer and not with putting the same into being, for which effect no special formality is required’.<sup>93</sup> In the words of the *Cassazione*:

All that matters for a valid and effective transfer of ownership is the contract between the parties (known as *contratto di rilascio* or *trasmissione*, ie contract of transfer), which is autonomous and conceptually, formally and even temporally distinct from those formalities.<sup>94</sup>

Unfortunately, however, the terminology is confusing and has never been fully clarified, so that, for instance, the courts continue to state that the double inscription is necessary for the ‘*esecuzione*’ of the transfer, while at the same time never making clear what is meant by that term.<sup>95</sup>

The main difficulty inherent in the *transfert* mechanism is, or rather was in the age previous to dematerialization, the requirement that the two annotations take place simultaneously, notwithstanding that they were at the mercy of the company and that alienor and alienee had no control over them. The need to make the formalities of alienation less burdensome for the parties caused the *transfert* procedure to be replaced by the mechanism of *girata* (endorsement). *Girata* means the alienor’s inscription of the name of the alienee on the body of the document. The company will later take care of the inscription of the alienee’s name in the register. Before that moment the alienee can sell on the shares freely by endorsing them, ie by writing on the back of the document the name of

<sup>92</sup> Cass 5 settembre 1995 no 9314 in *Le Società* 1996, 171.

<sup>93</sup> App Milano 12 luglio 1991 in *Banca Borsa Titoli di Credito* 1992 II 572.

<sup>94</sup> Cass 18 settembre 1970 no 1549 in *Foro Italiano* 1970 I 2828.

<sup>95</sup> The necessity of registration for the execution of a transfer *mortis causa* was restated in Cass Sez II 19 febbraio 1999 no 1410 *Poltretti c Cailotto* in *Banca Borsa Titoli di Credito* 2001 II 156, 158; noted A Tucci *ibid* 159, 160.

a new alienee, dating, and signing the document. The endorsement must be certified as authentic by a notary.<sup>96</sup>

Mere endorsement of a *titolo nominativo*, or rather the evidence of a continuous series of endorsements, is sufficient for the alienee to exercise certain corporate rights, such as the right to dividends and to intervene in the meeting of shareholders.<sup>97</sup> For him to be able to exercise all other rights, however, he will have to ask the company to inscribe his name in the register. No sooner than this happens will the *girata* be effective in relation to the issuer.<sup>98</sup>

### C ALIENATION AND WRITING

The next chapter deals with the modern paperless market, in which requirements of writing have to be evaded or, if necessary, excluded by legislation. It is as well at this point briefly to notice two such statutory requirements which, if they do not apply to traditional alienation of shares, nevertheless stand ominously nearby. The Law of Property Act 1925 requires writing for assignment (s 136) and for the disposition of equitable interests (s 53).

Section 136 of the Law of Property Act 1925 provides the machinery for a valid assignment at law. It does not affect the long established availability of equitable assignment. However, an equitable assignment is in several respects weaker. It will only bind the purported assignor and not third parties, thus leaving the assignee vulnerable to the double-dealing and insolvency of the purported assignor. The section says:

Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—

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

<sup>96</sup> Lack of *autenticazione* of the *girata* makes the transfer ineffective (*inefficace*) towards the company in that it prejudices the subsequent right of the shareholder to obtain inscription of his name in the register: Cass 20 marzo 1962 no 556 in Banca Borsa Titoli di Credito 1962 II 403.

<sup>97</sup> L 29 dicembre 1962 no 1745 arts 4–5.

<sup>98</sup> Balzarini (n 31 above) 264–66. The case of German *Namensaktien* (registered shares) is analogous: the company will only recognize as shareholders those whose names appear in the register. A similar mechanism of endorsement (*Indossament*) for the transfer of *Namensaktien* is present in German law. Notice of the transfer is given to the company, which will record the passing of title in the register as soon as the share (*rectius*: the share certificate) is produced and evidence of the transfer is submitted.

The language of ‘choses in action’ was discouraged early on in this book, though clearly it cannot be avoided when used in an Act. In so far as it means ‘intangibles’, the question arises whether the provision applies to shares. Having in mind traditional modes of alienation of shares, where transfer forms are signed and handed to the company, the question may seem to lack any practical point. Either the requirements are satisfied by the traditional procedures or they are inapplicable on the ground that what happens is not an assignment but a novation. In the next Chapter, when the first limb of this retort falls away, the second may have to bear more weight.

The question of the alienation of equitable interests does not arise in the ordinary case of traditional alienation, in which only the legal interest is at stake. But whenever shares are held on trust the Law of Property Act 1925 s 53 becomes immediately relevant, for s 53(1)(c) and (2) provide:

(1) (c) [A] disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.

(2) This section does not affect the creation or operation of resulting, implied or constructive trusts.

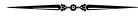
So far as an alienation of sub-shares, whether or not construed as a novation, can be classified as a ‘disposition’, the application of this provision to shares is beyond doubt. The term ‘disposition’ in this context is broad, not technical like ‘novation’. It is akin to the a-technical meaning which we have chosen to attribute to alienation.<sup>99</sup> The implication is that the effects of these provisions on alienations of equitable interests in shares cannot be ignored. In connection with the way in which traditional sales of shares work we have already had one occasion to notice the importance of the constructive trust and its exemption from the requirement of writing under s 53(2).<sup>100</sup>

Compliance with, or evasion of, these provisions is especially problematic, and urgent, in relation to computerized alienation on a large scale and at a high speed in modern securities markets. Shares have long been the subject of trusts. Indeed every nominee holder holds on trust. But immobilization and intermediation mean that investors increasingly hold sub-shares, not shares. The problems caused by the existence of the rule requiring writing are thus endemic in the case of sub-shares, which, as intermediated interests held under a trust, are equitable interests by definition. To this matter we will therefore return in the next chapter.

<sup>99</sup> In *Grey v IRC* [1960] AC 1 (HL) an oral direction given by a settlor to his trustees to begin holding for his grandchildren to his own exclusion was held to be a disposition. Lord Radcliffe said: ‘[I]t is inadmissible to allow the construction of the word “disposition” in the new Act [Law of Property Act 1925 s 53(1)(c)] to be limited or controlled by any meaning attributed to the words “grant” or “assignment” in section 9 of the old Act [Statute of Frauds 1644]’ (17–18).

<sup>100</sup> The mechanism is described in *Oughtred v IRC* (n 83 above) 227 (Lord Radcliffe); cf *Neville v Wilson* [1997] Ch 144 (CA) 155–58 (Nourse LJ).

## *New Modes of Alienation*



**N**EW TECHNOLOGY, GLOBALIZATION,<sup>1</sup> and hugely increased volumes of business have overtaken traditional modes of alienation. Whether at settlement or registration, paper is now an impediment. Settlement is the process whereby, in fulfilment of contractual obligations arising out of trading, securities are delivered against payment. Registration in its traditional form is the inscription of the shareholder's name in a register maintained for the issuing company in the form of books or ledgers. Settlement used to require a transfer form to be lodged with the company, certificates to be transferred to the transferee, and a cheque by way of payment to the transferor.<sup>2</sup> These operations could be easily carried out where volumes were low and investors, or their brokers, could meet face to face.

Delays in settlement increased when, in the 1970s, higher volumes of shares began to be traded. Delay is a serious matter, for it implies exposure to the risks of the counter-party's insolvency. The advent of the new technology opened up the possibility of dealing in a matter of seconds worldwide, if only paper and writing could be dispensed with. The efforts of lawyers have therefore been bent on side-stepping certificates and ledgers. The challenge has been to ensure that the public can have absolute confidence in the new mechanisms.

<sup>1</sup> For a definition, see D Held and A McGrew entry 'Globalization' in J Krieger and ME Crahan (eds) *The Oxford Companion to Politics of the World* (2nd edn OUP Oxford 2001): 'Globalization, in short, can be thought of as the widening, intensifying, speeding up, and growing impact of world-wide interconnectedness'. A classic on the notion is D Held and A McGrew (eds) *The Global Transformations Reader: An Introduction to the Globalization Debate* (2nd rev edn Polity Press Cambridge 2003), and see esp P Hirst and G Thompson 'The Limit to Economic Globalization' in *ibid* 335, 343–44. Also, K Pilbeam *Finance and Financial Markets* (Macmillan Houndsmills 1998) 4. In Italy, economic globalization is described in GM Gros-Pietro E Reviglio and A Torrisi *Assetti proprietari e mercati finanziari europei* (Il Mulino Bologna 2000) 23–32; for the growth and integration of equity markets see *ibid* 72–75. At the time of this book going to print, a press release published by Dow Jones International News (13 Dec 2004, 08:22 GMT) contained a potential episode of globalization in the making: the London Stock Exchange announced that *Deutsche Borse AG* had made an offer to acquire LSE plc for 530 pence per share in cash. The Board of LSE had, for the moment, rejected the proposal, believing that it undervalued the Company and the synergies that would derive from the merger, and declared that it was awaiting a 'significantly improved proposal' in the interests of both LSE's shareholders and its customers.

<sup>2</sup> Ch 6 text to nn 17 ff.

The quest to eliminate share certificates and physical registers has brought with it the practice of intermediation. It is now usually not the share itself that the investor holds and alienates but rather an intermediated interest in it. In that increasingly common case the question is not how to alienate a share but how to alienate an interest in a share which is actually held for one by some financial institution. Chapter 3 introduced the structure of intermediated shareholding and the concomitant terminological innovations. Investors now generally hold only sub-shares, with more ‘sub-’ prefixes being added according to the growth of the pyramid of intermediation.<sup>3</sup>

The task of this chapter is to examine the ways in which alienation has changed in the computerized marketplace. Gains in efficiency have turned on reducing the physical dimension of both securities and their transfer. The latter aspect, electronic settlement, requires that we look first at its two principal instrumentalities, known as immobilization and dematerialization.

## A GAINS IN EFFICIENCY

### 1 Immobilization

In introducing intermediated shareholding we encountered one mechanism which enhances efficiency of dealing. It consists in immobilizing certificates in a depository.<sup>4</sup> Immobilization is indeed both the foundation of indirect holding and a technique which eliminates the need for the circulation of paper. While the presence of certificates is still presupposed, the paper, and the legal title, are concentrated in the institution which acts as the depository.<sup>5</sup> Thus, immobilization deeply affects the pattern of shareholding by necessarily resulting in the investor’s holding indirectly. In short, the investor’s asset is then always a sub-share. Changes in the ownership of sub-shares are then effected through electronic entries in the accounts kept by that institution rather than entries in a paper register and the delivery of certificates. Electronic settlement is therefore capable of being applied to immobilized shares.

<sup>3</sup> Ch 3, beginning and end of section D. J Benjamin and M Yates *The Law of Global Custody: Legal Risk Management and Securities Investment and Collateral* (2nd edn Butterworths Lexis Nexis London 2002) [2.4], [8.6].

<sup>4</sup> Ch 3 text to nn 41–42.

<sup>5</sup> A single, global certificate, rather than individual ones, normally represents the entire issue of securities.

## 2 Dematerialization

'Dematerialization' is a term borrowed from nuclear physics, where it refers to the annihilation of the particles of matter into energy.<sup>6</sup> Dematerialized shares are shares whose physical dimension has been annihilated.<sup>7</sup> Dematerialized shares are uncertificated shares. The demerits of paper-based systems—not only the cost in time and money of moving and storing the certificates but also the risk of forgery and theft<sup>8</sup>—made uncertificated shares welcome on the market and provoked the legislation which made them possible.

### (a) Dematerialization in Italy

In Italian essentially the same word is used to describe the separation of financial instruments from their paper *materia*. *Dematerializzazione* covers both the once and for all substitution of an electronic record in place of the document and the acceptance of an electronic alternative for the document.<sup>9</sup> *Decartolarizzazione*, with its more explicit echo of the *chartula* which traditionally supported *titoli di credito*, is sometimes used with the same meaning.<sup>10</sup>

In Italian law the relevant legislation—the so-called '*decreto Euro*'—allows the dematerialization of 'securities currently traded on the stock exchange or meant for trade therein' and of securities which it is advisable to dematerialize because their widespread demand renders it advisable.<sup>11</sup> All *strumenti finanziari dematerializzati* (dematerialized securities) cease once and for all to be represented by *titoli di credito* and the provisions of the Civil Code relating to the latter are correspondingly disapplied.<sup>12</sup>

<sup>6</sup> According to the *Grand Dictionnaire Encyclopédique Larousse* (Librairie Larousse Paris 1982–85) 'dématisation' is defined as 'annihilation de particules matérielles et apparition correlative d'énergie': L Dallèves 'La dématérialisation des papiers-valeurs: un décalage croissant entre droit et réalité' in *La Société anonyme suisse* 1987, 45, 47.

<sup>7</sup> C Reed *Electronic Finance Law* (Woodhead-Faulkner Cambridge 1991) 111–28.

<sup>8</sup> AO Austen-Peters *Custody of Investments: Law and Practice* (OUP Oxford 2000) 8–9 [1.27–30].

<sup>9</sup> P Spada 'La circolazione della "ricchezza assente" alla fine del millennio (Riflessioni sistematiche sulla dematerializzazione dei titoli di massa)' *Banca Borsa Titoli di Credito* 1999 I 407, 409.

<sup>10</sup> Cf M Bessone (ed) *Istituzioni di diritto privato* (7th edn Giappichelli Torino 2000) 1151, 1154.

<sup>11</sup> D Lgs 24 giugno 1998 n 213 *Disposizioni in materia di introduzione dell'Euro nell'ordinamento nazionale* ('*decreto Euro*') art 28 paras 1–2 in GU 8 luglio 1998 suppl ord no 116, made under L 17 dicembre 1997 no 433 art 1 para 1. Art 28 paras 1–2: 'Gli strumenti finanziari negoziati o destinati alla negoziazione nei mercati regolamentati non possono essere rappresentati da titoli . . .'. [The same may apply to other securities 'in funzione della loro diffusione tra il pubblico'. Criteria for inclusion of securities in the two categories are laid down, respectively, *ibid* art 61 (*Borsa di Milano* being the dominant market) and in the *Regolamento* agreed between Consob and *Banca d'Italia*, enacted through *Deliberazione* Consob no 11600, 15 settembre 1998 (now repealed by *Regolamento in materia di mercati* (*Delibera* no 11768, 23 dicembre 1998, as amended)). The latter category is very broad. For the application of this provision to state bonds see M Ambrosio 'La dematerializzazione dei titoli di Stato: ultimo atto' *Rivista del Diritto Commerciale e Diritto Generale delle Obbligazioni* 2000 I 55, 59.

<sup>12</sup> *Decreto Euro* (previous n) art 28 para 1.

These developments mean that the traditional classification of shares as *titoli di credito* is now outflanked by new taxonomical tools neutral to the presence of paper.<sup>13</sup> A first step taken by legislation in this direction was the inclusion of shares in the class of *valori mobiliari* (moveable values).<sup>14</sup> A new wave of terminology has now come with the category of *strumenti finanziari* (financial instruments, securities), whose creation satisfies the need to encompass once non-typical securities. This is the case of quotas in investment funds and all contracts regarding derivatives such as the so-called ‘futures’ and ‘interest swaps’.<sup>15</sup> The recent reform of company law has been in the sense of increasing freedom in the creation of such instruments with a view to promoting the development of *mercati mobiliari* (stock markets).<sup>16</sup> The principle of *decartolarizzazione* is embedded in the new terminology, which is designed also to include securities which had no history as *titoli di credito* and were never endowed with a *chartula*.

The 1998 legislation in this field, however, was not perceived as revolutionary. Rather, it came as an *imprimatur* for the juristic conviction that it was indeed possible to dispense with the documentary aspects of securities. Italian law was not averse to such developments. In 1986 the introduction of immobilization, conceived as a way of dispensing with the circulation of certificates, prepared and preceded by a decade the dematerialization of the securities themselves.<sup>17</sup> The change thus brought about dissociated the transfer of the moveable value inherent in the securities from the *traditio* of the certificates as moveables.<sup>18</sup> The investor would deposit certificates with an intermediary, who would in turn sub-deposit, that is immobilize them, with the institution *Monte Titoli*. The sub-shares under those immobilized securities were thus no longer dealt with through *traditio* but through entries (so-called *scritture di giro*) in the register kept by the deposittee.<sup>19</sup>

<sup>13</sup> CC art 2346 para 1; M Cian ‘Note sui rapporti tra il nuovo diritto societario e il regime di dematerializzazione’ *Giurisprudenza Commerciale* 2004 I 315, 315–16.

<sup>14</sup> L 7 giugno 1974 no 216 art 18 bis, introduced by L 6 giugno 1985 no 281.

<sup>15</sup> D Lgs 23 luglio 1996 no 415 art 1, absorbed into D Lgs 24 febbraio 1998 no 58 *Testo unico delle disposizioni in materia di intermediazione finanziaria* (‘decreto Draghi’ or ‘TUF, Testo Unico della Finanza’) (made under L 6 febbraio 1996 no 52) art 2 para 2. Recent talk of *prodotti finanziari* pushes the new terminology even further, by assimilating the great variety of services offered on the market to ‘products’.

<sup>16</sup> L delega 3 ottobre 2001 no 366 art 2; P Montalenti ‘Diritto commerciale, diritto tributario, scienze aziendali: categorie disciplinari a confronto in epoca di riforme’ *Giurisprudenza Italiana* 2004, 684, 684 speaks of *detipizzazione* or ‘de-typification’ of *strumenti finanziari*. According to the same author ‘La riforma del diritto societario: profili generali’ in S Ambrosini (ed) *La riforma delle società: Profili della nuova disciplina* (Giappichelli Torino 2003) 1, 5, 10, whilst it might be a good thing that the rigid binomial shares–debentures is officially dead, there has been an excessive liberalization of the categories and shapes of *strumenti finanziari* in the name of easing access to markets.

<sup>17</sup> L 19 giugno 1986 no 289 (*legge Monte Titoli* now repealed by TUF).

<sup>18</sup> P Spada ‘Titoli di credito (1977–86): esperienza, legislazione e dottrina’ *Rivista di Diritto Civile* 1986 II 617, 626–27.

<sup>19</sup> B Libonati *Titoli di credito e strumenti finanziari* (Giuffrè Milano 1999) 106. The central *gestio* of non-dematerialized *strumenti finanziari* is still possible (ibid 136–40) and provided for in TUF (n 15 above) arts 80 ff.

When the *decreto Euro* on dematerialization came about,<sup>20</sup> it was perceived as further pursuing, to a more radical extent, the same ‘farewell to valuable paper’<sup>21</sup> (that is, from documents of title) as the previous legislation. In order to understand how the central *gestio*<sup>22</sup> of dematerialized securities takes place this piece of legislation must be read in conjunction with the *Testo Unico della Finanza* (consolidated statute on finance).<sup>23</sup> For every issue of securities the issuer must open an account with a central depositary (*società di gestione accentrata*).<sup>24</sup> The investors will open an account with an intermediary providing the service in which they are interested and which will administer the securities electronically registered on that account. The intermediaries will in turn avail themselves of the services of the *società di gestione*. The alienation of *strumenti finanziari* and the exercise of rights therein may only be carried out through an authorized intermediary.<sup>25</sup> The link between dematerialization and immobilization as intermediation is that dematerialized securities are registered in electronic accounts, and these electronic accounts are kept centrally by the depositary. In multi-tiered intermediation, accounts will be kept by intermediaries at each tier.

What worries scholars is the effect of dematerialization on some of the functions that were traditionally performed by paper.<sup>26</sup> In the case of dematerialized *titoli* and of shares as a sub-category thereof, one casualty seems to be *legittimazione*. That term denotes the entitlement to exact the obligation inherent in the document. That entitlement may occasionally belong to a person other than the full owner of the document, for instance because the owner wants another person to be paid by his debtor. *Legittimazione* was traditionally regarded as incidental to the possession of the piece of paper. The anxiety with electronic registration replacing possession of the paper certificate seems to be that the very possibility of the distinction between full ownership and lesser

<sup>20</sup> Decreto Euro (n 11 above).

<sup>21</sup> The famous phrase was coined by the Swiss A Meier-Hayoz ‘Abschied vom Wertpapier?’ Heft Zeitschrift des Bernischen Juristenvereins 1986, 385 in the farewell lecture from his university post. The more recent publication of A Meier-Hayoz and HC von der Crone *Wertpapierrecht* (2nd rev edn Stämpfli Bern 2000), however, proves the enduring vitality of the concept of ‘valuable paper’, at least in the Swiss system, where immobilization of the certificates as an instrumentality to obtain efficiency is still the rule.

<sup>22</sup> Here *gestio* is used without specific reference to the type of activity carried out by the intermediary. A more technical definition considers an exercise of discretion on the part of the intermediary as to the management of the client’s assets as a necessary element of *gestio*: Cass Civ sez I 20 marzo 2003 no 4081 *Consob c Banca Fideuram spa* in Banca Borsa Titoli di Credito 2004 II 12, 16; noted A Tucci *ibid* 16. The decision was inspired by European Court of Justice C-356/00 *Testa and Lazzeri v Consob* (21 November 2002).

<sup>23</sup> TUF (n 15 above). A detailed description of how the *gestio* takes place is in Libonati (n 19 above) 122–33.

<sup>24</sup> TUF (n 15 above) arts 88 ff; F Recine ‘La gestione accentrata di strumenti finanziari’ in C Di Noia and R Razzante (eds) *Il nuovo diritto societario e dell’intermediazione finanziaria* (CEDAM Padova 1999) 239.

<sup>25</sup> Decreto Euro (n 11 above) art 33 para 1.

<sup>26</sup> G Carriero ‘La legge sulla dematerializzazione degli strumenti finanziari: tecniche giuridiche ed obiettivi’ *Foro Italiano* 1998 V 309, 315–16.



entitlement is called in question, for it is difficult to tell whether a transfer of the former rather than the latter has taken place. The law has chosen to make the holder of the ancient document equal to the holder of the electronic account, and it is to the account holder that *legittimazione* goes.<sup>27</sup>

In reality, once it is acknowledged that the treatment of shares as *titoli di credito* is more a pragmatic means of making wealth 'mobile' than a taxonomical truth to the effect that their juridical nature is tied to corporeal paper, their dematerialization should not be perceived as a radical change.<sup>28</sup> Immobilization had already affected the capacity of paper to pass from hand to hand.

(b) *CREST in England*

In England, the drive to eliminate the encumbrance of paper inspired CREST, a so-called CSD (Central Security Depository) offering custody and real-time electronic settlement services for the UK and Irish market.<sup>29</sup> Since September 2002 CREST has been part of the Euroclear Group, the world's largest settlement system for domestic and international securities transactions.<sup>30</sup> The functioning of electronic settlement is the topic of the next section and dematerialized shares are the topic of this one. Both, however, rest on one and the same legislative basis. It is not possible to dispense with certificates without legislative assistance. This difficulty was common to England, Italy, and to other European legal systems.<sup>31</sup> In England the seed was sown in the Companies Act (CA) 1989 s 207. This provision, under the rubric 'Transfer of Securities', established:

<sup>27</sup> Decreto Euro (n 11 above) art 32, equivalent to CC arts 1992 and 1994 for traditional *titoli di credito*.

<sup>28</sup> On the possibility of an electronic document of title which preserves all the functions traditionally performed by paper, F Guarracino 'Titolo di credito elettronico e documento informatico' Banca Borsa Titoli di Credito 2001, 514; on maintaining the terminology of *titoli di credito* even for *strumenti finanziari dematerializzati*, A Busani and CM Canali 'Strumenti finanziari dematerializzati: circolazione, vincoli e conferimento in fondo patrimoniale' Rivista del Notariato 1999 I 1059.

<sup>29</sup> <<http://www.crestco.co.uk>> (accessed 31 Oct 2004). 'CREST' is not an acronym.

<sup>30</sup> The merger was announced by a press release on 23 September 2002. The Euroclear Group <<http://www.euroclear.com>> (accessed 31 Oct 2004) is composed of one International Central Securities Depository (ICSD) and three Central Securities Depositories (CSD). At an international level, the function of ICSD is performed by Euroclear Bank, which offers a single access point to securities services in over 25 equity markets and over 30 bond markets worldwide. At a national level, Euroclear provides securities settlement and custody services for four 'local' markets. Thus, Euroclear France is the CSD for the French market, Euroclear Nederland is the CSD for the Dutch market, and CRESTCo is the CSD for the UK market and Irish equities.

<sup>31</sup> One notable case has been that of France, which proceeded to a complete and irreversible abandonment of paper through Loi des finances 30 décembre 1981 art 94 II, enacted through Décret 2 mai 1983, whose art 1 establishes: '[L]es titres de valeurs mobilières ne sont plus matérialisés que par une inscription au compte de leur propriétaire'. According to art 2: 'Les titres inscrits en compte se transmettent par virement de compte à compte'. The dematerialization was less radical in Switzerland, where it proceeded 'par étapes' and without legislative intervention. At the beginning it involved the immobilization of bearer shares (*actions au porteur*) with a central depository, which equalled a dematerialization de facto, for the exercise of the usual rights connected with the share (dividends, vote) was no longer dependant on exhibiting the document. A *certificat global* began to be created to replace what had become *titres inertes*. Then came the turn of registered shares (*actions nominatives*), for which dematerialization started with the issue of global certificates not

The Secretary of State may make provision by regulations for enabling title to securities to be evidenced and transferred without a written instrument.

It was also specified that the reference to transfer without a written instrument included, in relation to bearer securities, transfer without delivery.<sup>32</sup> Title to securities would include any legal or equitable interest in securities. The possibility of introducing procedures for recording and transferring title to securities was thus laid down subject to safeguards. For example, the regulations must contain such provisions as appear appropriate for the protection of investors and must be framed so as to ensure that the rights and obligations in relation to securities dealt with under the new procedures correspond, so far as practicable, with those obtaining within the old legislative framework.

The necessary delegated legislation then followed. The immediate legal basis for dematerialization in CREST is the Uncertificated Securities Regulations (USR) 2001.<sup>33</sup> These regulations expressly disapply the provisions of company law on the issue of certificates evidencing title to shares and those of company and property law as to the need for written instruments of transfer.<sup>34</sup>

In view of the conclusions which we will draw in the next chapter on the capacity of alienability to gain shares a place in the area of personal property, it will be noted that the concept of a registered share as an intangible entails that the mere disappearance of its paper evidence cannot affect either the nature of the share or the ownership of it. According to the same logic, dematerialization must be expected to affect bearer shares to a greater extent, for in relation to those the paper used to embody the share, not merely represent it.<sup>35</sup> Bearer shares apart, however, dematerialization eliminates the last vestige of the temptation to think of shares as having a corporeal nature, a notion which was anyhow deceptive.<sup>36</sup>

### 3 Electronic Settlement

In an electronic settlement system the interests of selling and buying participants are recorded by entries maintained by the operator, who also maintains cash

destined for circulation and destroyed and replaced in the case of alienation, followed by the issue of *actions nominatives avec impression différée du titre*, which consisted in theory in postponing the printing of the certificates, which were in practice never requested and thus never printed. The dematerialization was thus total, but, unlike the French case, reversible: Dallèves (n 6 above) 43–45.

<sup>32</sup> CA 1989 s 207(10).

<sup>33</sup> USR 2001 SI 2001/3755, made under CA 1989 s 207. The previous set of regulations, SI 1995/3272, as amended by the Uncertificated Securities (Amendment) Regulations 2000 SI 2000/1682, has been repealed.

<sup>34</sup> USR 2001 SI 2001/3755 regs 14–17, 38(2); 38(3)(a) disapplying CA 1985 s 186; reg 38(5) disapplying the Law of Property Act 1925 ss 53(1)(c) and 136. Cf Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 SI 2001/3646 reg 7.

<sup>35</sup> J Benjamin *Interests in Securities* (OUP Oxford 2000) [1.90–91]; Benjamin and Yates (n 3 above) [9.9].

<sup>36</sup> Ch 4 paras concluding section B.

accounts. When a seller has agreed to deliver shares to a buyer against payment, the two participants instruct the system to debit the securities account of the seller and credit that of the buyer, while at the same time debiting the cash account of the buyer and crediting that of the seller. This arrangement removes the need for paperwork and allows for quick and efficient settlement. The synchronization of the delivery of the shares with the payment of the cash sum is called ‘delivery versus payment’ (DVP). DVP minimizes the risk that one’s counterparty may become insolvent before meeting its obligations as regards the delivery or payment of the shares.<sup>37</sup>

CREST provides one prominent example of an electronic settlement system applied to the direct holding of dematerialized securities, among which are equities.<sup>38</sup> ‘Direct holding’ means that the share itself is transferred, not a sub-share. Within the limits of this study it must suffice merely to point to other applications of electronic settlement, whether to transfer sub-shares or securities entirely different from shares. It will be noted that electronic settlement can be used in conjunction with both dematerialization and immobilization. To say that it can complement immobilization means that it is compatible with indirect holding, whereas in conjunction with dematerialization it is neutral as to the ‘directness’ of the holding. The Italian case is not dissimilar. *Decartolarizzazione* serves the needs of *intermediazione finanziaria* in all the ways which are permitted by the combined application of the respective decrees.<sup>39</sup> At an international level, custody and settlement facilities within the framework of immobilization are provided by two International Central Securities Deposits (ICSDs). Euroclear has already been mentioned.<sup>40</sup> The other one is called Clearstream.<sup>41</sup>

CREST maintains securities accounts in the names of members in respect of their holdings of uncertificated securities. When CREST receives matching

<sup>37</sup> Benjamin and Yates (n 3 above) [9.6–9].

<sup>38</sup> CREST also settles transactions concerning debt securities, warrants, depositary receipts, units in unit trusts, gilts (ie British government stock) and money market instruments. This comprehensive series of services is the result of the merger of CREST with two other settlement systems which were previously in operation, the CGO (Central Gilts Office) and the CMO (Central Money Markets Office), respectively in July 2000 and October 2003. The cost of issuing, holding and settling trades in UK money market instruments has thereby been reduced by around 85%: <<http://www.crestco.co.uk/home/home.html#/company/timeline.html>> (accessed 31 Oct 2004).

<sup>39</sup> Decreto Draghi (TUF) on intermediation (n 15 above) and decreto Euro on dematerialization (n 11 above).

<sup>40</sup> Text to n 30 above.

<sup>41</sup> <<http://www.clearstream.com>> (accessed 31 Oct 2004). Clearstream is part of the *Deutsche Boerse Group*: <[www.deutsche-boerse.com](http://www.deutsche-boerse.com)> (same access date). Clearstream, not unlike Euroclear, performs both ICSD and CSD functions. As an ICSD, it has links to counterparts in 40 domestic markets. Selected stock exchanges automatically route transactions to Clearstream following the trading phase. Cash and securities instructions are then checked, matched, and released for settlement across a special platform. Transactions settle through a book-entry system in which cash and securities change hands simultaneously. The process is a DVP one. The CSD role is performed by Clearstream Banking, which serves the German and Luxembourg domestic markets. The Deutsche Boerse Group also comprises Eurex Clearing AG, a clearing house and central counterparty for trades in equities executed on the Frankfurt Stock Exchange (*Frankfurter Wertpapierbörse*).

instructions to deliver shares of one participant in the system to another, it settles the transaction by debiting the seller's securities account with a certain number of shares and by correspondingly crediting the buyer's account with the same number.<sup>42</sup> The buyer will thus have acquired legal title to the securities.<sup>43</sup>

In respect of each company participating in the system, the operator of CREST, Crestco, holds a register of members. In as far as the company chooses to issue dematerialized securities, this register has replaced the traditional register of the issuer as *prima facie* evidence of title. The issuing company is still required to maintain a 'record of uncertificated shares' reflecting the contents of the operator's register and must seek regularly to reconcile the entries in such record with those in Crestco's register.<sup>44</sup> However, in so far as the issuer's record is inconsistent with that held by the operator, the latter will prevail.<sup>45</sup>

The traditional register survives in relation to certificated shares, in the event that a company may choose to continue to issue them or that a shareholder should prefer to hold his shares in paper form. Larger companies will therefore have two registers of shareholders: an 'issuer register of members' evidencing title to certificated shares and an 'Operator register of members' evidencing title to uncertificated ones.<sup>46</sup>

Alienation through CREST happens in such a way that payment is made concurrently through account entries. However, the system is not a bank holding cash deposits for its members. The traditional handing over of a cheque by the alienee (or rather the alienee's broker) to the alienor (or rather his broker) is replaced by a system of cash memorandum accounts which record the members' payment entitlements and obligations and which are debited and credited as required.<sup>47</sup> It is nonetheless an assured payment system, in that each participant is required to appoint a settlement bank. For each book-entry that takes place within CREST the alienee's settlement bank is obliged to pay the price to the alienor's bank.<sup>48</sup>

Under Italian law the fact that both issuers and intermediaries open accounts with a *società di gestione* creates the possibility for the latter to make securities into liquidities and set off one trade against another, just as with multiple money transactions.<sup>49</sup> The depositary will check daily the correspondence of the balances in the accounts which it holds (*quadratura dei conti*) and communicate the results to the intermediaries, which will double check that their accounts

<sup>42</sup> CREST *Reference Manual* <<http://www.crestco.co.uk/publications/reference/manual/ref-manual.pdf>> (accessed 31 Oct 2004) ch 4 ss 2–3.

<sup>43</sup> *Ibid* ch 5 s 1.

<sup>44</sup> USR 2001 SI 2001/3755 reg 20(6) and sch 4 para 5(2).

<sup>45</sup> *Ibid* reg 24(1)–(2).

<sup>46</sup> *Ibid* reg 20(1)(a)–(b); PL Davies (ed) *Gower and Davies' Principles of Modern Company Law* (7th edn Sweet & Maxwell London 2003) 682–83.

<sup>47</sup> CREST *Reference Manual* (n 42 above) ch 6 ss 1–2.

<sup>48</sup> Benjamin and Yates (n 3 above) [9.8].

<sup>49</sup> TUF (n 15 above) art 69 para 1.

mirror those of the *società di gestione*.<sup>50</sup> To allow for the daily matching process to happen with the necessary speed, the flow of information between the central depositary and the intermediaries must, as from 1 January 2000, take place exclusively through computerized systems (*reti telematiche*).<sup>51</sup>

#### 4 Novation

The modern direct-holding system dispenses with paper but does not renounce any of the functions which paper used to perform in the traditional alienation of shares. Thus, CREST does without transfer forms and certificates but not without a non-paper record of the transfer by updating a set of securities accounts belonging to the alienor and alienee. It does without a paper register but not without registration of the legal title to shares, which is effected through entry in the computerized record of the registrar. The functions of the various phases of alienation remaining unaltered, some of the analysis proposed in relation to them in their traditional mode may still be valid.

For instance, the switch to an electronic register hardly touches the recently proposed analysis of registration as effecting a novation of the corporate contract, which we considered in the previous chapter<sup>52</sup> and will re-encounter in the next section when discussing the requirement of writing. This must be read as confirming the limited consequences of dematerialization for the life of a share.

Electronic settlement also lends itself to a new use of the term ‘novation’. In this new use the word is coupled with ‘clearing’. With this notion, adopted from the language of banking, we must briefly deal.<sup>53</sup> Settlement entails the transfer of value to discharge a payment obligation. To that end, in a modern economy legal tender has been replaced by movements in bank accounts. Banks settle transactions by sending payment messages to each other. Accounts, generally kept within a central institution, will be correspondingly credited or debited. Therefore, settlement involves information being conveyed from one bank to the other, and to the central bank. ‘Clearing’ is the organization of such information, in the sense of calculating the mutual positions of the parties with a view to facilitating the settlement of their mutual obligations on a net basis.<sup>54</sup> It is therefore the adjustment of bankers’ mutual claims by settling the balance. The institution traditionally designed to provide this service is a clearing house.

Applied to CREST, clearing is the operation of modifying and possibly simplifying the contractual obligations which require delivery and payment, with a view to facilitating settlement. Clearing is not a condition precedent to

<sup>50</sup> Regolamento Consob–Banca d’Italia (n 11 above) arts 23–25.

<sup>51</sup> Ibid art 25.

<sup>52</sup> Ch 6 text from n 36.

<sup>53</sup> *Oxford English Dictionary* (2nd edn OUP Oxford 1989) entries ‘clearing, vbl n, 8’ and ‘Clearing House’.

<sup>54</sup> R Cranston *Principles of Banking Law* (2nd edn OUP Oxford 2002) 50–54 and 278–86.

settlement, but, when it takes place, it precedes settlement and follows trading.<sup>55</sup> One mode in which clearing can take place is precisely novation.<sup>56</sup>

LCH.Clearnet (London Clearing House Clearnet) provides a clearing service for certain trades executed on the London Stock Exchange and settled through CREST.<sup>57</sup> The service is a Central Counterparty (CCP) one. It serves to novate the transaction between a buyer and a seller by replacing it with two new transactions. In one of these LCH.Clearnet will replace the buyer and in the other the seller. Both transfers will then be settled in CREST. The use of a counterparty serves to protect the buyer and seller from the risk that the original contractual partner might become insolvent. This happens because each separate transaction, being now conducted with a clearing house, will settle at all events. The original buyer and seller will be relieved of the burden of ascertaining the capacity of each other to perform, leaving the clearing house to bear the counterparty risk.<sup>58</sup> This situation can be analysed as resulting from two novations of the same contract of alienation between buyer and seller. When a clearing house appears on the market, novation intervenes to substitute two contracts for the original single contract between buyer and seller.

Given the analogies which we have observed between national ways of applying technology to the alienation of securities, it is perhaps curious that little need has been felt in Italian specialized works to speak of electronic settlement, or *liquidazione*, in terms of novation.<sup>59</sup>

## B THE PROBLEM OF WRITING

The speed and efficiency of transactions now attainable through the new technology supposes systems entirely free of paper. Requirements for signatures or other forms of writing are an unwanted impediment, to be outflanked or overridden. Such requirements can be escaped by convincing manipulation of existing doctrine or, peremptorily, by legislative intervention. Legislative solutions are sometimes slow in coming but are preferable to juristic ones in terms of certainty. The inquiry into the latter engages the mind of the creative lawyer but now needs to be taken into consideration only to the extent that legislation has not already solved the problems.

<sup>55</sup> The post-trade infrastructure is explained in Benjamin and Yates (n 3 above) ch 8.

<sup>56</sup> Another mode, with which we will not deal, is the off-setting of the alienor's and alienee's mutual obligations.

<sup>57</sup> <[http://www.crestco.co.uk/home/home.html#/products/ccp\\_net.html](http://www.crestco.co.uk/home/home.html#/products/ccp_net.html)> (accessed 31 Oct 2004).

<sup>58</sup> Benjamin *Interests in Securities* (n 35 above) 217–18.

<sup>59</sup> The stages of the alienation are otherwise described in entirely similar terms: *conferimento dell'ordine* (placing of the alienation order), *esecuzione* (order execution), *compensazione* (clearing), and *liquidazione* (settlement): R Razzante 'Contratti conclusi sul sistema telematico di borsa' in E Gabrielli and R Lener (eds) *I contratti del mercato finanziario* (UTET Torino 2004) vol I, 435, 441–42.

The results of an investigation into how much writing survives in the Italian alienation of securities are straightforward. When we turn to English law the difficulties multiply. Chapter 6 showed that the Law of Property Act 1925 ss 136 and 53(1)(c) prescribe writing both for the assignment of choses in action and the disposition of equitable interests.<sup>60</sup> The difficulties become insistent in the context of modern alienation where, on the one hand, computerized mechanisms leave little doubt that what is being alienated is intangible wealth and, on the other hand, indirect holding reduces most investors' interests to sub-shares, which are, as we have maintained, equitable interests in shares.

### 1 Writing in Italian Transactions

There are two reasons why the Italian relationship between new market mechanisms and writing does not appear to be problematic. The first is the equivalence, expressly made by law, between the old notion of *possesso qualificato* (possession qualified by entry into the issuer's register) of a *titolo di credito* and the new one of electronic entry of title to a sub-share (in the language of the law: to a *strumento finanziario dematerializzato*) in the records of a *società di gestione*, for the purposes of the entitlement to exercise the rights inherent in the security.<sup>61</sup> The second is the absence of restrictive provisions in the general law which might be said to be applicable to the transfer of sub-shares, as there are in relation to English equitable interests.

Any outstanding aspects of the role of writing in modern alienation are provided for in the provisions for the enactment of *Testo Unico della Finanza*, as laid down by the *Commissione Nazionale per le Società e la Borsa (CONSOB)*.<sup>62</sup> The supply of financial services by authorized intermediaries must be documented in a written contract with the investor. That initial contract must define which documentation the investor is to receive in relation to the activities performed by the intermediary on his behalf.<sup>63</sup> For the rest, although trading itself is paperless, there has to be a record after the event. Thus, the subsequent orders which the intermediary receives from the client on the phone are recorded on magnetic tape or in an equivalent way. The client will receive a paper acknowledgement containing the details of the order which he has made.<sup>64</sup> When the deal is done,

<sup>60</sup> Ch 6 text following n 98.

<sup>61</sup> CC art 1992; Decreto Euro (n 11 above) art 32(1).

<sup>62</sup> Regolamento Consob di attuazione del D Lgs 24 febbraio 1998 (*disciplina degli intermediari*), Delibera (decision), no 11522 1° luglio 1998 (as amended by Delibere no 11745 9 dicembre 1998 no 12409, 1° marzo 2000 and no 12498, 20 aprile 2000).

<sup>63</sup> *Ibid* art 30, esp art 30(2)(d).

<sup>64</sup> *Ibid* art 60(2–1). In the 'old' intermediation system in force prior to L no 1/1991 art 6 no formalities or written requirements were required for *ordini di borsa*. Oral orders could therefore be given by the client to the intermediary. Controversies concerned the way of obtaining procedural evidence of the order: cf Cass Sez I 1 febbraio 2000 no 1088 *Nasso c Cariplo spa* in Banca Borsa Titoli di Credito 2001 I 415, 417 and Corte d'Appello di Milano 6 agosto 1999 *Galvagno c Deutsche Bank spa* in Banca Borsa Titoli di Credito 2001 I 415, 422, noted GP La Sala *ibid* 427.

a note detailing the securities which were involved, the time, type, market, price, and other party must be sent to the investor's place of residence.<sup>65</sup> The essential elements of both the orders received by or transmitted on behalf of the investors and of the transactions carried through must be recorded—immediately or within one day—by the intermediaries in electronic form. Recording procedures are expressly required to be accurate so as to allow the investigation and reconstruction of all the relevant data of a transaction and to remedy errors. Electronic recordings must not be subject to modifications without corrections being indicated as such.<sup>66</sup> Finally, it has already been pointed out in relation to settlement that, in the matching of account entries carried through daily between the central depository of securities and the intermediaries which hold accounts in it, the flow of such information must, as from 1 January 2000, be entirely computerized.<sup>67</sup>

Along the same lines, recent legislation implementing the Directive on Electronic Commerce dispenses with writing in respect of certain phases of the conclusion of contracts of financial content through the Internet.<sup>68</sup>

## 2 Assignment of Intangibles in English Law

For an 'absolute assignment of things in action' the Law of Property Act 1925 s 136 requires writing. Although we do not favour the continued use of that originally 'Law French' term, shares are things in action. Properly understood, they were intangible all along, even before paperless systems were invented. Sub-shares are undeniably intangible. They are things in action. On the other hand sub-shares, if our analysis is correct, cannot be caught by the section because they are not 'debts or other legal things in action'. That is, they exist in equity, not at law. The section is concerned with legal assignments of legal things in action. It is also true that the s 136 requirement is anyhow inapplicable, even to shares, if it is correct to assert that shares are alienated by novation, not by assignment.<sup>69</sup> Here it suffices to say that the s 136 requirement of writing is easily worked around. To sub-shares, as equitable interests, it does not apply. So far as shares are concerned it is met by the argument that shares pass by novation.

<sup>65</sup> Ibid art 61(1).

<sup>66</sup> Ibid art 63. *ibid allegato* (schedule) 3 pt A point 4.4 warns against the risk of malfunctioning of computerized systems for the transmissions of orders (so-called order routing), crossing, registration and settlement of the operations.

<sup>67</sup> Regolamento Consob–Banca d'Italia (n 11 above) art 25.

<sup>68</sup> Directive 2000/31/EC on Certain Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market (E-commerce Directive) [2000] OJ L178/1, enacted in Italy by D Lgs 9 aprile 2003 no 70. Thus, preliminary requests of information and the placing of orders through the web are exempted from writing: R Torino 'Contratti finanziari conclusi tramite internet' in E Gabrielli and R Lener (eds) *I contratti del mercato finanziario* (UTET Torino 2004) vol I, 459, 477–80.

<sup>69</sup> See Ch 6 text to nn 51–52. It is of course true that the language of assignment is frequently prominent, as, for instance, throughout *Pennington v Waine* [2002] EWCA Civ 227.



### 3 Disposition of Equitable Interests

Our discussion of modern shareholding has hitherto shown that from an investor's point of view what is commonly described as the holding of shares is increasingly often more correctly the holding of sub-shares. Sub-shares are equitable interests under a trust. The legal title in the share being often immobilized with an upper-tier intermediary, most alienations concern sub-shares. This raises the question of compliance with the s 53(1)(c) requirement that dispositions of any subsisting equitable interest be in writing.

One statutory dispensation has already been observed in the case of CREST in the previous section. CREST, it will be recalled, transfers the whole security and not mere equitable interests in shares.<sup>70</sup> The latest version of the relevant regulations, the Uncertificated Securities Regulations 2001, confirms the dispensation from the requirement of writing within an approved computerized system:

2(1) These Regulations enable title to units of a security to be evidenced otherwise than by a certificate and transferred otherwise than by a written instrument, and make provision for certain supplementary and incidental matters; and in these Regulations 'relevant system' means a computer-based system, and procedures, which enable title to units of a security to be evidenced and transferred without a written instrument, and which facilitate supplementary and incidental matters.<sup>71</sup>

The poor drafting and disrupted syntax of the provision, surprisingly unaltered from the previous version,<sup>72</sup> and the cumbersome repetition of 'supplementary and incidental matters' renders the definition of 'relevant system' rather obscure. This is all the more unfortunate in that the exemption from the requirement of writing depends precisely on the understanding of that which counts as a 'relevant system'.

Under the heading of 'Certain formalities and requirements not to apply' it is furthermore provided:

38(5) Sections 53(1)(c) and 136 of the Law of Property Act 1925 (which impose requirements for certain dispositions and assignments to be in writing) shall not apply (if they would otherwise do so) to—

- (a) any transfer of title to uncertificated units of a security by means of a relevant system; and
- (b) any disposition or assignment of an interest in uncertificated units of a security title to which is held by a relevant nominee.

<sup>70</sup> Text to n 33 above.

<sup>71</sup> USR 2001 SI 2001/3755 reg 2(1), made under the powers conferred by CA 1989 s 207 (amended by Bank of England Act 1998 s 35) and vested by the Transfer of Functions (Financial Services) Order 1992 SI 1992/1315. The previous sets of rules were made in 1992 and 1995, and an amendment in 2000. The latest set came into force on 26 November 2001.

<sup>72</sup> USR 1995 SI 1995/3272 reg 2(1); the provision was absent in the 1992 version of the USR.

(6) In paragraph (5) “relevant nominee” means a subsidiary undertaking of an Operator designated by him as a relevant nominee . . . .<sup>73</sup>

The Uncertificated Securities Regulations do not apply generally to all transfers of intermediated securities. They only disapply the Law of Property Act s 53(1)(c) within a relevant system run by a suitably qualified operator. This is typically, although not necessarily exclusively, CREST, run by the operator CrestCo. Subject to the system’s being such a ‘relevant system’ ‘disposition or assignment of interest in uncertificated units of a security title to which is held by a relevant nominee’ is exempted from the requirement of writing. The language is exceedingly pleonastic and weighty, but this formulation nonetheless seems to free alienation of sub-shares from written formalities.<sup>74</sup>

Why is there no requirement of writing in relation to dispositions of sub-shares? Section 53(1)(c) has been criticized as obsolete and a general disapplication has been recommended.<sup>75</sup> One platform for this could be the Electronic Communications Act 2000 s 8, the principal provisions of which are:

(1) [T]he appropriate Minister may by order made by statutory instrument modify the provisions of . . . any enactment or subordinate legislation . . . in such manner as he may think fit for the purpose of authorising or facilitating the use of electronic communications or electronic storage (instead of other forms of communication or storage) for any purpose mentioned in subsection (2).

(2) Those purposes are—

(a) the doing of anything which under any such provisions is required to be or may be done or evidenced in writing or otherwise using a document, notice or instrument; . . .

(e) the keeping, maintenance or preservation, for the purposes or in pursuance of any such provisions, of any account, record, notice, instrument or other document; . . .

(g) the making of any payment that is required to be or may be made under any such provisions.

The Act in effect empowers ministers to remove restrictions on using the electronic medium instead of paper. This power has already led to an Order facilitating electronic communication between companies and their members, debenture holders and auditors, and between companies and the registrar of

<sup>73</sup> The predecessor of USR 2001/3755 reg 38 was USR 1995/3272 reg 32. Cf Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226 reg 4(2), which disapplies Law of Property Act 1925 ss 53(1)(c) and 136 in relation to financial collateral arrangements.

<sup>74</sup> Cf Benjamin and Yates (n 3 above) [2.13] and [9.3].

<sup>75</sup> Benjamin (n 35 above) [3.41], [4.21]; Financial Markets Law Committee *Property Interests in Investment Securities: Analysis of the Need for and Nature of Legislation relating to Property Interests in Indirectly Held Investment Securities, with a Statement of Principles for an Investment Securities Statute* (FMLC c/o Bank of England July 2004) <[www.fmlc.org/papers.htm](http://www.fmlc.org/papers.htm)> (accessed 31 Oct 2004) [6.9]. Principle 6 of the proposed Investment Securities Statute, *ibid* 15 ff, in dealing with ‘The Perfection of Third Party Interests’, provides under (a) Transfer of control: ‘Deals in securities (including outright transfers and security interests) are enforceable against third parties by the transfer of control. No further formalities are required’. And under (b) Meaning of control: ‘“Control” means legal, or legal and operational, control. A person has control of interests in securities if it is entitled, or entitled and able, to direct how they shall be dealt with’.

companies.<sup>76</sup> However, at the time of writing no order has yet been made disapplying s 53(1)(c) from the alienation of sub-shares. Besides, a general disapplication would be preferable to the inefficiencies of complex reasoning to work around the problem.

For the moment, therefore, it is still important to keep in mind the common law of this matter. For it is arguable in more than one way that legislation would not be necessary to work around the requirement of writing in the alienation of sub-shares. There are indeed other contexts in which solutions to the problems posed by Law of Property Act s 53(1)(c) have been found and where nobody looks too hard for flaws in their operation. One important case is the way property behaves when held by the shifting membership of an unincorporated association. When assets are held by trustees for the members of a club or other association, it is nowadays accepted that the members for the time being take beneficially as co-owners in equity but in such a way that the assets so co-owned are caught by the contract which is constituted by the rules to which every member subscribes. It is only by that contract that the assets are dedicated to the purpose of the association.<sup>77</sup> It is a question how the assets detach from members who leave and attach to new members without any writing. That they do so is not beyond all challenge.<sup>78</sup> It has been said that the transfer takes effect as a succession rather than a disposition. Following this analogy the co-ownership rights of an intermediary's client in a pooled account would potentially allow for new clients to join the class of clients without formalities.

Another case in which s 53(1)(c) has been outflanked is in the interpretation of the statutory scheme for varying trusts. Variations of existing beneficial interests under trusts are normally approved by courts, on behalf of categories of persons unable to make the decision for themselves and where it is in the interest of beneficiaries to do so,<sup>79</sup> without the formality of writing.<sup>80</sup> In the absence of express legislative provision, the courts found it unnecessary to abide by the letter of s 53(1)(c). This has no direct relevance to sub-shares but it shows that it is unimaginable that no way would be found to avoid crippling their electronic transfer.

A third escape is rooted in the operation of specifically enforceable contracts. We have seen that, provided a contract is specifically enforceable, a constructive trust arises as soon as the contract is entered into, whereby the equitable

<sup>76</sup> Companies Act 1985 (Electronic Communications) Order 2000 SI 2000/3383, made under Electronic Communications Act 2000 ss 8–9. In a different context but made under the same statute, cf the Patents Act 1977 (Electronic Communications) Order 2003 SI 2003/512.

<sup>77</sup> *Re Recher's Will Trusts* [1972] Ch 526, discussed in Ch 4 text to n 55.

<sup>78</sup> *Ashby v Blackwell Milton Bank* (1765) Amb 503, 27 ER 326; *Carne v Long* (1860) 2 DeGF & J, 45 ER 550; *Neville Estates Ltd v Madden* [1961] 2 All ER 769. DJ Hayton (ed) *Hayton & Marshall's Commentary and Cases on the Law of Trusts and Equitable Remedies* (11th edn Sweet & Maxwell London 2001) [3–92].

<sup>79</sup> Variation of Trusts Act 1958 s 1(1).

<sup>80</sup> At least since *Re Holt's Settlement* [1969] 1 Ch 100 (Megarry J).

interest passes to the purchaser by virtue of his right to specific performance.<sup>81</sup> Constructive trusts being exempted from the requirement of writing by s 53(2) the promisee obtains his equitable interest even if there is none. However, in *Chinn v Collins*,<sup>82</sup> which was concerned with a capital gains avoidance scheme consisting in transfers of shares in a public company, Lord Wilberforce seemed to hold that, in the case of what we are calling sub-shares, it was not necessary for the contract to be specifically enforceable. He said:

[T]he respondent contended that, granted the identity of the shares sold with the settlement shares, he could not be regarded as a beneficiary in respect of them because he could not get specific performance of the agreement. This was said to be because the law of Guernsey does not recognise specific performance. . . . But in my opinion the whole contention is misconceived. The legal title to the shares was at all times vested in a nominee . . . and dealings related to the equitable interest in these required no formality. As soon as there was an agreement for their sale accompanied or followed by payment of the price, the equitable title passed at once to the purchaser . . . and all that was needed to perfect his title was notice to the trustees or the nominee, which notice both had at all material times. Consequently, the trustees were bound to transfer the shares to Anthony immediately . . . and [the purchaser] was the beneficiary, under the settlement, as regards the shares.<sup>83</sup>

It is all too tempting to rely on this statement without notice of its fragility.<sup>84</sup> However, Lord Wilberforce, though very careful to note that the legal title to the shares was outstanding in nominees, never adverted to the need for writing to complete the disposition of an equitable interest. It may be that his statement, if not provoked by the particularities of the law of Guernsey, was no more than a rare instance of Homer nodding. Despite this all the indications are that if a challenge were made the courts would most likely find a way of reaching a not very dissimilar conclusion. Against the background of present practice, insistence on paper and writing for the transfer of sub-shares would be unthinkable.

### C THE PROBLEM OF CERTAINTY OF SUBJECT-MATTER

The chief question in this section arises when we know in principle how to transfer a sub-share. Let us suppose that we know that writing is not required and that the proper means of alienating it is by account entries on a computer. There is an analogy, useful up to a certain point, with the transfer of money in a modern banking system. The question then is whether the alienation of sub-shares in that mode will encounter special problems with the rules of certainty

<sup>81</sup> Ch 6 text to n 80; *Re Holt's Settlement* (previous n) 116 (Megarry J), contra *Oughtred v IRC* [1960] AC 206 (HL).

<sup>82</sup> [1981] AC 533 (HL).

<sup>83</sup> *Ibid* 548.

<sup>84</sup> JE Martin *Hanbury and Martin's Modern Equity* (Sweet & Maxwell London 2001) 90–91 does notice this fact.

of subject-matter. This turns out to be a remarkably intricate inquiry but one which is constantly led by the conviction that what is already being done will not be impeded by requirements of certainty any more than it can be disrupted by requirements of writing. The added intricacy here ultimately arises from the fact that rules of certainty cannot be given the go-by, for unlike rules of formality they are a natural necessity.

It is axiomatic that it is impossible to transfer anything which is not identifiable. I cannot transfer a sheep in a flock, or a debt which is owed to me, if I do not make it apparent which sheep or which debt. Since the creation of a trust is itself a species of transfer, exactly the same applies. I cannot declare myself a trustee for you of a sheep, or of a debt, without identifying the subject-matter. The same is true if I want to transfer to trustees for you rather than make myself trustee. The rules requiring certainty are not meaningless dogma. They are there to prevent insoluble problems.<sup>85</sup>

## 1 Fundamentals: Divided and Undivided Fractions

If I have a storage tank full of 1 million litres of olive oil and I sell 250,000 of them to you, the property in the 250,000 cannot pass until the 250,000 are ascertained. But here a distinction immediately has to be made. It is one thing to transfer one quarter of the olive oil but quite another to alienate an undivided one-quarter share in it. In the second case the rules of certainty are immediately satisfied. The English common law of sales has always insisted, until recently without exception, not only that goods have to be ascertained in order for property in them to pass<sup>86</sup> but also that an intention to transfer part of a larger mass could not be construed as though the parties had intended to transfer an undivided share in the whole mass.

This approach gave rise to such cases as *Re Wait*.<sup>87</sup> Wait bought a cargo of 1000 tons of wheat and sold half of it on to sub-purchasers, who paid him with a cheque without either appropriating their 500 tons or receiving any document of title representing them. Wait cashed the cheque and pledged the cargo to the bank as security for his debts. In Wait's insolvency, the sub-purchasers claimed that the property had already passed to them, while the appointed trustee claimed to retain the whole of the cargo, thus leaving the sub-purchasers with a mere remedy in damages. No ear-marking, identification or appropriation of the 500 tons having taken place, the sub-purchasers stood in no better position than the other unsecured creditors.

<sup>85</sup> *Re Goldcorp Exchange Ltd (in Receivership)* [1995] 1 AC 74 (PC) 90 (Lord Mustill): '[A]ny attempt by the non-allocated claimants to show that a legal title passed by virtue of the sale would have been defeated, not by some arid technicality but by what Lord Blackburn called "the very nature of things".'

<sup>86</sup> Sale of Goods Act 1979 s 16.

<sup>87</sup> [1927] 1 Ch 606 (CA) 639 (Atkin LJ).

A new set of more pragmatic rules was introduced through the Sale of Goods (Amendment) Act 1995. Section 20A now reverses the old approach to the construction of such transactions. It provides that where a quantity is purchased from an identified bulk, then, provided that the buyer has paid the price for some or all of the goods which are the subject of the contract and form part of the bulk, the buyer will become an owner in common of the bulk and will be entitled to recover such undivided share as the quantity of goods paid for and due to him out of the bulk bears to the quantity of goods in the bulk at that time.<sup>88</sup> In short the certainty problem is solved by understanding the sale as having been intended to confer an undivided, not a divided share.

This kind of solution gives rise to the problem of unilateral partition, by which is meant the problem of reconciling co-ownership of the mass with sole ownership of that which the buyer actually gets. Section 20B expressly provides a solution by deeming that any owner in common of the bulk is assumed to consent both to the delivery of goods out of the bulk to another co-owner, to whom they are due under his contract, and to the removal, dealing with, delivery or disposal of goods in the bulk by any other co-owner, provided that such activities only affect that co-owner's share. In short, contrary to the normal behaviour of co-ownership, this statutory co-ownership does not persist.

The traditional distaste of the common law towards insufficiently determined goods has a parallel in equity, which precludes the creation of a trust if the intended trust property is imprecisely indicated.<sup>89</sup> Doubts about the certainty of subject-matter cast a suspicious reflex over the intention to create a trust.<sup>90</sup> There is an undoubted necessity of ascertaining to what subject-matter the interest of the beneficiary is to attach. This is as true of shares as other commodities.<sup>91</sup>

This is the reason of the perplexity which was induced by the decision in *Hunter v Moss*,<sup>92</sup> in which the defendant's oral declaration of himself as trustee for the claimant of 5 per cent of a company's issued share capital of 1000 identical shares was held to be valid. The defendant being the registered holder of 950 such shares, and the shares being solely of one class in one company, Dillon LJ held the trust to apply to any 50 of them, although the shares had never been separated out. This seems to fly in the face of 'the nature of things'. Though subsequently followed in *Re Harvard Securities (in liq)*,<sup>93</sup> adverse criticism has raised a doubt whether the decision can survive. One difficulty relates to the chargeability of capital gains tax in the event that a hypothetical Moss should

<sup>88</sup> E McKendrick 'The Passing of Property in Part of a Bulk' in N Palmer and E McKendrick (eds) *Interests in Goods* (2nd edn LLP London 1998) 385, 398–400.

<sup>89</sup> *Re Jones* [1898] 1 Ch 438; *Palmer v Simmonds* (1854) 2 Drew 221, 61 ER 704; *Hemmens v Wilson Broune* [1995] Ch 223.

<sup>90</sup> *Mussoorie Bank Ltd v Raynor* (1882) 7 AC 321 (PC).

<sup>91</sup> *Re London Wine Co (Shippers) Ltd* [1986] PCC 121 (ChD).

<sup>92</sup> [1994] 1 WLR 452 (CA).

<sup>93</sup> [1998] BCC 567, [1997] 2 BCLC 369 (ChD), noted R Stevens 'The Lex Situs of Shares' [1999] Company Financial and Insolvency L Rev 138.

subsequently decide to alienate any 50 of his shares. From the impossibility of identifying them, it has been argued, follows the impossibility of deciding who—whether Hunter or Moss—should be charged.<sup>94</sup>

However, the arguments pull both ways. Uncertainty rules must not impede the market unless they really do anticipate insoluble problems. It seems hardly desirable, at a time when the undisputed necessity of securities pooling makes identification of shares impractical, to maintain the view that *Hunter v Moss* was badly decided. If certainty is to be reconciled with ‘the nature of things’, then the intangible nature of shares should be relied upon to favour a more flexible version of certainty, to allow for what always was intangible subject-matter, today indeed even more vanishing. Professor Hayton has stated that ‘there is no sound reason for distinguishing trusts of goods from trusts of intangibles’.<sup>95</sup> But just as powerful is the counter-argument that the one and only requirement of certainty of subject-matter cannot, unless for absolute necessity, get in the way of market efficiency. In the presence of vast amounts of electronically traded shares certainty can but mean a certain number of shares considered for the value that they represent and as can be monitored on the intermediary’s computer screen, just as, in the case of cotton, certainty had to mean a certain number of bales taken for the value that they represented and as they physically appeared on a dock, having been unloaded from the ship.<sup>96</sup>

To sum up this discussion of these fundamentals, it appears possible to make a number of propositions. First, the problem in *Hunter v Moss* arose because the settlor had purported to create a trust of a fraction of his holding by declaring himself trustee. Had he transferred that fraction to trustees there would have been no problem at all. The trust would, on all views, have been valid. Secondly, there would have been no objection to the declaration of trust if as a matter of construction it had been understood as a trust of an undivided share of all the shares of that kind held by the settlor. Thirdly, it is possible that that which statute has done in relation to sales from bulk may in future prove possible to be done by courts, namely to construe such declarations in such a way as to enable them to be valid, as trusts of undivided shares.<sup>97</sup> Fourthly, it is, however, difficult, perhaps but not necessarily impossible, to defend the *Hunter v Moss* conclusion that there can be a trust of a number of unascertained shares located in a mass of other shares. Prima facie that does run against the nature of things. The examination of the fourth of these propositions requires a book of its own. The briefest investigation is attempted below. First, however, it is necessary to ask whether the requirements of certainty of subject-matter pose problems for

<sup>94</sup> D Hayton ‘Uncertainty of Subject Matter of Trusts’ (1994) 110 LQR 335, 336.

<sup>95</sup> DJ Hayton *Underhill and Hayton’s Law Relating to Trusts and Trustees* (16th edn Butterworths London 2003) 79.

<sup>96</sup> *Spence v Union Marine Insurance Co Ltd* (1868) LR 3 CP 427.

<sup>97</sup> A footnote in Benjamin and Yates (n 3 above) [3.10] fn 3 swiftly mentions SGA 1979 s 20A to rule out its application to securities, for SGA 1979 s 61 excludes ‘choses in action’ from the definition of goods. The limited definitional power of the phrase ‘choses in action’ has been stressed elsewhere in this book. The result which is advocated here may well be attained judicially.

the alienation of sub-shares which cannot be overcome without recourse to the less orthodox version of the *Hunter v Moss* trust. By 'less orthodox' is meant the view that the case is authority for the proposition that a settlor can declare himself trustee of a fraction of a mass without identifying it, as for instance of 10 sheep in a flock of 100 without identifying them.

## 2 Sub-shares

Under Italian law certainty has not attracted attention. It is true, of course, that sub-shares are not conceived as equitable interests under a trust. Yet the difficulty is not a purely nominalistic or illusorily linguistic one. The similarities with the institution of *intestazione fiduciaria* (fiduciary entitlement) have been analysed,<sup>98</sup> and the main difference from the trust indicated in the feature of patrimonial separation. Intermediation functions on the basis of a 'double principle of separation' of clients' accounts from each other and of each of these from those held by the intermediary in his own name. Patrimonial separation subsists regardless of the existence of a mandate according to which the intermediary or fiduciary acts, as well as on behalf of, also in the name of the clients. The separation concerns every account in the system from the very moment the account is created.<sup>99</sup> Hence it is from a necessarily 'ring-fenced' account that securities are extracted to start a transaction, the provenance of whose subject-matter is therefore necessarily 'certain'.<sup>100</sup>

In English law the problem can be contemplated in terms of a simple triangle, the points being the alienor, the alienee, and the intermediary. This simple triangle contains no traps, though in reality there may be a hierarchy of intermediaries so as in effect to create a whole pyramid of such triangles. It is not evident that the pyramid raises problems of uncertainty which are not raised in the simple case.

Suppose that Alienor has 100 sub-shares. If he transfers them to Alienee, they will pass by account entries, very much as money, or more accurately credit, passes from one person's bank account to another. Alienor will in all probability think of himself as transferring 100 somethings of his own. With one eye on the possible future insolvency of Intermediary we do not want to conclude that Alienor is merely transferring personal claims against his intermediary, which, statute apart, might rank with the claims of all Intermediary's other unsecured

<sup>98</sup> Ch 3 text from n 17.

<sup>99</sup> TUF (n 15 above) art 22.

<sup>100</sup> The conclusion here reached could be described in Goode's terminology in terms of 'all accounts being non-fungible', that is, at all times distinguishable as belonging to Intermediary or Alienor or Alienee. R Goode 'Are Intangible Assets Fungible?' in P Birks and A Pretto *Themes in Comparative Law in Honour of Bernard Rudden* (OUP Oxford 2002), repr [2003] LMCLQ 379. The potential of the ring-fencing device is explored in DJ Hayton *Extending the Boundaries of Trusts and Similar Ring-fenced Funds* (Kluwer Law International The Hague 2002).



creditors. We need to say that Alienor is transferring assets held on trust for him. We therefore have to take account of the position of Intermediary, the trustee.

If Alienor holds 100 X Plc sub-shares from Intermediary who holds 1000, and if Alienor transfers 100 to Alienee, then, even if Alienor thinks he is transferring 100 individual somethings, if the law's analysis is that he is transferring a co-owned, undivided one-tenth fraction of Intermediary's whole parcel of 1000, orthodox doctrine is satisfied. The less orthodox understanding of the limits of *Hunter v Moss* would support the alternative proposition that it is possible for Intermediary to hold a fraction of a mass on trust for another without segregating it, even though that fraction is not contemplated as simply an abstract undivided share. In short I can hold 10 sheep on trust for you, even although they are still mixed in my flock of 100.

We might be tempted simply to reaffirm that the minimum requirement must be identification implicit in at least a moment of segregation.<sup>101</sup> Nevertheless there are loose ends in the law relating to mixing and substitution which could possibly be invoked to defend the unorthodox view. So far as mixing is concerned, it may be that the effect of involuntary mixing is sometimes not co-ownership but rather continuing ownership of the constituent units indistinguishably mixed. The importance of that proposition here would be that it would show, if it were true, that the law can tolerate this kind of situation. If 10 of your sheep join mine and, unidentifiable within the flock, remain yours, so that we do not become co-owners of undivided shares in the whole flock, there would seem to be no insuperable obstacle to my making 10 of my 100 sheep yours, without segregation. It is certainly true that this was the analysis of a Roman *commixtio*, a mixture of indistinguishable things which despite running together were of such a nature as, unlike fluids, to retain their own integrity. But the evidence for an English equivalent is fragile, to say the least.<sup>102</sup>

Some further support for an unexpected flexibility and adaptability of 'the nature of things' in relation to property can be derived from the House of Lords decision in *Mercer v Craven Grain Storage Ltd*.<sup>103</sup> This case, which considered what happened to proprietary rights in the context of the storage of grain in a silo which was constantly emptied and refilled, appears to show the property can subsist through mixtures and substitutions in circumstances which might be thought to defy all requirements of certainty. This case has its Roman and modern Italian parallels, especially in the figure of *deposito irregolare*<sup>104</sup> (irregular deposit). Under the pressure of necessity, out of these materials one might well build a proof that the fundamentals of the law of property are not violated by

<sup>101</sup> On this premise turn the contrasting results of *Re London Wine Co (Shippers) Ltd* [1986] PCC 121 and *Re Stapylton Fletcher Ltd* [1994] 1 WLR 1181.

<sup>102</sup> Discussion of 'granular mixtures in English law' in P Birks 'Mixtures' in N Palmer and E McKendrick (eds) *Interests in Goods* (2nd edition LLP London 1998) 227, 238.

<sup>103</sup> [1994] Current L Cases 328 (HL).

<sup>104</sup> CC art 1782.

the *Hunter v Moss* trust. However, for the moment it remains to be seen whether problems will arise sufficient to exert that pressure.

With all its difficulties the less orthodox view may well prevail. When we come to the vindication of shares we will see that in Hong Kong and in Italy courts have allowed the vindication of entitlements despite uncertainty of subject-matter, albeit without fully explaining how it can be done. These results are not explicable in terms of co-ownership but only as instances of separate ownership of units within a mass, as of sheep within a flock.<sup>105</sup> *Hunter v Moss*, widely regarded, in its more extreme interpretation, as wrong, may after all turn out to have opened a new chapter in the law.

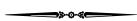
#### D CONCLUSION

This chapter has looked at the problems implicit in the new modes of alienating shares and, more especially, sub-shares. Shares are now generally held in custody. Sub-shares, which we have come to regard as equitable interests in shares held under a trust, are freely traded through the new technology. Computerized alienation has both increased the efficiency of the transaction and exacerbated some of its legal difficulties. The consequences of dispensing with paper, whether its assumed necessity is overcome through legislative or interpretative means, require careful reflection. Paperless transfer does not bring with it any exemption from the necessary requirements of certainty, for these are part of 'the nature of things'. The question whether those requirements have been stretched to breaking point by the new market practices has been answered in the negative, although some decisions have come very near to approving the impossible. Equipped with the partial conclusion that sub-shares can be securely alienated, this book must now return to the technical sense or senses of 'property'. The next chapter asks whether the feature of alienability is sufficient to make shares and sub-shares property, and, if so, whether all things alienable are property for the same reason.

<sup>105</sup> Ch 9 text from nn 34–42.



## *The Second External Boundary: Property as Alienability*



### A ALIENANDA AND MODES OF ALIENATION

**A**FTER THE INTRODUCTORY first Part, the second Part of this book argued that a clear conception of personal property could be formulated by confining it to rights in things capable of being located in space. To such things we gave the name ‘*locanda*’. The category so named is slightly larger than that of corporeal things. It includes in addition to corporeal things a handful of ideational incorporeal things which can be found and recognized in physical space. The difficulty with the category of rights *in rem locandam* is that its narrowness can by no means be made to reach shares or sub-shares.

Since it would be best, where possible, not to drive the legal and colloquial senses of any word too far apart, the third Part therefore began the task of trying to enlarge the category of personal property without losing completely the distinction between property and obligations. Part III is founded on the undoubted fact that every book on personal property deals at length with alienation.<sup>1</sup> The question is whether a satisfactory boundary can be drawn along the line of alienability. The present chapter comes after two which have focused on shares as items capable of alienation. We have looked at the principal aspects of the alienability of shares and sub-shares. If the discussion has been prolonged, it is because of the upheaval still continuing in that area of the law. The question must now be asked whether the alienability of shares and sub-shares can allow them to regain a place in any version of the law of personal property.

Alienability is repeatedly held to be an essential aspect of property. In his background discussion of property rights for the purposes of a study of custody of securities in the financial markets, one scholar has recently declared:

<sup>1</sup> This feature is symptomatic of the episodic treatment of personal property condemned in Ch 2 text to nn 47–50.

The real distinction [of a proprietary right from a personal one] turns on the need for it to be ‘capable in its nature of assumption by third parties’; in short, it should be capable of alienation. . . . [P]roprietary rights are rights in relation to determinate or identifiable assets that may be exercised against the generality of mankind and/or are assignable. Depending on the nature of the *res*, it may be sufficient that they are either good against the generality of mankind or assignable.<sup>2</sup>

This ties together two strands, one of which is alienability while the other is what the next Part of this book calls ‘vindication’. The equivocal ‘and/or’ destabilizes the relationship between the two. Notwithstanding the claim that this passage is grounded in the case law,<sup>3</sup> this chapter will come swiftly to the conclusion that, so far as its reliance on alienability is concerned, it leads down a dead end. It will be the business of Chapter 10 to examine vindication ‘against the generality of mankind’.

## B PROPERTY-AS-OPPOSED-TO-OBLIGATIONS

The external boundary of the law of personal property must leave intact the contrast between property and obligations. This section sets out to demonstrate that alienability cannot successfully be used to discriminate between property and obligations. The demonstration that alienability is not a peculiarity of rights *in rem* has three stages. Three short propositions sum them up. First, even rights *in personam* are alienable. Secondly, rights *in rem* are not necessarily alienable. Thirdly, the illusion that alienability might suffice to identify property in the strict sense is due to the inveterate habit of concentrating on the wrong end of the right, on the benefit rather than on the burden.

### 1 Even Rights *in Personam* Are Alienable

Rights *in personam*, or, viewed from the other end of the personal relationship, obligations, can nowadays often be alienated. The alienation of such rights is usually called assignment. In modern law a contracting party may assign, that is, transfer, to a third party contractual rights which are already in existence. Formalities of writing and written notification to the debtor are required for a transfer of a full legal title to the right in question.<sup>4</sup> Writing and the signature of the disposing person suffice to transfer an equitable title to an equitable right, such an assignment being a disposition of an equitable interest.<sup>5</sup> The position in relation to an unwritten assignment of a legal right is complex. There is no

<sup>2</sup> AO Austen-Peters *Custody of Investments: Law and Practice* (OUP Oxford 2000) 25 [2.17–18].

<sup>3</sup> According to Austen-Peters, mainly in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1247–48 (Lord Wilberforce).

<sup>4</sup> Law of Property Act 1925 s 136(1).

<sup>5</sup> *Ibid* s 53(1)(c).

doubt that if the assignee gives consideration, the oral assignment is good in equity. It is less clear that a voluntary oral assignment of a legal right is effective. It is sometimes said that, for want of the statutory writing, it counts as an imperfect gift<sup>6</sup> and can only be perfected under the conditions which we have discussed in that connection.<sup>7</sup> However, this is not logical, since the relevant question must be whether oral assignments of legal rights were valid in equity before the statutory mechanism was invented. A negative answer would conflict with the undoubted proposition that the declaration of trust of personalty need not be in writing, not being the disposition of an equitable interest but the creation of one.<sup>8</sup>

Not every contractual right is assignable. Those of a personal nature, such as an employer's right to his servant's work, are not. Money debts are usually assignable. The modern thought is that, so long as he knows whom he must pay, the debtor has no interest, or none worth protecting, in the identity of his creditor.<sup>9</sup>

It is evident that the assignability of rights *in personam* suffices in itself to render alienability useless as an indicator of property *stricto sensu*. However, it is interesting to notice that, if one goes back in time, the situation looks different. It has not always been possible to say that some rights *in personam* were alienable. The history of the assignment of obligatory rights shows that that the law has begun from an instinctive conviction that that such rights are inalienable. Had it not abandoned that view, alienability would have had a much stronger claim to be the criterion by which to distinguish property and obligations.

Roman law did not allow assignment. It evaded that commitment by allowing cession of actions.<sup>10</sup> In the words of Buckland:

*Obligatio*, being personal, could not be assigned. This principle was evaded by the use of mandate in the form of *procuratio ad litem*. The assignment was effected by making the assignee a mandatary to sue on the claim, not to be accountable for the proceeds—*procuratio in rem suam*. In its simple form this was imperfect: the debtor could still pay the assignor, the assignor might revoke the mandate, at least till *litis contestatio*, and death of either party revoked the mandate. All this was gradually remedied. If the mandate was revoked by death, or expressly, the mandatary was allowed an *actio utilis* in his own name, though, in the last case, perhaps not till Justinian. Again, in one case in the third century, but perhaps generally only under Justinian, it was provided that after notice to the debtor or part payment by him to the

<sup>6</sup> *Olsson v Dyson* (1969) 120 CLR 365 (HCA).

<sup>7</sup> See Ch 6 text to nn 67–79.

<sup>8</sup> G Treitel *The Law of Contract* (11th edn Sweet & Maxwell London 2003) 688: 'The true position seems to be that oral voluntary assignments of legal choses can be valid so long as they are perfect gifts. They are not imperfect merely for want of writing . . .'

<sup>9</sup> PS Atiyah *An Introduction to the Law of Contract* (5th edn Clarendon Press Oxford 1995) 363.

<sup>10</sup> German law on the transfer of ownership in chattels offers one modern example of *cessio actionum*, for the requirement of delivery may sometimes be substituted through an assignment of the right to claim to retrieve chattels: BGB §398, cf §§ 931 and 870.

assignee, the original creditor could no longer claim the money or release the debt, nor could the debtor validly pay it to him. There was now an effective transfer of such assignable right as the creditor had. Anastasius introduced a modification which must have done some injustice. He provided that any one who had so bought a debt could never recover more than he paid for it, whatever the amount of the debt.<sup>11</sup>

Thus, assignability was reached by an indirect method based on the conception of the assignee as a representative of the assignor for the purpose of litigation. There were numerous cases where one in whom a right of action was vested was compellable to transfer it to another, by this indirect method of *cessio actionum* (cession of action). Where this *cessio* could be claimed, of course, the actual step of claiming and transferring the action might seem an idle and cumbersome form. The question was bound to be asked whether the transferee might not be allowed to proceed directly, as though he had had a transfer.

Some cautious steps were taken in that direction. The action which was given was not one in which *cessio* was feigned (*actio ficticia*) but an *actio utilis suo nomine*, usually an *actio in factum*. Such automatic transfer was called *cessio legis*. The notion starts from the cases of a transfer which had become inoperative before it was acted on, but it gradually extended to cases where there had been no transfer. But, in general, where *cessio* had not been actually taken there was no right to sue.<sup>12</sup> It is worth noting that there could be no similar transfer on the debtor's side. That reflects the common sense proposition that no debtor should have the power to escape his creditor without the latter's consent. The burden of a debt could indeed be transferred, but only by novation, which does require the consent of the creditor.<sup>13</sup>

The common law started from the same negative proposition that rights *in personam* were inalienable. In his definition of contract Blackstone said:

A contract . . . is an *agreement* . . . and therefore there must at least be two contracting parties. . . : as where A contracts with B to pay him 100 *l.* and thereby transfers a property in such sum to B. Which property is however not in possession, but in action merely, and recoverable by suit at law; wherefore it could not be transferred to another person by the strict rules of the antient common law: for no *choses* in action could be assigned or granted over, because it was thought to be a great encouragement

<sup>11</sup> P Stein (ed) WW Buckland *A Text-book of Roman Law from Augustus to Justinian* (3rd rev edn CUP Cambridge 1963) 520–21. Ibid 554 it is specified that a *utilis actio* was brought where a debt had been given as *dos* or where a debt had been sold, or on the legacy of a debt. By contrast, the automatic transfer of *obligatio* was possible in various forms of universal succession, and in the case of guardianship on the termination of the wardship. Cf FH Lawson (ed) WW Buckland and AD McNair *Roman Law and Common Law: A Comparison in Outline* (2nd edn CUP Cambridge 1952) 309–10.

<sup>12</sup> This same discussion is currently conducted in English law in relation to subrogation, which is a species of *cessio legis*: *Esso Petroleum Ltd v Hall Russell & Co Ltd (The Esso Bernicia)* [1989] AC 643 (HL) 676–77 (Lord Jauncey of Tullichettle). The HL held that Esso as 'assignee' still had to sue in the name of the crofter victims of the tort, whose right it claimed to be able to maintain because it had made good the losses inflicted on them by the negligent tortfeasor who had caused the Esso Bernicia to spill its cargo of oil on their shoreline.

<sup>13</sup> Buckland *Text-book* (n 11 above) 555. We return briefly to this immediately below.

to litigiousness, if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded: though, in compliance with the antient principle, the form of assigning a *chose* in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore, when in common acceptance a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person, to whom it is transferred, being rather an attorney than an assignee. But the king is an exception to this general rule; for he might always either grant or receive a *chose* in action by assignment: and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose* in action, as much as the law will that of a *chose* in possession.<sup>14</sup>

Hence the evasion from the prohibition to assign intangibles came through Equity before statutory intervention put a seal to it.

Italian law contemplates the assignment of rights *in personam* in the forms of both contracts and single obligations. We will look briefly into both. The Italian Civil Code provides for *cessione del contratto* (assignment of a contract) as follows:

Each party [*cedente*] may be replaced by a third party [*cessionario*] in a contractual relationship involving an exchange of performances, where these have not yet been performed, provided that the other party [*ceduto*] agrees to the substitution.<sup>15</sup>

*Cessione* is generally understood as a trilateral contract, perfected when the contracting party who has proposed the *cessio* becomes aware of the last acceptance. In particular, the change in the person of the debtor (*cessionario*) must be accepted by the creditor (*ceduto*).<sup>16</sup> Where the consent of the *ceduto* is not necessary the legal framework is that of *successione ex lege* rather than *cessione*.<sup>17</sup> The *cessione* of a contractual position is wider than that of single rights and obligations arising under the contract, for it includes, as well as all these, the possibility of raising the claims and bringing the actions for the protection of one's contractual position. That the contract of *cessione* of a contract is a form of alienation does not appear to be doubted.<sup>18</sup>

When the contract originally envisaged particular qualities in the contracting parties limitations to the assignability of the contract may arise, such as when the contract defining a sportsman's performance is assigned.<sup>19</sup> In other cases

<sup>14</sup> W Blackstone *Commentaries on the Laws of England. Volume II. Of the Rights of Things* (Oxford 1766) (facsimile of 1st edn of 1765–69, University of Chicago Press Chicago 1979) 442.

<sup>15</sup> CC art 1406.

<sup>16</sup> F Gazzoni *Manuale di diritto privato* (9th edn ESI Napoli 2001) 1013; R Sacco and G De Nova *Il contratto* in R Sacco (ed) *Trattato di diritto civile* (3rd edn UTET Torino 2004) vol II 749–52.

<sup>17</sup> *Ibid* 1013–14. One instance of *successione ex lege* is in L 27 luglio 1978 no 392 *Disciplina della locazione di immobili urbani* (landlord and tenant relationships) art 6. The spouse and family, who had shared the place with the deceased tenant, may succeed to him in the tenancy contract by operation of law.

<sup>18</sup> Gazzoni (n 16 above) 1016.

<sup>19</sup> *Ibid* 1014–15.



*cessione* is excluded by law for other reasons. Thus, for instance, the assignment of a contract to carry out work to immovables belonging to public bodies is forbidden, for the mechanism has long been a form of speculation favoured by the Italian mafia.<sup>20</sup>

Assignment of a single obligation, as opposed to a contract, is treated differently according to whether the replacement concerns the person of the creditor or that of the debtor. The substitution of a new creditor for the original one is known as *cessione del credito* (assignment of the credit). It does not require the debtor's consent:

A creditor may transfer his credit onerously or gratuitously regardless of the debtor's consent, unless the credit is of a strictly personal nature or the transfer is forbidden by law.<sup>21</sup>

Thus, rights which are the subject of controversy in a certain court or within a certain jurisdiction may not be assigned to the people charged with the administration of justice in that court or jurisdiction (for example, judges and practising lawyers).<sup>22</sup>

The debtor's consent is proclaimed irrelevant for the *cessione* itself. However, the assignment is said to be effective towards the debtor when he has accepted it or it has been notified to him.<sup>23</sup> Together with the credit are assigned the claims for its protection.

The substitution of a new debtor for the original one is an entirely different matter. We are concerned with the alienability of rights, while this is the transfer of, so to say, the other end of the right, the liability or duty. By contrast with the assignment of the right, there can be no such thing as a transfer of the liability to pay a debt without the co-operation of the creditor. With that co-operation the alienation of a debt is possible and may take one of three forms:<sup>24</sup> '*delegazione*', which is the mechanism through which the debtor mandates a third party to pay the creditor; '*espromissione*', which is the legal device through which a third party promises to pay the creditor, thus paying off the debtor's debt; and '*accollo*', which takes place when a third party binds himself to the debtor to pay off the latter's debt.<sup>25</sup>

One recurrent manifestation of the assignability of rights *in personam*—in the form of *cessione*—and the wealth inherent therein is the phenomenon of credit securitization.<sup>26</sup> Italian law has a fairly recent statute on the

<sup>20</sup> L 19 marzo 1990 no 55 *Nuove disposizioni per la prevenzione della delinquenza di tipo mafioso* art 18.

<sup>21</sup> CC art 1260 para 1.

<sup>22</sup> CC art 1261 para 1.

<sup>23</sup> CC art 1264 para 1.

<sup>24</sup> Gazzoni (n 16 above) 613–20.

<sup>25</sup> CC arts 1268–76.

<sup>26</sup> The term is understood in a number of different ways. In relation to receivables financing, F Odith *Legal Aspect of Receivables Financing* (Sweet & Maxwell London 1991) 32–35. In Italy, A Frignani 'La "securitization" come strumento di smobilizzo dei crediti di massa (profili di diritto comparato europeo)' *Foro Italiano* 1995 V 294, 294–306; L Carota 'La cartolarizzazione attuata

matter.<sup>27</sup> The operation of *cartolarizzazione* is a combination of two contracts. The first of these consists in the assignment of a credit portfolio by an assignor (*cedente*) called ‘originator’ to a company (*società di cartolarizzazione*, equivalent to the common law notion of ‘special purpose vehicle’) whose sole purpose is to carry out the securitization activity.<sup>28</sup> The second consists in the issue, on the part of this company, of as many *titoli* as are necessary to finance the purchase of the said credit portfolio. Through the proceeds of the sale of the new securities the company pays for the purchase of the original credits portfolio.<sup>29</sup> The income of the assignment of the first series of credits will, on the one hand, be employed by the *cedente* to undertake new financial operations. The freshly issued *titoli*, on the other hand, will be conveniently alienated by the *società cessionaria*, who, as a debtor, will only offer limited security for these obligations, being liable not with its whole patrimony but only within the limits of the stream of income deriving from financing the purchase of the credit portfolio.<sup>30</sup>

## 2 Rights *in Rem* are Not Necessarily Alienable

We have already seen that alienability cannot in modern law be used to discriminate between property and obligations because obligatory rights (rights correlative with obligations) are often alienable. However, the problem goes deeper. While it is perfectly true that rights *in rem* are generally alienable, it is not absolutely necessary that they should be so, not even when they are indisputably within the category of wealth. In other words, there is such a thing as property, even within the narrow sense of Part II, which is inalienable.

The right of usufruct provides an example. Usufruct is a personal servitude entitling the grantee to enjoy the use of an asset and to take its fruits over a fixed time, often for life. In modern Italian law a usufruct is alienable, subject to the notification to the owner of the thing.<sup>31</sup> In classical Roman law, however, a usufruct was inalienable. The effect of an attempted *cessio in iure* by the fructuary to a third party would either work as a forfeiture, so that the rights lapsed to the *dominus*, or turn out to be a nullity. In other words, any attempt

mediante cessione dei crediti’ in E Gabrielli and R Lener (eds) *I contratti del mercato finanziario* (UTET Torino 2004) vol I, 211, 214–22, 248–53.

<sup>27</sup> L 30 aprile 1999 no 130, on which C Rucellai ‘La legge sulla cartolarizzazione dei crediti’ *Giurisprudenza Commerciale* 1999, 411, esp 411–12; C Rucellai ‘La cartolarizzazione dei crediti in Italia’ *Giurisprudenza Commerciale* 2001 I 392.

<sup>28</sup> L 130/99 (n 27 above) art 3.

<sup>29</sup> *Ibid* art 5.

<sup>30</sup> The latter mechanism is known as ‘limited recourse’. It is a major exception to the principle in Italian CC art 2740 according to which a debtor is liable for the performance of his own obligations with all his assets whether present or future: C Rucellai ‘La legge’ (n 27 above) 413.

<sup>31</sup> CC art 980.

to alienate the usufruct would destroy it.<sup>32</sup> In this it resembles the interest of the primary beneficiary under a modern protective trust, which itself provides us with a second example of an inalienable property right. A protective trust is one which is constructed in such a way as to preserve an estate against bankruptcy or profligacy. The key is that the interest which is conferred is so designed as to be destroyed by any alienation. Since insolvency itself entails a transfer to a trustee, insolvency will itself destroy the interest, so that there will be nothing to transfer. On the destruction of the interest new interests arise in other persons, typically a large class of discretionary beneficiaries.<sup>33</sup>

Again, it is possible for a legal system to render inalienable a whole category of corporeal things, without thereby removing them from the category of property.<sup>34</sup> Under Italian law, for example, heritage is protected in this way. There is a class of *demanio pubblico* and *patrimonio indisponibile dello Stato* (domain belonging to the State and inalienable by definition<sup>35</sup> and inalienable State patrimony whose destination cannot be changed<sup>36</sup>). The inalienable property of the state extends on the one hand to the collections held by museums, galleries, archives, and libraries,<sup>37</sup> and, on the other hand, to all *cose di interesse storico, archeologico, paleontologico, e artistico* which happen to be found in the ground.<sup>38</sup> When found, these things belong to the State. However, the transient character of inalienability is apparent in the numerous exceptions to the rule. Possibilities of alienation have been introduced by very recent legislation.<sup>39</sup>

That alienability does not either add to or subtract anything from the proprietary quality of these corporeals is confirmed by the fact that the English notion of treasure, composed of much the same items, does not exclude alienability. ‘Treasure trove’, which formerly consisted only of gold and silver hidden so

<sup>32</sup> Buckland *Text-Book* (n 11 above) 270: ‘But though the right itself could not be transferred, there was no objection, in classical or later law, to letting or selling the enjoyment, the position and responsibilities of the usufructuary being, however, retained’. This reinforces the argument below that alienation was always concerned with the benefit rather than the burden.

<sup>33</sup> JE Martin *Hanbury and Martin’s Modern Equity* (16th edn Sweet & Maxwell London 2001) 191–200.

<sup>34</sup> The fact that corporeals may be made inalienable by law prompts revision of the assumption that corporeals are necessarily alienable. Birks, for instance, once wrote: ‘The statement “I own this corporeal thing” entails a power to alienate the thing. On the other hand, incorporeal things, which are creatures of the law itself, can be . . . definitionally inalienable’. See P Birks ‘The Roman Law Concept of Dominium and the Idea of Absolute Ownership’ [1985] *Acta Juridica* 1, 20–21. It is not only incorporeals that can be inalienable. The qualification ought to be introduced that a system can equally choose to make some corporeals inalienable by law.

<sup>35</sup> CC arts 822–23; TG Watkin *The Italian Legal Tradition* (Ashgate Dartmouth 1997) 203–5.

<sup>36</sup> CC arts 826–28. The distinction between the two categories is difficult to justify: V Cerulli Irelli ‘Beni pubblici’ in *Digesto Discipline Pubblicistiche* (4th edn UTET Torino 1987) 279 ff.

<sup>37</sup> CC arts 822–23.

<sup>38</sup> CC arts 826–28; and the innovations by the recent D Lgs 22 gennaio 2004 no 42, esp art 2(1–2), which has introduced the notions of *patrimonio culturale* (cultural domain) and *beni culturali* (cultural property).

<sup>39</sup> D Lgs 22 gennaio 2004 no 42 arts 55–57. G Cian (ed) G Cian and A Trabucchi *Commentario breve al Codice Civile* (7th edn CEDAM Padova 2004) 754.

long ago as to make it impossible to find any owner,<sup>40</sup> has nowadays been expanded by statute to include a range of objects which are at least 300 years old or made of precious components in high percentage, as well as less old things of outstanding historical, archaeological or cultural importance, so designated by the Secretary of State.<sup>41</sup> Treasure vests in the Crown, which may and often does alienate to museums, who are legal persons in their own right and not just emanations of the Crown.

No suggestion is here being made that that inalienability is anything other than highly exceptional. Alienability is clearly the rule. However, the mere possibility of there being exceptions shows that it would be unsafe to treat alienability as more than a very commonly observable—as opposed to strictly necessary—characteristic of property in the strict sense.

### 3 Benefit and Burden

This section seeks to say why people recurrently associate alienability and property. It is not adding yet another argument against that association but rather diagnosing the source of the confusion. All talk about title or entitlement, and hence all talk about the alienation thereof, focuses on the benefit, whereas the difference between property and obligations is based on the behaviour of the burden. To say the mark of property in the strict sense is alienability is to look at the wrong end of the right.

One usually alienates something in order to extract some benefit from it—generally an economic advantage and typically a money price. Honoré's reconstruction of the twelve incidents of ownership, defined as 'the *greatest possible interests in a thing which a mature system of law* recognizes',<sup>42</sup> includes a description of this economic aspect of alienation which reads as follows:

The right to capital consists in the power to alienate the things and liberty to consume, waste or destroy the whole or part of it: clearly it has an important economic aspect. . . . Most people do not wilfully destroy permanent assets; hence the power of alienation is the more important aspect of the owner's right to the capital of the thing owned. This comprises the power to alienate during life or on death, by way of sale, mortgage, gift or other mode, to alienate a part of the thing and partially to alienate

<sup>40</sup> W Blackstone *Commentaries on the Laws of England. Volume I. Of the Rights of Persons* (Oxford 1765) (facsimile of 1st edn of 1765–69, University of Chicago Press Chicago and London 1979) 285.

<sup>41</sup> Treasure Act 1996 ss 1(1), 3(3), ss 1(1)(b), 2. On this Act: MG Bridge *Personal Property Law* (3rd edn OUP Oxford 2002) 25–26. The Italian definition of *tesoro* is not identical to the English notion. It is much narrower. Indeed the Italian provision is sometimes ridiculed as being of little practical importance: U Mattei *La proprietà* in R Sacco (ed) *Trattato di diritto civile* (UTET Torino 2001) 167.

<sup>42</sup> T Honoré 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence* (1st series Clarendon Press Oxford 1961, repr in T Honoré *Making Law Bind* (Clarendon Press OUP Oxford 1987) 161) 107, 108 and 113.

it. The power to alienate may be subdivided into the power to make a valid disposition of the thing and the power to transfer the holder's title (or occasionally a better title) to it.<sup>43</sup>

The return which one hopes to achieve when alienating is part of the whole benefit deriving from ownership as a right in the thing. Alienation is therefore concerned with the benefit of rights: alienability is the potential for passing the benefit from one person to another.

Yet the mark of property in the strict sense lies not in the way the benefit behaves but in the burden, for the burden moves with the thing. Property rights—those which are *in rem*—are defined by the behaviour of the burden. In other words, the difference between *in rem* and *in personam* depends on the behaviour of the liability, for a right *in rem* is one whose exigibility is defined by reference to the existence and location of the thing, while the liability inherent in an obligation is incumbent on a person, and its exigibility depends on the location of that person.<sup>44</sup> It is true that sometimes the benefit also moves with the thing in question. Thus, a praedial servitude (easement) is alienated automatically with the dominant tenement: the benefit runs with the land. But the behaviour of the benefit has nothing to do with its character as a property right. A servitude is a property right because its burden follows the servient tenement.<sup>45</sup> A personal servitude such as usufruct is no less a property right despite the fact that its benefit is attached to one person, and sometimes indissolubly.<sup>46</sup>

From this it follows that alienability, which is provided for with a view to the benefit that may be drawn from proprietary rights, is irrelevant to the definition of property as rights *in rem*. It is essential to break the habit of focusing on entitlement. The entitlement is indeed generally alienable. But to find out something about the nature of that to which I am entitled we need to look at the behaviour of the burden. I may have an alienable claim against you that you pay me a sum of money. It would not be offensive to call my relationship with the right ownership of it. It is my right. But even the word 'ownership' ought not to distract attention from the fact that what I own is here a right *in personam*. In this way we can conclude that even 'ownership' is not reliably indicative of property-as-opposed-to-obligations.

<sup>43</sup> Ibid 118.

<sup>44</sup> P Birks 'The Roman Law Concept of Dominion and the Idea of Absolute Ownership' [1985] *Acta Juridica* 1, 20.

<sup>45</sup> For a definition in terms of burden of Italian CC art 1027: 'La servitù prediale consiste nel peso imposto sopra un fondo per l'utilità di un altro fondo appartenente a diverso proprietario' ('The praedial servitude is a burden imposed on land for the benefit of other land belonging to a different owner').

<sup>46</sup> A manifestation of this is the fact that the duration of usufruct may not exceed the usufructuary's life, who may assign it to someone else for a certain time or for its full duration provided that that was not excluded at the time of its constitution: Italian CC arts 979–80.

The analysis based on the behaviour of burden and benefit is equally applicable to shares and sub-shares. Our discussion of their alienation has unavoidably led us to talking of title to shares. The meaning of title, as Honoré has shown, is torn between the idea of the conditions of fact which must be fulfilled in order that a person may acquire a claim to a thing, and the idea of a mode of acquisition, or, as the case may be, mode of loss.<sup>47</sup> 'Title' seems immediately to suggest 'property'. But all talk about title or entitlement focuses on the benefit which is realized, in money form or other, when title is alienated. This aspect is economically important in that it is on it that the market draws in order to make shares an appetizing commodity. However, it is but one case where alienability proves a good indicator of wealth, and further proof that the description of the behaviour of the benefit does not throw any light on the proprietary nature of the thing. In fact, all benefits attached to shares can only be claimed *in personam*, that is, against the company as the person in whom the corresponding obligation to perform is located.

### C PROPERTY-AS-WEALTH

The previous section was all about property-as-opposed-to-obligations. In this section we ask whether alienability is a good test of property-as-wealth. It is necessary to say, once more, that the difference between those two notions of property is that in the former property excludes obligations while in the latter it does not, although it does not thereby necessarily include any and every obligation. The most extreme version of the notion of property-as-wealth was the Roman law of things (*ius rerum*), which, loosely understood as the law of assets, unequivocally included all the law of obligations. The question now is whether alienability is reliably indicative of the quality of something as wealth. Its answer turns on the exploration of the outer boundary of property *lato sensu*, that between wealth and non-wealth.

The attraction of alienability as a test of property-as-wealth is that anything alienable can be realized in money. The premise which is tacitly assumed is that anything which can be exchanged for money is manifestly wealth. The question has recently arisen in England whether body parts can be property, and if so under what conditions. Hospitals have been in the habit of retaining the brains of dead patients for the purposes of research, without obtaining any consent. The issue in *Dobson v North Tyneside Health Authority*<sup>48</sup> was whether that amounted to a conversion. It was held that it did not.<sup>49</sup> The court accepted that a different conclusion would apply to arms and legs which had been treated and, by *specificatio*, been turned into something different, namely medical

<sup>47</sup> Honoré (n 42 above) 134.

<sup>48</sup> [1997] 1 WLR 596 (CA).

<sup>49</sup> *Ibid* 602 (Gibson LJ).

specimens.<sup>50</sup> In that distinction a line is drawn between that which is exchangeable for money and that which is not. The drawing of the line is difficult but the nature of the line to be drawn is not in doubt or seems not to be.

However, closer examination shows that alienability is not even a wholly satisfactory indicator of wealth, that is, of property in the largest sense.<sup>51</sup> While undoubtedly a commonly observable quality of wealth, it does not provide a test capable of discriminating between wealth and non-wealth. Alienability is only an approximation for something slightly different. The true test is whether the law (or social morality) will in any circumstances at all allow or compel the substitution of money or other value in kind for the thing in question.

There are inalienable assets which are undoubtedly wealth. The Roman usufruct was inalienable and in English law an interest made under a protective trust is inalienable in that any attempted alienation will destroy it.<sup>52</sup> Yet if a stranger tried to take the assets in question free from these inalienable interests a court would have no scruples about awarding their money value. Nor would anyone suggest that such interests could not be surrendered for money or other value. It was also possible for a usufructuary to hire out the asset. If in a dispute the law will turn the thing into money, that is sufficient to show that it is wealth. All these things show that a thing which is inalienable can be regarded as having a money value realizable in some events. Alienability is not an infallible indicator.

Again Roman law had no difficulty in treating all obligations as assets within the *ius rerum* (law of all things). Yet, obligations were inalienable by the person entitled to the performance. There is no need to have recourse to the argument that they were in effect rendered alienable by *cessio actionum*.<sup>53</sup> The truth is independent of that evasion. Obligations could in various ways be changed into money. Even if the person under the obligation was not bound to pay money his performance could be released for money and, if it came to litigation, the court would always condemn in money.<sup>54</sup>

Just as there are inalienable things which are wealth, so there are alienable things which are not. Kidneys can be alienated, as where one sibling gives one to another, and children can be given in adoption. But in both cases there is no circumstance in which the donor can turn these things into money. People who seek to recover abducted children could never be made to accept money in lieu.

<sup>50</sup> Ibid 601 (Gibson LJ), with reference to *Doodeward v Spence* (1908) 6 CLR 406 (HCA). Cf *R v Kelly* [1998] 3 All ER 741 (CA); *Moore v Regents of the University of California* (1990) 271 Cal Rptr 146, (1990) 793 P 2d 479. Cf *Davis v Davis* (1992) 842 SW 2d 588 (Tenn 1992), discussed from an anthropological perspective in A Riles 'Property as Legal Knowledge: Means and Ends' (2004) 10 J Royal Anthropological Institute 775, 781. For literature, see Ch 5 n 48 above.

<sup>51</sup> LS Underkuffler *The Idea of Property: Its Meaning and Power* (OUP Oxford 2003) 103–4 appears to maintain that the existence of American provisions prohibiting the sale of body parts is not fatal to the idea of the body as property.

<sup>52</sup> Text to n 33 above.

<sup>53</sup> Text to nn 10–11 above.

<sup>54</sup> Buckland *Text-book* (n 11 above) 657–59.

The line between wealth and not-wealth therefore turns out to be more subtle than the mere criterion of alienability would suggest. The right question is whether the law would in any contingency at all award money instead. Alienability, which is useless to discriminate between property and obligations, is only an approximate indicator of property-as-wealth. Put another way, the ‘realizability’ of things in money is not always, although almost always, represented by alienability.

Finally, it should not be thought that the boundary around property-as-wealth is of solely academic interest and therefore might for all practical purposes be left undefined or could settle for the approximation represented by the test in terms of alienability. The very coinage of the word ‘biocommerce’ witnesses the pressure for greater precision.<sup>55</sup> Quite apart from practical problems in that sector, there are contexts in which property has to mean wealth. Even the law has serious applications of this broad, almost colloquial notion of property. In the area of human rights, for example, the scope of the protected interest in property as a human right is not the narrow technical meaning of property as right *in rem*. The protection of private wealth is a human right.

Most recently *Wilson v First County Trust Ltd (No 2)*<sup>56</sup> has raised a question about this. A pawnbroker sought repayment of a loan which had been made to a Mrs Wilson. Failing repayment the pawned property, a BMW, would be sold. Mrs Wilson sought an order for return of the car, claiming that the agreement was unenforceable because it did not contain all the terms prescribed by the Consumer Credit Act 1974 s 127(3). The Court of Appeal held that the statutory bar to the enforcement of the loan agreement was disproportionate to the policy objective of ensuring inclusion of all relevant terms in the document signed by the borrower and incompatible with the protection of property as a human right.<sup>57</sup> The ‘property’ in question was the lender’s contractual position, including his right to possession of the pawned BMW. Property was defined in terms so broad as to make it equivalent to ‘wealth’.<sup>58</sup>

The House of Lords, however, thought differently of the matter and reversed the decision. It excluded that s 3(1) of the Human Rights Act 1998, which provides for the interpretation of legislation in conformity with the Act, could apply retrospectively to causes of action accruing before the section came into

<sup>55</sup> R Brownsword ‘Freedom of Contract, Human Rights and Human Dignity’ in D Friedmann and D Barak-Erez (eds) *Human Rights in Private Law* (Hart Publishing Oxford 2001) 181, 194.

<sup>56</sup> [2001] EWCA Civ 633, [2002] QB 74 (CA); revd [2003] UKHL 40, [2004] 1 AC 816 (HL): Ch 2 n 111 above.

<sup>57</sup> *Wilson* [2001] EWCA Civ 633 (previous n) [50]; First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as scheduled to the Human Rights Act 1998) art 1. The English version is entitled ‘Protection of Property’ but the text soon switches to ‘possessions’, evidently understood in the lay sense of ‘belongings’. Art 6(1), which guarantees everyone a fair, expeditious and public trial of disputes about his civil rights, was also considered in view of the statutory ban.

<sup>58</sup> Cf Ch 2 ‘Property Matters’ above. Cf the wide definition in Theft Act 1968 s 4(1): “‘Property’ includes money and all other property, real or personal, including things in action and other intangible property”.



force. Jurisdiction to make a declaration of incompatibility according to s 4 was *a fortiori* out of the question. Lord Nicholls, however, turned to consider what the position of the parties would had been had art 1 of the First Protocol applied. He said:

Possessions . . . is apt to embrace contractual rights as much as personal rights. Contractual rights may be more valuable and enduring than proprietary rights. . . . [T]he relevant provisions in the 1974 Act are more readily and appropriately characterised as a statutory deprivation of the lender's rights of property in the broadest sense of the expression rather than as a mere delimitation of the extent of the rights granted by a transaction. . . . This was a deprivation of possessions within the meaning of art 1.<sup>59</sup>

He acknowledged that, whilst drastic consequences derived to the lender from the application of s 127(3), the buyer acquired a windfall in that she could keep the money and recover the security. However, somewhat surprisingly given the premise, he went on to conclude that the fact that Parliament was, on this occasion, painting with a broad brush, did not mean that Parliament had attached insufficient importance to the applicant's convention right.<sup>60</sup> The provision in question would therefore have been compatible with a notion of property as a human right.

The protection of private wealth also surfaced in *Patel v Jones*. If the Court of Appeal had had to answer the question which it managed to avoid, namely whether an inalienable pension right could be property, the test they should have applied was whether it could in any event be turned into money. Self-evidently the answer would have been that the right's very purpose was to be turned into money, so that it was necessarily property when what was meant was property-as-wealth.<sup>61</sup>

## D CONCLUSION

Alienability cannot serve to draw any line around the law of personal property unless property is understood as including obligations, because most obligations are as alienable as land and cars. Had the initial Roman and common law position held—that rights *in personam* were inalienable—alienability would have had a far stronger claim to be the mark of property-as-opposed-to-obligations. But, in modern law, any test based on alienability would serve only to identify almost the whole of the Roman law of things—all, that is, except a handful of inalienables. The utility of this operation would be doubtful.

Not even great property lawyers are exempt from the temptation of applying the test of alienability to property in the strict sense. The most recent work by

<sup>59</sup> *Wison* [2003] UKHL 40 (n 56 above) [38], [44].

<sup>60</sup> *Ibid* [72], [79].

<sup>61</sup> [2001] EWCA Civ 779, [2001] Pension LRep 217; Ch 2 text to nn 85–88.

Professor Rudden, whose subtle intuitions on the necessity of distinguishing things as such from their meaning as wealth are a cherished tenet of English property law, contains the following definition of rights *in rem*:

[T]he expression ‘*real right*’ can be used with regard to any type of property (moveable or immoveable). It is used to describe those interests which, broadly speaking, (a) can be alienated; (b) die when their object perishes or is lost without trace; (c) until then can be asserted against an indefinite number of people; (d) if the holder of the thing itself is bankrupt, enable the holder of the real right to take out of the bankruptcy the interest protected by the real right.<sup>62</sup>

The words ‘broadly speaking’ are enemies of good taxonomy. This chapter has been attempting a finer focus. In that spirit it dissents vigorously from such statements as the one marked (a), not because it is not broadly speaking true but because it orients the reader’s mind to a distracting issue. This application of the test of alienability, all the more unfortunate in that it is contained in the introduction to English property law *par excellence*, invites the reader to contemplate the characteristics of the benefit of the right, not the burden. Alienability of the entitlement is not a peculiarity of property rights.

The orientation of the analysis towards entitlement destroys the opposition between property and obligations, for alienable entitlement is common to both rights *in rem* and rights *in personam*. However, the law of wealth cannot be understood or expounded without subdivisions. The collapse into each other of the two great categories recreates the Roman law of things or assets. But, one level down, the necessity of subdivision immediately compels the re-invention of the distinction between property and obligations as a subdivision. There is nothing wrong with acknowledging the whole *ius rerum*, but every lawyer should be constantly alert to the difference between property as the whole law of things and property as that part of the law of things which excludes obligations. The Part IV asks whether the key to the subdivision might lie in the word ‘*vindicanda*’.

<sup>62</sup> B Rudden *Lawson and Rudden on the Law of Property* (3rd rev edn OUP Oxford 2002) 14.



## PART IV

# VINDICANDA

In Part IV, Chapter 9 is directed to the inward aspect of the study and aims to state analytically how shares and sub-shares are protected in litigation. Chapter 10, by contrast, engages in the outward-looking critical and taxonomical exercise of asking whether the fact that shares and sub-shares use, in large measure, the same protective regime as chattels provides a sufficient technical basis for treating them as property.

The terminological choice of '*vindicanda*'<sup>1</sup> indicates that shares are here contemplated as things capable of being vindicated. The Latin verb *vindicare* meant 'to lay legal claim to a thing' and, in its narrower legal meaning, to do so through a direct assertion of entitlement, on the lines of '*meum esse aio*' ('I say that the thing is mine').<sup>2</sup> The *vindicatio* was the corresponding Roman action. The use of the word 'vindication' among some English scholars is much looser and often indicates any claim which directly or indirectly protects property, whether or not it conforms in substance to '*meum esse*'.<sup>3</sup> Whilst Part IV seeks to maintain the clear line between the strict sense and the broader usage, no attempt is made to expel the latter altogether. The word '*vindicanda*' is therefore used to include all things entitlement to which can be claimed in court, whether 'directly' or 'obliquely'. The context will make clear whether the narrow or the slightly broader sense is being employed.

The word 'vindication' has at least three shades of meaning. At the narrow end of the spectrum, the word refers to a 'this is mine' type of claim directly asserting entitlement. At an intermediate position is found any procedure which puts before the court the direct question whether a given asset belongs to a particular person. At the broad and riskier end, the word extends to include even claims in which entitlement to an asset is no more than indirectly protected, as for instance by an action for damages for interfering with assets belonging to the

<sup>1</sup> Addressed in Ch 1 n 18 and text thereto.

<sup>2</sup> PGW Glare (ed) *Oxford Latin Dictionary* (OUP Oxford 1982) entry 'vindico (. . . also written vendico), āvi, ātum, 1, v. a. [vim-dico, to assert authority . . . in a case where legal possession of a thing claimed is refused; hence . . .] to lay legal claim to a thing, whether as one's own property or for its restoration to a free condition'; cf Ch1 n 18.

<sup>3</sup> G Virgo *The Principles of the Law of Restitution* (OUP Oxford 1999) 11–16: 'The word "vindication" will be used in this book, as the most useful word, albeit not the most accurate, to describe the award of restitutionary remedies where the defendant has interfered with the claimant's property rights' (16). Cf the loose use in LD Smith 'Transfers' ch 5 in P Birks and A Pretto (eds) *Breach of Trust* (Hart Publishing Oxford 2002) 111–38.

complainant. This third sense would probably be favoured by those to whom the quintessential prerogative of ‘property’ is the owner’s capacity to exclude others from his free enjoyment of it.<sup>4</sup> Drawn into using even the third sense, this book nevertheless hopes not to encourage it.

Part IV speaks recurrently of the protection of shares and sub-shares. It intentionally avoids relying on the word ‘remedy’.<sup>5</sup> Most lawyers would claim to understand a question which asked what remedies were available when personal property fell into the wrong hands. In that language we would have asked whether a common remedial regime suffices to bring shares within the technical sense of personal property. In reality, much confusion lurks behind the thick curtain of the word ‘remedy’.<sup>6</sup> In the words of Peter Birks:

[M]ost of the questions which seem to invite answers in the language of remedy can be more clearly answered in terms of either rights or court orders.<sup>7</sup>

One further remark is necessary to circumscribe our field. The claims with which this book is concerned assert entitlements to shares in private law. Another kind arises out of the non-compliance with regulations overseen by financial authorities. The increase in the quantum and detail of financial regulation has meant that the line between proper and improper practice on the part of players in the financial markets is now largely legislatively defined. Litigation initiated by regulatory authorities with a view to disciplining the markets lies beyond the horizon of this book.<sup>8</sup>

<sup>4</sup> Anxiety for the erosion of individual freedom is expressed in C Reich ‘The New Property’ (1964) 73 Yale LJ 733 7561–160. A more controversial question is, and has always been, where the limits of such enjoyment lie: B Rudden ‘The Battle of Manywells Spring’ in London Rev of Books, 19 June 2003, 24–25, review of M Taggart *Private Property and Abuse of Rights in Victorian England: The Story of Edward Pickles and the Bradford Water Supply* (OUP Oxford 2002).

<sup>5</sup> The word is in fashion: C Rotherham *Proprietary Remedies in Context* (Hart Publishing Oxford 2002); U Mattei ‘I rimedi’ in G Alpa et al *Il diritto soggettivo* in R Sacco (ed) *Trattato di diritto civile* (UTET Torino 2001) 103–76.

<sup>6</sup> Eg P Birks ‘Personal Property: Proprietary Rights and Remedies’ in (2000) 11 King’s College LJ 1, 1: ‘It is dangerous to be unaware that the language of remedy clouds the clearest pool’. ‘Remedy’ comes from *medeor*, which is the Latin for ‘I heal’, with the prefix ‘re-’ indicating the movement back which restores a previous desirable condition (ibid 2). Comparative law makes abundant use of the word. Cf U Mattei *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Greenwood Press Westport CT 2000) ch 8 ‘Remedies’.

<sup>7</sup> Birks (previous n) 3; *contra*, Mattei (previous n) 182.

<sup>8</sup> European regulation is especially pervasive. The overarching objectives of financial services and securities regulation were set out in A Lamfalussy *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets* <[http://europa.eu.int/comm/internal\\_market/securities/lamfalussy/index\\_en.htm](http://europa.eu.int/comm/internal_market/securities/lamfalussy/index_en.htm) (15 February 2001)> (accessed 31 Oct 2004). Most recently, see European Commission *The Application of the Lamfalussy Process to EU Securities Markets Legislation: A Preliminary Assessment by the Commission Services* SEC (2004) 1459 (Brussels 15 Nov 2004) <same website>. In England, regulation is by the Financial Services and Markets Act 2000, whose part xxv provides for ‘Injunctions and Restitution’ in case of market abuse. The controlling body is the Financial Services Authority, whose decisions on enforcement, supervision, and authorization may be referred to the newly established Financial Service Markets Tribunal. See *Eurolife Assurance Co Ltd v FSA* (FSM Tribunal, decision no 001, 26 July 2002). The equivalent Italian procedure is described in R Costi and L Enriques *Il mercato mobiliare* in G Cottino (ed) *Trattato di diritto commerciale* (CEDAM Padova 2004) 299–318.

## *Protection of Entitlement to Shares and Sub-shares*



**W**EALTH WHICH GETS into the wrong hands has to be claimed or reclaimed. Not unlike other species of personal property, shares can be misappropriated. When this happens they require protection in much the same way as other moveables. The protective regime for familiar corporeal things is thus the right starting point.

### A CLASSIFICATION OF PROTECTION

#### 1 Direct and Oblique

In principle, the assertion of entitlement to an asset can be either direct or oblique. The direct assertion of entitlement is the *proprium of vindicatio* in its strict sense. Whatever the actual form of words employed, the direct claim always reduces to a simple assertion that the thing in dispute belongs to the claimant: 'I say that that thing is mine'. In what follows the category is enlarged to include other means of putting that question directly before the court, as for instance where a third party interpleads, asking the court to say whether an asset belongs to one of two or more other people.

Meanwhile, subject to one point to be made below in relation to tracing, the oblique assertion of a right is always made by recourse to the law of obligations—either to the law of obligations arising from wrongs or the law of obligations arising from unjust enrichment. Oblique protection of entitlements through the law of obligations reduces either to the assertion that the defendant committed a legal wrong by appropriating or otherwise interfering with the claimant's asset, and hence incurred an obligation to pay damages, or that by the receipt of the asset the defendant was enriched at the expense of the claimant and thereby incurred an obligation to pay over the value of that enrichment.

## 2 Original Assets and Traceable Substitutes

There is one complication, which could be integrated into the previous paragraph by allowing for a varied form of oblique protection but is probably best separated from it, if only for the sake of clarity. It concerns tracing or, more accurately, traceable substitutes. If we call an asset which has one way or another passed from C to D ‘the original asset’, English law recognizes one mode of oblique protection of the entitlement to the original asset which consists in raising a new but similar entitlement in any traceable substitute in the defendant’s hands. The entitlement to the substitute will in turn be protected either in the direct mode of the *vindicatio* or obliquely, through the law of obligations.

If protection of entitlements to an asset is divided according as it focuses on the original asset or the traceable substitute for it, that division could be one way of asserting that protection of the traceable substitute is no more than another species of oblique protection of the right in the original. That being so, it falsifies the proposition that oblique protection is always done through the law of obligations. The importance of the protection which focuses on traceable substitutes has rightly been thought to merit a whole monograph.<sup>1</sup> A number of leading cases show that claims contingent on tracing can be a party’s most attractive option.<sup>2</sup> This importance notwithstanding, the investigation of tracing any claims contingent on tracing would constitute too great a digression in this book. Therefore, tracing and claiming substitutes for shares are mentioned only to be excluded from further consideration.

## 3 Three Phases and an Exclusion

Professor Birks has drawn attention to the fact that the protection of property in chattels runs through three phases.<sup>3</sup> They are, first, the claim which is the assertion of the right which the claimant puts before the court; secondly, the order of the court made by way of realizing that right; and thirdly, the enforcement of that order through execution of judgment. Of these only the first and the second phases, and indeed overwhelmingly the first, are the concern of this book.

The later discussion will be oriented in relation to the following excerpt from Birks’s discussion of these matters:

When things go missing there appear to be five phase one modes in which our law responds. That is to say, there are five kinds of claim which it may make available.

<sup>1</sup> LD Smith *The Law of Tracing* (Clarendon Press Oxford 1997).

<sup>2</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL); *Trustees of the Property of FC Jones & Sons v Jones* [1997] Ch 159 (CA); *Foskett v McKeown* [2001] 1 AC 102 (HL).

<sup>3</sup> P Birks ‘Personal Property: Proprietary Rights and Remedies’ (2000) 11 King’s College LJ 1.

These are: 1. the direct assertion of the pre-existing proprietary right; 2. the assertion of an obligation arising from a wrong; 3. the assertion of a new property right arising from a wrong; 4. the assertion of an obligation arising from unjust enrichment; and 5. the assertion of a new property right arising from unjust enrichment. In every case it is necessary to remember the need for phase two. Phase one responses are birds in the bush. They have to become birds in the hand. Phase two consists in orders which realise the rights and sometimes also alter their substance.<sup>4</sup>

The effect of our exclusions is that 3 and 5 can be put on one side. The programme can be safely narrowed and simplified by limiting it to 1, 2, and 4. It is, however, necessary to enter a caveat against the word 'proprietary' in this passage. We have so far striven not to use that word, speaking, neutrally, only of the assertion of entitlements to assets. The reason, in outline, is that the fact that an asset enjoys 'protection' in a manner analogous to the protection of property in chattels is not a secure indicator of proprietary rights existing in that asset or, which comes to the same thing, of that asset belonging to the category of property in the strict sense.

#### 4 Law and Equity

The final structural observation is that the scheme we have set out has to be divided in two, since the protection of personal property in English law has to continue to reflect the duality between common law and equity. Although the fusionist school of thought appears to be gaining ground,<sup>5</sup> there are many years still to wait before English law will be able to speak with a single voice even on such a matter as the regime protecting items of personal property.

Chattels may sometimes be found to provide an inadequate analogy from which to consider the protection of shares. The scheme which we have just outlined may then be found wanting. However, despite some divergences which are to be expected, the strategy of the bipartition between direct and oblique claims, with an eye, in the latter case, to the event from which the claim originates, and with the addition of the bipartition between legal and equitable claims, seems to constitute a viable route to the understanding of these matters. It will therefore be adopted in what follows, having been preferred to alternative classifications of remedies which seem less effective.<sup>6</sup>

<sup>4</sup> Ibid 3–4.

<sup>5</sup> A 'fusionist' view is sometimes possible at the cost of only marginal adjustments to the law, according to the pattern applied by AS Burrows 'We Do This at Common Law but That in Equity' (2002) 22 OJLS 1, 7–8 to monetary remedies for civil wrongs. However, the same article concedes that the institutions of English private law are not always amenable to complete unification. Cf J Hackney, review of J McGhee (ed) *Snell's Equity* (30th edn Sweet & Maxwell London 2000) (2001) 117 LQR 150.

<sup>6</sup> Eg U Mattei La proprietà in R Sacco (ed) *Trattato di diritto civile* (UTET Torino 2001) 171–91 lists remedies 'possessory and proprietary', and 'forward-looking and backward-looking', aimed at 'protection of title' and at 'protection of enjoyment'. He then assesses the 'effectiveness of remedies' and the impact of the 'property rule' as interpreted by Calabresi and Melamed (see Ch 2 text to



## B VINDICATION

This heading covers direct assertions of entitlement—those which reduce to the formula ‘I say those shares are mine’. The paradigm of direct assertion of entitlement is the Roman *vindicatio*: ‘I say that sheep is mine’. The original nature of the Roman *vindicatio* was considered in Chapter 2.<sup>7</sup> Its character as a pure proprietary claim did not suppose that, at ‘phase two’, the court would order delivery up of the thing claimed. The principle was universal *condemnatio pecuniaria*. The nature of the phase two order is irrelevant to the analysis of the claim. The fact that a system moves from condemnation in money to orders for specific delivery does not alter the character of the action. It is merely a choice which different systems make differently at different times.

## 1 Italian Law

The *vindicatio* survives in the modern civil law. Phase one of *azione di rivendicazione* is the assertion of an ownership title to the thing. Proof of title is essential and must be given, where necessary, through *probatio diabolica*.<sup>8</sup> *Rivendicazione* is therefore said to be the *azione petitoria* in the purest form. At phase two the court will ideally effect recovery of the possession of the thing, but in practice often awards money instead. This is necessary, first, when the defendant, having parted with the thing, can no longer return it; secondly, when the thing has ceased to exist. Professor Mattei has described the mechanism as a replacement of *tutela piena* (full protection) with *tutela risarcitoria* (protection through damages).<sup>9</sup> The *azione di rivendicazione* is contemplated in the Civil Code:

(Action of vindication) The owner may vindicate the thing from whomever might possess or otherwise hold it and may continue to bring the action notwithstanding that the defendant, after the action was started, has ceased, by virtue of his own initiative,

nn 62–65 above). He finally describes ‘damages’. This list is attractive to the comparatist in that it does not engage in labelling of actions of a national flavour. Our classification of rights hopes to prove attractive in its pursuing the opposition between *in rem* and *in personam* at a remedial level.

<sup>7</sup> See Ch 2 text to nn 34–35.

<sup>8</sup> A less onerous *onus probandi* is associated with bringing an action based on a possessory title to the thing (*azione di reintegrazione o spoglio*, CC art 1168), in which case the claimant’s title must simply be proven to be better than the defendant’s. Phase one consists in the assertion that one had been deprived of possession of the thing in a violent or clandestine way. Phase two consists in having possession reinstated. With a view to this outcome, the action is often said to be the functional equivalent of *rivendicazione*, with the procedural limit that the possessory action must be brought within one year of the *spoglio* (deprivation of possession). Both are *azioni reipersecutorie*, that is, intended for the recovery of the thing: Mattei *La proprietà* (n 6 above) 384–87.

<sup>9</sup> *Ibid* 387–89. One full application of this terminology is in U Mattei *Tutela inibitoria e tutela risarcitoria: contributo alla teoria dei diritti sui beni* (Giuffrè Milano 1987).

to possess or hold the thing. In that case the defendant is obliged to recover the thing at his own cost, or, failing that, to pay its value to the claimant, as well as damages.

Should the owner obtain the restitution of the thing directly from its new possessor or holder, he shall pay back to the previous possessor or holder the sum which he was paid in lieu of the thing.

The action of vindication is not extinguished by the passing of time, except for the case where ownership may have been acquired by others through *usucapio*.<sup>10</sup>

Italian law holds that registered shares—the only species thereof that nowadays matters—can be treated as *titoli di credito*. Insistence on the requirement of double annotation on the document and in the issuer's register for the transfer of registered shares (*possesso qualificato*) led us to the conclusion that their qualification as corporeals is largely fictitious. Hence the notion of possession which applies to them is rather distant from the concept of control of the corporeal dimension of the thing (*possesso semplice*), which would only be fully applicable to the very marginal class of bearer shares. This, unsurprisingly, does not seem to preclude the bringing of *rivendicazione* to recover all types of shares, given that, strictly speaking, the action is concerned with the assertion of title. This is true notwithstanding that the provision envisaging the defendant as 'possessing or holding the thing' evokes the recovery of possession. Thus, there are statements to the effect that a share 'is a document and therefore a movable thing that can well be the subject of *vindicatio*'.<sup>11</sup> Establishing whether a dematerialized share forfeits its membership of the category of *titoli di credito* proved of relatively little importance for the purpose of establishing whether a share was alienable.<sup>12</sup> The question is even more otiose in the present investigation, for a dematerialized share certainly remains vindicable. Sub-shares, which are by nature paperless, can also be vindicated.

A landmark in the direct assertion of claims to shares, or more accurately sub-shares, was a 1997 judgment by the Italian *Cassazione*,<sup>13</sup> deciding favourably on a vindication of sub-shares brought by a group of *fiduciari* (beneficiaries) in the context of winding up of the *società fiduciaria* (trust company) which was in charge of administering their shares. The context was the provision which allows for the withdrawal from an insolvent estate of assets belonging to another—in the statutory language, for the 'vindication, restitution, and

<sup>10</sup> CC art 948 (*Azione di rivendicazione*): 1. Il proprietario può rivendicare la cosa da chiunque la possiede o detiene e può proseguire l'esercizio dell'azione anche se costui, dopo la domanda, ha cessato, per fatto proprio, di possedere o detenere la cosa. In tal caso il convenuto è obbligato a ricuperarla per l'attore a proprie spese, o, in mancanza, a corrispondergliene il valore, oltre a risarcirgli il danno. 2. Il proprietario, se consegue direttamente dal possessore o detentore la restituzione della cosa, è tenuto a restituire al precedente possessore o detentore la somma ricevuta in luogo di essa. 3. L'azione di rivendicazione non si prescrive, salvi gli effetti dell'acquisto della proprietà da parte di altri per usucapione.

<sup>11</sup> Corte d'App Firenze 12 gennaio 1979, in *Giurisprudenza Commerciale* 1980 I 243.

<sup>12</sup> See Ch 7 text to nn 26–28.

<sup>13</sup> Cass civ sez I 14 October 1997 no 10031 *Modiano c Soc Fundus* in *Foro Italiano* 1998 I col 851, noted M Crisostomo and F Macario in *Foro Italiano* 1998 I col 855.

separation of moveables'.<sup>14</sup> Regardless of the fact that the *titoli* held by the company were all represented by a cumulative certificate; that the accounts kept by it and those kept by its depositary bank could not identify specific shares as belonging to specific *fiducianti*; and despite the fact that the administrators of the *fiduciaria* had perpetrated unlawful intermixtures between the accounts opened in the name each of the *fiducianti*,<sup>15</sup> the Court found itself able to conclude that separation and withdrawal was still possible. The significance of this claim is greater if we consider that it antedated the statutory affirmation of patrimonial segregation in this situation.<sup>16</sup> The vindication succeeded because the Court held that *fiducianti* were entitled to 'real' protection:

[T]he qualification of the *fiduciante* as real owner of the shares administered in fiduciary capacity reveals the intention of attributing to *fiduciante* a real protection, actionable directly and in immediate competition with each of the company members.<sup>17</sup>

## 2 English Law

### (a) *Common law*

On the Chancery side, equity does have a *vindicatio*, albeit in a somewhat concealed form. By contrast it is a well-known feature of the common law that it does not. Even the action to recover land is not a perfect example, though in its modern manifestation its tortious history is no more than a vestige. In relation to personal property the common law managed with only oblique protection. However, there are exceptional cases in which, in substance, the common law does recognize a vindicatory claim. Two are relevant here.

<sup>14</sup> RD 16 marzo 1942 no 267 art 103: 'Domande di rivendicazione, restituzione e separazione di cose mobili'. The provision is located in a part of the statute which concerns the so-called *accertamento dello stato passivo* of the insolvent, that is, the gathering of all the elements in which his indebtedness consists (ibid arts 92–103). Within this context all creditors may make the administrator aware of their proprietary claims concerning moveable things. This notion is opposed to that of *liquidazione e ripartizione dell'attivo*, consisting in the realization of whatever assets may still be present in the patrimony of the insolvent (ibid arts 104–17).

<sup>15</sup> Previous cases had denied the possibility of vindication on one or the other of these grounds, which did not hinder the decision of the Supreme court in this case: cf Trib Torino 7 luglio 1988 in Repertorio Foro Italiano 1989, voce 'Società' no 338 (the claim of the *fiduciante* to the restitution of the *titoli* was deemed to be personal only); Trib Torino 10 gennaio 1991 in Repertorio Foro Italiano 1001, voce 'Fallimento' no 529 (vindication of *titoli* was held possible only subject to the condition that the *titoli* be specifically identified).

<sup>16</sup> D Lgs 24 febbraio 1998 n 58 *Testo unico delle disposizioni in materia di intermediazione finanziaria* art 22; cf Ch 3 text to n 27 above, and, on the relationship between patrimonial separation and *revindica*, P Gaggero, comment on art 22, in G Alpa and F Capriglione (eds) *Commentario al Testo Unico delle disposizioni in materia di intermediazione finanziaria* (CEDAM Padova 1998) 233, 236–39.

<sup>17</sup> Cass 10031/1997 (n 13 above) col 867: '[L]a qualificazione del fiduciante quale "effettivo proprietario" dei titoli affidati in amministrazione fiduciaria rendeva palese l'intento di attribuire a detto soggetto una tutela di carattere reale, azionabile in via diretta e immediata nei confronti di ogni consociato'.

(i) *Rectification of the register* As with registered land,<sup>18</sup> in the case of shares the law provides a mechanism for challenging the truth represented by registration. Misappropriation of shares, broadly understood to include even mistaken misdirection, is likely to manifest itself in the form of denial that someone has an entitlement to them. Entitlement to shares is evidenced in the company register. Hence, following misappropriation, the register will be alleged not to reflect shareholdings accurately. The importance of registration as evidence of title to shares and as prima facie evidence of all the details recorded in the register has been analysed in depth.<sup>19</sup> The register normally records the name and address of each member, the date on which a person was registered as a member, and the date on which a person ceased to be a member. For companies which have a share capital the additional details are required of a statement of the shares held by each member, distinguishing each share by number where this formality is not dispensed with, and the class of share, where the company has more than one class; and the amount paid, or agreed to be treated as paid, on the shares of each member.<sup>20</sup>

Mistakes happen. A claim in the form of the assertion of the entitlement to the shares is certainly exemplified by the rectification of the register of members which all companies are required to maintain, in the event that such register is found to contain incorrect information.<sup>21</sup> The facility for rectification is set out in the company legislation in terms of what we have called a ‘phase two’ remedy:

Power of court to rectify register

(1) If—

(a) the name of any person is, without sufficient cause, entered in or omitted from a company’s register of members, or  
(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,  
the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.

(2) The court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.

(3) On such an application the court may decide any question relating to the title of a person who is a party to the application to have his name entered in or omitted from

<sup>18</sup> A fairly recent example was *Kingsalton Ltd v Thames Water Developments Ltd* [2001] EWCA Civ 20, [2002] 1 Property Planning and Compensation Rep 15. However, developments must be awaited since the coming into force of the Land Registration Act 2002, on which see R Smith *Property Law* (4th edn Longman Harlow 2003) 218–75.

<sup>19</sup> Companies Act 1985 ss 360–61; Ch 6 from n 17 above.

<sup>20</sup> Companies Act 1985 s 352.

<sup>21</sup> Claims for rectification often follow an alienation of shares whose result is for some reason doubtful. In the regime of paper instruments of transfer, doubts as to their validity would often lead to such claims: *Re Holcrest Ltd* [1998] BCLC 175; *Elliott v The Hoilies Ltd* [1998] BCLC 627. A mistake in the registration of the transfer, ending up with the issue of duplicate certificates to a fraudster, was remedied not through rectification, but with the compensation of the legal owner by the registrar through the purchase of replacement shares and the payment of lost dividends, in *Royal Bank of Scotland plc v Sandstone Properties Ltd* [1998] BCLC 429, noted E Micheler ‘Innocent Broker Must Indemnify Bank’ (1999) 3 Company Financial and Insolvency L Rev 125.

the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register. . . .

(4) In the case of a company required by this Act to send a list of its members to the registrar of companies, the court, when making an order for rectification of the register, shall by its order direct notice of the rectification to be given to the registrar.<sup>22</sup>

The protection available for shares through the rectification of the register is regardless of their form as certificated or uncertificated. It is the intangible share that is vindicated. It is unlikely that anything resembling this could be adapted for sub-shares, although, behind the register, sub-shares are, so to say, registered in the form of the computerized account entries made by the intermediary. However, sub-shares are held behind the curtain of a trust. They will therefore be vindicated in equity, as described below.

(ii) *Interpleaders* Another small exception appears when we enlarge the notion of vindicatory protection to include third-party ways of directly raising the question whether a party owns a thing. Interpleader proceedings then come into view. Interpleaders allow a party who has an asset, but knows it is not his, to apply to the court to say which of two or more other claimants is entitled. If a biscuit tin full of money is found in a chimney flue by a builder dislodging some bricks in order to install a stove, and is by him handed over to the police, the police may interplead, thus asking the court to say whether the previous or present owner of the cottage is entitled to it.<sup>23</sup>

### (b) *Equity*

Equitable entitlements to shares can be directly asserted by seeking a declaration that they are held on trust for the claimant. This mechanism underlies the statement to the effect that equity, differently from the common law, has a *vindicatio*. One who asks for a declaration that such and such shares are held for him on trust is essentially saying ‘I claim that in equity those shares, or sub-shares, are mine’. Hence the term ‘equitable *vindicatio*’.

In relation to shares the most notable example is the first tier of the litigation revolving around the Maxwell saga. As the tycoon’s empire collapsed he misappropriated securities underpinning people’s pension funds in a desperate attempt to keep his creditors at bay. This ultimately precipitated his suicide, which was followed by a series of complex cases one branch of which ultimately issued in *MCC Proceeds v Lehman Bros*,<sup>24</sup> to which we shall return. The

<sup>22</sup> Companies Act 1985 s 359.

<sup>23</sup> *Moffatt v Kazana* [1969] 2 QB 152; *Trustees of the Property of FC Jones & Sons v Jones* [1997] Ch 159 (CA).

<sup>24</sup> [1998] 4 All ER 675 (CA).

primary case was *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)*,<sup>25</sup> which itself is an instance of the direct assertion of title to sub-shares.<sup>26</sup> It was an attempt by Macmillan to vindicate shares of which it still claimed to be the equitable owner. This litigation has been described as a ‘conflict between the rights and interests of banks who hold security taken in the ordinary course of their banking business and those of the innocent victims of fraud seeking to undo the financial consequences of the wrong done to them’.<sup>27</sup>

The facts were as follows. Robert Maxwell and his family controlled a web of private companies and trusts, commonly referred to as ‘the private side’ of the Maxwell empire, among which was Bishopsgate Investment Trust. In the months prior to Mr Maxwell’s death, the private group found itself in serious financial difficulties. Macmillan, a Delaware corporation within the Maxwell empire, owned the shares of Berlitz International Inc, the well-known New York company dealing mainly with the language learning business. Maxwell decided to misapply those shares. Through a series of manoeuvres Maxwell caused Macmillan to transfer them to Bishopsgate. The board of Macmillan was unaware of the fraud. Macmillan’s single stock certificate (for 10.6 m Berlitz shares) was cancelled and replaced by nine certificates in the name of Bishopsgate. An agreement was signed according to which Bishopsgate acknowledged that it held the shares as nominee for Macmillan.

Most of the shares were placed by Bishopsgate, in clear breach of trust, in the transfer system in operation in New York called Depository Trust Company. This pool of securities functions in such a way that when shares enter it they undergo a loss of identity through two stages. First, the legal title to the shares is registered in the name of a clearing corporation. Evidence of title, in the form of the corresponding share certificates, is cancelled. Shares are transferred by simple entries in the books of the clearing corporation, then re-registered again in the name of a nominee of the Depository called CEDE, in whose name a brand new certificate is issued.

At the end of this process the shares were held by CEDE for the account of the Depository agent acting for the Maxwell Group of companies. In the next stage of the misapplication, Bishopsgate applied for the shares to be re-embodied in American certificates. They could be and were pledged as security for the debts owed by Robert Maxwell’s private companies to various pledgees, among which Shearson Lehman Bros Holdings plc, Swiss Volksbank and Crédit Suisse. Macmillan, claiming to be still beneficially entitled to the stock, sued both its

<sup>25</sup> *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1995] 1 WLR 978 (ChD), [1996] 1 WLR 387 (CA).

<sup>26</sup> See Aldous LJ’s narration *ibid*, 414–16. Also, P Birks ‘Property and Unjust Enrichment: Categorical Truths’ [1997] *New Zealand L Rev* 623, 625; G Moss and F Toube ‘Cross-border Security Enforcement and the Conflict of Laws’ in FD Rose (ed) *Restitution and Banking Law* (Mansfield Press Oxford 1998) 89, 90.

<sup>27</sup> N Segal ‘Cross-border Security Enforcement, Restitution and Priorities’ in FD Rose (ed) *Restitution and Banking Law* (Mansfield Press Oxford 1998) 99, 99.

trustee Bishopsgate for breach of trust, demanding that it should restore the stock, and the pledgee recipients of the shares for conversion, among other things seeking a declaration that the shares were held by the three major defendants on constructive trust for Macmillan.

Macmillan claimed that it had maintained an equitable interest in the shares. The pledgee banks were not in a position to counter that claim by saying that they had acquired the legal interest to the shares without notice of Macmillan's claim, for they were aware of it. The question arose, therefore, whether the acquisition of something less than a legal estate, when assisted by lack of notice, would assist the pledgees. Only two routes were open to the banks. They either had to show that they held a better right to the legal estate to the shares, on account of having themselves transferred it to the nominee CEDE; or that they had subsequently acquired the legal estate to the shares through registration. In the latter case they had to show that they had previously acquired an equitable title without notice of any subsisting equities. They would then avail themselves of the rule in *Saunders v Vautier*,<sup>28</sup> which enables a beneficiary who has an absolute interest under a trust to call for the legal estate, thus causing the collapse of the trust.<sup>29</sup> Furthermore, the banks were assisted by the authority of *Dodds v Hills*,<sup>30</sup> which excludes any breach of trust in such a situation and which Millett J held to be good law. Hence the banks succeeded by going down the second route.<sup>31</sup>

This is a perfect example of an equitable vindication of sub-shares. In fact it failed. The equitable entitlement of the claimants, initially indisputable, was destroyed by the defence of bona fide purchase. The claimants knew all along that the defence was the principal obstacle in their path. The case was fought almost exclusively on issues in the conflict of laws, because the claimants perceived that if English law were applied it would be more difficult to satisfy the defence than if the law of New York or Delaware governed the transaction. The claimants lost before Millett J and again on appeal. The judges did not all agree on the right approach to the conflicts issues but, by different routes, came to the conclusion that the applicable law was New York law.<sup>32</sup> The hearing of the appeal was purportedly limited to the question of determining the *lex causae*. However, it also cast light on the nature of the shares at stake. Under New York law shares are certificated securities and negotiable instruments, which are transferred (as between the parties) by acquisition of possession, without a need for registration. The effect of negotiability is that a bona fide purchaser for value who takes delivery of a certificated security, including delivery through New York paperless system, takes it free from any adverse claim of which he had

<sup>28</sup> (1841) 4 Beav 115, 49 ER 282.

<sup>29</sup> JE Penner *The Law of Trusts* (4th edn Butterworths Lexis Nexis London 2004) [3.25].

<sup>30</sup> (1865) 2 H&M 424, 71 ER 528.

<sup>31</sup> Segal (n 27 above) 115–19.

<sup>32</sup> A Briggs 'From Complexity to Anticlimax: Restitution and Choice of Law' [1996] *Restitution L Rev* 88, 89.

no notice at the date of delivery, whether he subsequently obtains registration or not.<sup>33</sup>

Entitlement to sub-interests in immobilized shares has been the subject of the Hong Kong decision *Re CA Pacific Finance Ltd (in liq)*,<sup>34</sup> delivered by Yuen J following the application by the joint liquidators of two companies. The issue, whose formulation was agreed between the parties, was whether the clients of a broker company in liquidation, which had been instructed by its clients to purchase securities paid for from the clients' own resources and held through a settlement and clearing system, had a proprietary interest in the securities so purchased and what the nature of such interest was.<sup>35</sup> Under our slightly extended notion of vindicatory protection this counts as an example under this head because, though the application was made by third parties, it raised directly, and not obliquely, the issue of entitlement. That is to say, the court had to ask itself the *vindicatio* question and declare the answer.

CA Pacific Securities Ltd (CAPS), a broker in securities in Hong Kong, became insolvent. In the course of its activity CAPS had purchased securities on the Hong Kong Stock Exchange through a computerized book-entry settlement system, according to which unnumbered share certificates were immobilized and deposited with a central securities depository. The securities had been purchased by CAPS pursuant to its clients' instructions and paid for in full out of the clients' own resources. When CAPS was wound up its clients tried to recover the securities held by the company.

The judge had to determine whether the clients had any proprietary interest in those securities. Different investors had different interests: some would on a proprietary basis have maximized their recovery, whereas others would have got the most by assuming that the securities held by CAPS were part of its general assets. The judge found herself able to conclude that each client maintained an individual beneficial proprietary interest in the securities purchased with his own resources. The clients' sub-shares were, in other words, not part of the insolvent's estate.

The traditional position is that a broker is his client's agent and owes fiduciary duties to him as a principal. Where a client puts his broker in funds for the purpose of acquisition of securities, the equitable proprietary interest in the money still belongs to the client and the broker has to hold the securities on trust for him. The broker need not necessarily retain the very shares that were handed to him in the transaction, but he must get into his possession an equivalent quantity of those securities to satisfy his client's proprietary interest.<sup>36</sup> In the present case it was contended that this traditional scheme did not apply due to peculiarities in the ordinance governing the company and the particular mechanism through which the securities were traded.

<sup>33</sup> For the analogous English concept of negotiability 'in the strict sense' see Ch 6 text from n 4.

<sup>34</sup> [2000] 1 BCLC 494 (HK HC), [1999] 2 Hong Kong L Rep Digest 1.

<sup>35</sup> *Ibid* 497.

<sup>36</sup> *Solloway v McLaughlin* [1938] AC 247 (PC).



The first contention did not hold. By providing that the dealer shall pay into trust accounts kept at a licensed bank all amounts received for or from the client, section 84 of the Hong Kong Securities Ordinance, under which CAPS was registered as a securities dealer, does not affect the position of the broker as a trustee. As for the second contention, the mechanism is such that eligible securities are traded on the Hong Kong Stock Exchange through the computerized system called CCASS (Central Clearing and Settlement System). The system, in which all brokers participate, is run by HKSCC (Hong Kong Securities Clearing Co Ltd). The role of HKSCC is twofold, as is its profile as a trader and a custodian. The consideration of this dual role suggests an analysis in terms of bailment and sale, as the legal figures that traditionally allow for moveables to be kept safe and traded.

As for the buying and selling of securities through CCASS, a computerized system matches the buying and selling orders when the prices meet. HKSCC is interposed between the selling and buying brokers, acting as if it would purchase the shares from the former and then on-sell them to the latter at the price agreed between them.<sup>37</sup> As for the holding of securities bought through the system, HKSCC acts as a custodian by having the securities registered in its name or in the name of its nominees, whereas the scrip and transfer forms are kept by depositaries of HKSCC. As trader, HKCSS is the legal owner of the deposited securities and enabled to pass the property in them. As custodian, however, it holds the securities but has no beneficial proprietary interest in them. Since it is the client who puts the broker in funds for the acquisition of the securities, it is the client who is the beneficial owner.<sup>38</sup>

Any participant in CCASS is made liable to HKSCC as a principal, notwithstanding that it may be acting as an agent or trustee of a client or otherwise in a fiduciary capacity. When purchasing securities on the instructions and with the funds of its clients, CAPS was acting as an agent and the beneficial interest in the securities remained vested in the clients. Reliance on the instructions of the clients and on the purchase of securities out of their own funds was held sufficient for the *vindicatio* to succeed. In other words, on these facts it was not necessary to recognize a declaration of express trust. Ms Justice Yuen said:

[T]he client agreement does not need to be read as a declaration of trust for the purposes of the first representative respondent's case. The client's proprietary interest in the securities arises simply from the fact that those securities had been acquired with his funds and on his instructions by his agent the broker. The client agreement was simply the document which articulated the relationship of principal and agent between client and broker.<sup>39</sup>

<sup>37</sup> *CA Pacific* (n 34 above) 502.

<sup>38</sup> *Ibid* 503.

<sup>39</sup> *Ibid* 506. Nor was the statutory trust implied in HK Securities Ordinance ss 84–85 held to change in any way the traditional obligations of the broker to his client. For an analysis of these less than transparent provisions see A Pretto and B Rudden 'Trust in Money and Money in Trust' [2001] LMCLQ 157, 160–61.

This case features a *commixtio* of securities made up of a plurality of initial contributions. Yuen J concluded that the clients' beneficial interest in the securities held in the clearing system was an individual interest in a certain amount of purchased securities and expressly disregarded the alternative solution of a tenancy in common of the entire pool notwithstanding that the latter is often postulated as the best solution.<sup>40</sup> Indeed, the language of the agreement so implied and the expressed intention of the joint owners is normally relevant for a tenancy in common to arise.<sup>41</sup>

The case offers some indication as to how the fungibility of shares affects and enables the outcome. Securities were immobilized in a clearing system. Investors had bought sub-shares which now subsisted under the immobilized shares. Each tangible immobilized certificate was held to evidence an equivalent bundle of rights and each bundle of rights in turn became the object of the client's proprietary interest.<sup>42</sup> The deposit having taken place consensually, it was presumed from the fungibility of the shares that the parties had also agreed that any one share could be substituted for any other. This reasoning would of course encounter some difficulties in the event of an intervening shortfall of the shares purchased and held by the depositary. Nothing therefore obstructed Yuen J's declaration that the purchasers had all along maintained their proprietary interests in their sub-shares, notwithstanding that there had never been any appropriation of any identified items to any particular investors.

## C OBLIQUE CLAIMS

The opening pages of the chapter outlined the nature of oblique protection of entitlements. In that regard, this section first examines obligations originating from wrongs and then, briefly, obligations arising from unjust enrichment. The chapter then turns to oblique protection in equity.

### 1 Common Law

#### (a) Tort

In 1977 interference with goods was rolled up in one statute, three words of which abolished detinue.<sup>43</sup> Conversion has not been abolished, and conversion

<sup>40</sup> *CA Pacific* (n 34 above) 509.

<sup>41</sup> J Hill and E Bowes-Smith 'Joint Ownership of Chattels' in N Palmer and E McKendrick (eds) *Interests in Goods* (2nd edn LLP London 1998) 251, 251.

<sup>42</sup> *CA Pacific* (n 34 above) 508.

<sup>43</sup> Torts (Interference with Goods) Act 1977 s 2(1). Conversion and detinue previously shared the ground with trespass. The latter survives but need not detain us here. The history is lucidly condensed in JH Baker *An Introduction to English Legal History* (4th edn Butterworths London 2002) 391–400.

dominated the scene even before the Act. It therefore seems safe to continue to speak in terms of that tort. In its ordinary sense the meaning of ‘conversion’ is very close to ‘misappropriation’. Under the forms of action the conversion was always described as having been dishonest. However, the need to cover all the ground of the missing *vindicatio* led to the allegations of dishonesty becoming formal. They were ‘untraversable’, which meant that the defendant could not improve his position by denying them. Conversion became a tort of strict liability. In this way conversion shed its most obvious tortious characteristics long ago. The view is sometimes asserted that it has now turned into an instrument for the assertion of title, akin to the *vindicatio*.<sup>44</sup> Statutory additions to the powers of the court, beyond the making of simple awards of damages, also militate in that direction. But, formally, conversion remains a tort, indifferent to the defendant’s being out of possession.

In fact, however, this is a point at which the protective regime for ordinary chattels has to diverge from that for shares.<sup>45</sup> Conversion can do little in relation to shares. There are two reasons. First, those with equitable interests cannot complain of a conversion. We have seen that investors increasingly often do not have legal title to their shares. Secondly, there can be no conversion of an incorporeal asset, since conversion requires that the claimant have an immediate right to possession. An incorporeal thing cannot be possessed. These two crucial points must be considered in turn.

(i) *Conversion and equitable owners* An owner in equity cannot maintain an action for conversion. There have been some cases in which this barrier seemed to be breaking down.<sup>46</sup> They have now been firmly confined to the single situation in which the equitable owner is in actual possession, so that he sues, not *qua* equitable owner, but *qua* holder of a possessory title. This was one important retrenchment to emerge from the Court of Appeal’s decision in *MCC Proceeds v Lehman Brothers*.<sup>47</sup>

This case was the sequel to *Macmillan v Bishopsgate Investment Trust plc (No3)*.<sup>48</sup> After the failure of their claim Macmillan was declared insolvent. Its rights were assigned to MCC Proceeds, a Delaware company acting as trustee of the Maxwell Realisation Liquidating Trust. As Macmillan’s successor and assignee in respect of the rights to the shares in Berlitz, MCC recommenced proceedings against the pledgee from one of the defendants in the first action, alleging conversion of five certificates relating to Berlitz shares.

<sup>44</sup> *IBL Ltd v Coussens* [1991] 2 All ER 133 (CA).

<sup>45</sup> The corporeal quality of other negotiable instruments, such as cheques, for the purposes of conversion is less controversial. However, a limit was firmly set in *Smith v Lloyds TSB Bank plc* [2000] 2 All ER (Comm) 693 (CA): the liability in conversion of a bank which had cleared a stolen and fraudulently altered cheque was limited to the valueless pieces of paper and was not held to extend to the face value of the cheque. The cheque was essentially a nullity.

<sup>46</sup> *International Factors Ltd v Rodriguez* [1979] 1 QB 351 (CA); *BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd* [1990] 1 WLR 409 (PC).

<sup>47</sup> [1998] 4 All ER 675 (CA).

<sup>48</sup> [1995] 1 WLR 978 (ChD), [1996] 1 WLR 387 (CA).

The defendant, Lehman Brothers International, was a wholly owned subsidiary of Shearson Lehman Bros Holdings plc, one of the three major defendants in the first action. Lehman Brothers had entered into an agreement with the principal fund manager of the common investment fund of Maxwell pension schemes. Under this agreement, on three occasions share certificates relating to Berlitz shares were delivered to Lehman Bros by way of pledge as security for obligations owed to it by the Maxwell fund manager. The stock was dealt with in various ways, none of which was either made known to or authorized by Macmillan. As usual, the relevant shares were transferred into the New York Central Depository System and re-registered, and the corresponding certificates were cancelled and reissued. In the event, Lehman Brothers enforced its pledge by selling its entire holding of shares.

In the second case MCC argued that Macmillan originally was the beneficial owner of, and had an immediate right to possess, the five certificates issued in the name of the registered holder Bishopsgate Investment Trust and subsequently delivered to Lehman Bros as security. The defendant was alleged to have converted the certificates on at least two occasions: at the moment of their receipt by way of pledge and of their transfer into the Depository Trust Company. The latter process entailed the cancellation and destruction of the certificates and was a wrongful interference with the chattels, clearly inconsistent with Macmillan's rights and causing MCC Proceeds to suffer substantial loss.

At first instance Harman J made an order to strike out the statement of claim for conversion as disclosing no cause of action. He held that Bishopsgate was beyond question the legal owner of the shares and the holder of the corresponding certificates as chattels, thus entitled to hand them to Lehman Brothers. Consequently, the defendants had obtained good title to the legal right to hold the certificates. In other words, they had become holders of a legal estate without notice that the right of their vendor Bishopsgate was less than absolute.

The Court of Appeal upheld the decision on the conversion point and dismissed the appeal. Hobhouse LJ held that a claim for conversion of goods is not maintainable by someone who has only an equitable interest in them. This was all the more true where the action threatened to subvert the operation of the defence of bona fide purchase. So far as it suggested anything different *International Factors Ltd v Rodriguez*<sup>49</sup> was regarded by Mummery LJ as little less than heresy and labelled as an incorrect appreciation of the working of the fusion of law and equity on the position of equitable owners, and in any case as obiter. Hobhouse LJ described Sir David Cairns' decision as unnecessary, wrong and contrary to earlier authority 'binding on him as it is on us'.<sup>50</sup>

*BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd*<sup>51</sup> must now be regarded as decided *per incuriam*. A numbered certificate representing a bonus issue of

<sup>49</sup> [1979] 1 QB 351 (CA).

<sup>50</sup> *MCC Proceeds* (n 47 above) 700.

<sup>51</sup> [1990] 1 WLR 409 (PC).

over 10 m shares in a company was held on trust for the claimants. The certificate, together with executed blank transfers, was then deposited with the defendant as security for a loan proposed to be granted by the defendant to that company. Later the defendant unlawfully delivered the certificate and shares and a further amount of shares in the same company to a third party in return for a cheque. The shares and certificate were thus wrongfully converted. The cheque represented the market value of the shares at that time but it was never presented for payment. Later the defendant bought in other shares in the same company at a lower price.

The claimants sued for the conversion of the original certificate and shares and were awarded the value of the shares at the time of conversion less the value of the replacement shares at the time of replacement.<sup>52</sup> It was held that the inexplicable failure by the defendant to collect the sale price could not mitigate or reduce the damages recoverable by the claimants or alter the measure of damages.<sup>53</sup> Regardless of the dispute on the measures of damages, the shares were held to be capable of being converted. Although no inquiry was conducted into the bearer nature of the shares, their being accompanied by blank transfers determined their treatment as documents of title. Yet all along the claimants were only equitable owners. It seems that they should not have been allowed to recover in conversion.

(ii) *Conversion requires possession* The exclusion of equitable owners from the action of conversion heavily reduces its scope in the field of shares and sub-shares. The other obstacle to using it was noticed above, namely that conversion supposes a claimant with a right to possession. The Court of Appeal recently underlined the possession-based nature of the action. In *Costello v Chief Constable of Derbyshire Constabulary*<sup>54</sup> the police had seized a car from the claimant under statutory powers and, in the belief that it had been stolen and that the claimant knew it had been, they refused to return it even after the temporary purpose of the seizure had been exhausted. The claimant was held to be entitled to delivery up of the car. Lightman LJ said:

[A]s a matter of principle and authority possession means the same thing and is entitled to the same legal protection whether or not it has been obtained lawfully or by theft or by other unlawful means. It vests in the possessor a possessory title which is good against the world save as against anyone setting up or claiming under a better title. In the case of a theft the title is frail, and of likely limited value . . . but nonetheless remains a title to which the law affords protection.<sup>55</sup>

<sup>52</sup> *Solloway v McLaughlin* [1938] AC 247 (PC).

<sup>53</sup> *Ibid* 413 (Lord Templeman).

<sup>54</sup> [2001] EWCA Civ 381, [2001] 1 WLR 1437 (CA), on which JW Davies 'Tort' in P Birks (ed) *English Private Law: Second Cumulative Updating Supplement* (OUP Oxford 2004) [14.316–317]; cf *Armory v Delamirie* (1722) 1 Stra 505, 505; 93 ER 664, 664 (Pratt CJ): 'That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover'.

<sup>55</sup> *Costello* (previous n) [31] (Lightman LJ).

Even the wrongful possessor was therefore held to have a right to possession which could only be defeated by statute, the only exception being that the court would not order that possession be restored of something which it would be unlawful to receive.<sup>56</sup> The case lays new emphasis on the necessity that the converted thing be corporeal, for only in relation to corporeal things can the notion of possession be appropriately employed. The notion is clearly not applicable to intangibles and certainly not to the generality of shares.

A rough equivalent is the Italian *azione di reintegrazione* or *spoglio* (action of restoration or against dispossession), which the claimant can bring where, unable to prove his title and therefore prevented from bringing *rivendicazione*, he was forced to part with possession of the thing in a violent or clandestine way. Italian *azione di spoglio* (action reacting to dispossession) seems to have followed a similar path. Although the action was originally meant to respond to a violent or clandestine deprivation of possession, nowadays any taking of the thing contrary to the possessor's will is considered violent. All the claimant needs to allege is that a deprivation of possession has taken place when he did not mean it to take place.<sup>57</sup> In the modern understanding of both conversion and *spoglio* the defendant's innocence or lack of violent behaviour do no seem to matter. Both English and Italian law stress the mere fact that an interference with a moveable thing has taken place, rather than taking the converter's fault into account.<sup>58</sup>

The emphasis on possession means that only in exceptional cases can conversion be brought in respect of shares. Incorporeals cannot be possessed. In Chapter 4 we considered the extent to which shares could be treated as corporeal and concluded that even in the case of certificated shares the corporeal paper was not the share and did not carry its value.<sup>59</sup> Bearer shares provide the counter-example, but bearer shares are now rarities. In the saga of the Macmillan shares in Berlitz, conversion only came into play because the shares were American and were in effect bearer securities. The paper could not only be possessed but also carried the value of the securities with it. Such rare cases aside, the tort of conversion thus has no role in the protection of shares. It may be that oblique protection of entitlement to shares through the law of tort should come from the economic tort of interference with business relations. Entitlements to contractual rights are protected in this way, and shares are of that nature. We will return to this in the next chapter.

<sup>56</sup> Ibid [34] (Lightman LJ).

<sup>57</sup> R Sacco and R Caterina *Il possesso* in A Cicu and F Messineo (eds) *Trattato di diritto civile* (2nd edn Giuffrè Milano 2000) 380–84.

<sup>58</sup> S Ferreri 'Una legge inglese (quasi) nuova sulla tutela della proprietà mobiliare: il *Tort (Interference with Goods) Act 1977*' *Rivista di Diritto Civile* 1984 I 532, 544. For the liability in conversion of a third party acquiring a diamond ring in good faith but from an agent without authority to sell, see *Jerome v Bentley & Co* [1952] 2 All ER 114.

<sup>59</sup> See Ch 4 sections A–B.

*(b) Unjust enrichment*

Where money falls into the wrong hands without the knowledge of its owner, it is clear that one recourse for that owner is what used to be called an action for money had and received<sup>60</sup> and what is now coming to be called an action in unjust enrichment. There are many cases of this kind.<sup>61</sup> This is not an area of law which can be regarded as comfortably settled. However, the scholars who work in this field use the word ‘enrichment’ to extend the law long applicable to money to wealth received in other forms. Applying that principle of symmetry between money and non-money receipts, one who receives and is enriched by shares should be liable in the same way as the recipients of money in these cases. However, these common law cases could only assist a claimant who could establish legal title. The equivalent body of law applicable to those with equitable interests is still in a confused condition.

## 2 Equity

Oblique protection of equitable entitlements is complex because the equity cases have not yet succeeded in distinguishing clearly between liability for wrongs and liability for unjust enrichment. It is not yet safe to divide this discussion between wrongs and unjust enrichment. The only course for the moment is to retain the traditional names of the two most common liabilities. The cases seem on their face to deal only in wrongs, but a number of influential publications have argued that it cannot rationally be maintained that an equitable owner ought to be shut out from the law of unjust enrichment.<sup>62</sup> If a trustee or other fiduciary misappropriates the assets in his keeping or transfers them to another person not entitled to receive them, he himself remains accountable. That is, he must replace the assets.<sup>63</sup> That case apart, the two common liabilities are ‘knowing assistance’ and ‘knowing receipt’.<sup>64</sup>

<sup>60</sup> P Birks and C Mitchell ‘Unjust Enrichment’ in P Birks (ed) *English Private Law* (OUP Oxford 2000) [15.39–41]; AS Burrows *The Law of Restitution* (Butterworths London 1993) 28–30.

<sup>61</sup> *Holiday v Sigil* (1826) 2 C&P 176, 172 ER 81; *Moffatt v Kazana* [1969] 2 QB 152; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL); *Trustees of the Property of FC Jones & Sons v Jones* [1997] Ch 159 (CA).

<sup>62</sup> Lord Nicholls of Birkenhead ‘Knowing Receipt: The Need for a New Landmark’ in WR Cornish, R Nolan, J O’Sullivan and G Virgo (eds) *Restitution—Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing Oxford 1998) 231.

<sup>63</sup> *Re Dawson (decd) (Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd)* [1966] 2 New South Wales L Rep 211; cf *Target Holdings v Redferns* [1996] 1 AC 421 (HL).

<sup>64</sup> The combination in one case of claims for knowing assistance and knowing receipt is not uncommon. For a large scale example see *Equiticorp Industries Group Ltd v The Crown* [1998] 2 NZLR 481, summarized in [1996] 3 NZLR 586.

(a) *Knowing assistance*

Whenever assets which are held on trust are diverted into wrong hands, one unequivocal wrong that comes into play is 'knowing assistance', which, as the name implies, does not in any way depend on the receipt of trust property but on the fact of dishonest assistance in the breach of trust. The assister becomes liable to make good the loss. That wrong has been comprehensively reviewed by Charles Mitchell<sup>65</sup> and has recently been carefully reconsidered by the House of Lords in *Twinsectra Ltd v Yardley*.<sup>66</sup>

There money was lent on the express terms that it would be used only in the acquisition of real property. The terms on which the money was lent were held to create a trust. Contrary to the terms of the agreement the solicitor trustee who held the money did not retain it till land was purchased but paid it out at once in breach of trust. The liability in question was that of another solicitor, not himself a trustee. This other solicitor had received the money from the trustee solicitor on behalf of his client and had paid it on to the client's order.

The lenders never having been repaid, was this second solicitor bound to make good their loss by reason of having knowingly assisted in the breach of trust? Their Lordships, Lord Millett dissenting, did not think that they could disturb the judge's finding of fact that the second solicitor lacked the necessarily subjective dishonest state of mind. Lord Millett would have held it sufficient that the second solicitor had assisted in circumstances in which, objectively according to prevailing standards, his behaviour was to be characterized as disreputable. It was enough that it was objectively dishonest. The other members of the Appellate Committee thought it essential that he be shown to have been aware of that adverse evaluation of conduct of the kind in which he was engaged. The conduct must be objectively dishonest and he must have known that, applying prevailing standards, it would be characterized in that way. This solicitor narrowly escaped liability because on the facts as found he had not subjectively known that others would think him dishonest.<sup>67</sup>

(b) *Knowing receipt*

The equitable wrong covering receipt by a third party has traditionally been called 'knowing receipt'. It cries out to be split into two, one half becoming a strict liability in unjust enrichment, while the other remains a wrong. This was the strategy advocated by Lord Nicholls extrajudicially<sup>68</sup> and subsequently supported by Professor Birks.<sup>69</sup>

<sup>65</sup> C Mitchell 'Assistance' ch 6 in P Birks and A Pretto (eds) *Breach of Trust* (Hart Publishing Oxford 2002) 139.

<sup>66</sup> [2002] UKHL 12, [2002] 2 WLR 802 (HL).

<sup>67</sup> *Ibid* [35–38].

<sup>68</sup> Lord Nicholls (n 62 above).

<sup>69</sup> P Birks 'Receipt' ch 7 in P Birks and A Pretto (eds) *Breach of Trust* (Hart Publishing Oxford 2002) 213.



In the *Twinsectra* case there was no issue of knowing receipt. Lord Millett allowed himself a carefully constructed dictum which gives notice that, as at present advised, he would understand this as a receipt-based liability not requiring the proof of any fault at all, but subject to defences such as change of position.<sup>70</sup> In other words he would favour re-interpreting knowing receipt as a liability arising from unjust enrichment. This is not the split strategy advocated by Lord Nicholls, but it would in practice lead to very similar results.

The review of knowing receipt cannot be much delayed.<sup>71</sup> The latest pronouncement of the Court of Appeal on the subject makes the liability depend on the receipt having been ‘unconscionable’.<sup>72</sup> That gives insufficient guidance. Meanwhile the existence of the isolated strict liability of recipients in respect of assets misdirected from a deceased person’s estate<sup>73</sup> makes it quite impossible to offer any but the most technical explanation of the exclusion of a similar unjust enrichment liability in respect of assets received from an *inter vivos* trust. Professor Lionel Smith has attempted such a defence of the present situation.<sup>74</sup> It fails to satisfy, since in the end there is no reason why the beneficiary under a trust should be shut out of the law of unjust enrichment, something doubly inexplicable when those who take under wills are not.<sup>75</sup>

Had knowing receipt undergone this interpretative transformation in time, or had it been attempted in the case itself, a claim of this kind might have been the best hope for the claimants in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*.<sup>76</sup> The banks had received the Berlitz shares which belonged in equity to Macmillan. They were prima facie strictly liable in unjust enrichment, subject to defences. Bona fide purchase is one of those defences.<sup>77</sup> We have seen that Macmillan wanted to fight that issue under English law. Had it focused on unjust enrichment it might have been able to secure that advantage. This was certainly one case which demanded close attention to the difference between the law of restitution and the law of unjust enrichment.<sup>78</sup> Macmillan did establish

<sup>70</sup> *Twinsectra* (n 62 above) [105].

<sup>71</sup> *Ibid* [105]; cf the comment in Davies ‘Tort’ (n 54 above) [14.330–331].

<sup>72</sup> *Bank of Credit and Commerce International v Akindele* [2001] Ch 437 (CA).

<sup>73</sup> *Ministry of Health v Simpson* [1951] AC 251 (HL) affirming *Re Diplock (Diplock v Wintle)* [1948] Ch 465 (CA).

<sup>74</sup> LD Smith ‘Unjust Enrichment, Property, and the Structure of Trusts’ (2000) 116 LQR 412, 432.

<sup>75</sup> Although we have excluded consideration of traceable substitutes (text to nn 1–2 above) it is important to note that the Smith position is especially unacceptable if one considers that he, no less than Birks and Burrows, admits that *vindicatio* of a traceable substitute in the hands of a recipient asserts a right arising from unjust enrichment. He thus admits against the recipient one manifestation of the law of unjust enrichment while excluding the other. Cf P Birks ‘Property, Unjust Enrichment, and Tracing’ [2001] 54 CLP 231, 245–47; AS Burrows ‘Proprietary Restitution: Unmasking Unjust Enrichment’ (2001) 117 LQR 412, 417–19.

<sup>76</sup> [1995] 1 WLR 978 (Ch), [1996] 1 WLR 387 (CA).

<sup>77</sup> G Jones (ed) *Goff & Jones on the Law of Restitution* (Sweet & Maxwell London 1998) 842–45; Burrows (n 60 above) 472–75.

<sup>78</sup> The ‘change of name’ from the former to the latter is in the title and at the core of Birks’s latest views: P Birks *Unjust Enrichment* (OUP Oxford 2003); P Birks ‘Unjust Enrichment and Wrongful Enrichment’ (2001) 79 Texas L Rev 1766, 1770–76; Birks and Mitchell (n 60 above) [15.01–10]. For a different version of the same change: G Virgo *The Principles of the Law of Restitution* (OUP

that its claim was to 'restitution'. It failed to insist that its cause of action was unjust enrichment. At the time the multi-causal understanding of restitution had not been clearly enunciated. That is, it was thought that there was no difference at all between an action for restitution and an action in unjust enrichment.

It is not easy to make a direct comparison with the Italian law. An approximate equivalent to liability in respect of misappropriations of trust property is to be found in the Italian cases on the liability of fiduciaries.<sup>79</sup> These, however, resemble actions against trustees for breach of trust, rather than actions against third parties based on interference with a beneficial proprietary interest. This is no doubt due to the non-proprietary nature of Italian equivalents to the trust. It is interesting at least to note that one recent claim of the kind analogous to that against a trustee in breach of trust required the court to take a position on the nature of sub-shares.

Fidimpresa, a *società fiduciaria* (a trust company) had gone into liquidation. The *commissari liquidatori* (liquidators) sued the directors for misfeasance (*mala gestio*). One question which arose before the *Cassazione* related to the ownership of investments which had been bought with funds belonging to claimant *fiducianti* (beneficiaries).<sup>80</sup> The shares so bought were held in a species of collective scheme, an account being kept of the proportion of their contribution in money. The defendant's argument was that the liquidators were not the right persons to sue in respect of losses caused to those investments. The client *fiducianti* were not mere creditors, for the investments belonged to them, notwithstanding that the formal title had been vested with the company, which would act in a capacity of *mandatario senza rappresentanza* (mandatary without proxy). Given the separation of patrimonies, the liquidators could not sue for the *mala gestio* of a patrimony which was not the company's. The *Cassazione* agreed, holding that an action for *mala gestio* of the securities bought with the money of *fiducianti* and fiduciarily held, could only be brought by *fiducianti*, who alone had suffered damage.<sup>81</sup>

#### D CONCLUSION

It has been the business of this chapter to show that shares can fall into the wrong hands and that the courts will then protect the person rightfully entitled much in the same manner as, if it goes astray, they will protect my entitlement to my computer. In the centre of the picture has been the *vindicatio*, conceived

Oxford 1999). The earlier view is defended in AS Burrows 'Quadrating Restitution and Unjust Enrichment' [2000] *Restitution L Rev* 257.

<sup>79</sup> D Magno 'Mala gestio e profili di responsabilità' in E Gabrielli and R Lener (eds) *I contratti del mercato finanziario* (UTET Torino 2004) vol II, 745, 785–93.

<sup>80</sup> Cass civ sez I 21 maggio 1999 no 4943 *Napolitano c Fidimpresa spa* in *Le società* 1999, 1330; noted by R Rordorf in *Le Società* 1999, 1335; digested *Le Società* 1999, 945.

<sup>81</sup> *Napolitano* (previous n) 1334.

slightly more broadly than most civilians would wish. In the loosest sense of the word, shares can be obliquely protected through the law of obligations. In the result we have proved that shares are indeed *vindicanda*. The question now is whether this quality of ‘vindicability’ can serve the purpose of identifying a sense in which property can be understood as a reasonably broad category while still remaining, not property-as-wealth, but property-as-opposed-to-obligations.

## *The Third External Boundary: Property as Vindicability*



THIS CHAPTER COMES as the third attempt in this book to draw the external boundary of the law of personal property. In that sense it is symmetrical with Chapters 5 and 8, which were driven by the same critical effort. Chapter 5 concluded Part II. It found that a thoroughly satisfactory boundary could be drawn around rights in things capable of being located in space, or *locanda*. The one drawback with such a category of right *in rem locabilem* was that its narrowness meant that a wide gap opened between property in its strict legal sense and property as understood by laymen. Shares and sub-shares, which are constantly called property, could not on this view fall within the category of property in its strict sense, except only in the rare case in which they were embodied in corporeal paper.

Part III therefore embarked on the attempt to enlarge the category compatibly with maintaining the distinction between property and obligations. That attempt to redraw the border of personal property was based on the proposition that it might be defined as the law of rights in all things alienable, or *alienanda*. However, Chapter 8 found that alienability of the entitlement is not a peculiarity of property rights. Alienability could not maintain any line between property and obligations and was hardly a satisfactory indicator even for the broad notion of property as wealth.

### A VINDICATION AND VINDICANDA

The present chapter examines a different attempt to enlarge the category of personal property in such a way as to accommodate shares and sub-shares within it. Once again it has to bear in mind the need to avoid collapsing the law of rights *in personam* into the law of rights *in rem*. We know that shares and sub-shares are property when property is understood as wealth. But property-as-wealth overrides the distinction between property and obligations. Having established that the edge of personal property cannot be found in alienability,

this chapter now looks to the possibility of drawing the boundary around all things capable of being vindicated, or *vindicanda*.

## 1 Notions of Vindication and What Counts as Vindicable

It is essential to begin with a clear idea of vindicability. A thing is vindicable if it is amenable to vindication. The meaning of vindication was illustrated earlier in this book. In the previous chapter we set out three shades of meaning which can be given to the various forms of that word.<sup>1</sup> In summary, a thing is vindicable in accordance with that earlier discussion if the entitlement to it can be protected in court in any one of the following three ways: (a) through a claim in the form ‘That thing is mine’; (b) under a procedure which directly raises the question whether the thing in question is X’s thing; or (c) through a claim that some other legal consequence follows from the fact that the thing in issue was the claimant’s thing when it came into the hands of the defendant, as for instance that the claimant has for that reason incurred an obligation either from a wrong or from unjust enrichment. Here (a) and (b) represent the discussion of direct protection in the previous chapter, while (c) represents the discussion of oblique protection. The cumbersome formulation of (c) is due to the fact that oblique protection is not always achieved through the law of obligations. Claims *in rem* to traceable substitutes, which we excluded from discussion, obliquely protect the entitlement to the original asset.<sup>2</sup>

It follows from this that a cow is vindicable at common law, even though the common law has no *vindicatio* in sense (a), which is the sole meaning of the word in Roman law and of *rivendicazione* in modern Italian law. On rare occasions a cow is vindicated at common law in sense (b) as where it is subject to interpleader proceedings. But a cow is indubitably vindicable at common law in sense (c). The standard means of protecting entitlements to cows is by recourse to the law of obligations, usually to obligations arising from the tort of conversion. Proof of the tort of conversion entails proof of the claimant’s immediate right to possession and hence raises the question of the claimant’s entitlement indirectly. By contrast actions to enforce obligations do not take the form of vindications. The claimant asserts the obligation on the defendant to make some performance, as for instance to pay him £1000. The assertion of the obligation is not vindication of the entitlement to that obligation, direct or oblique. That is, the claimant does not say that the obligation, or the correlative right *in personam*, is his or that the defendant has committed a wrong by interfering with a right that is his.

The previous chapter has shown that shares and sub-shares are indisputably vindicable, both at common law and in equity and in all three senses of the

<sup>1</sup> Introduction to Pt IV text preceding n 4.

<sup>2</sup> Ch 9 text to nn 1–2.

language of vindication. Our question now is whether vindicability, in any of these three senses, can serve to define the boundary of property and hence whether the vindicability of shares entitles them to be full members of that category. This question has acquired a special importance because of recent work which asserts that sub-shares must be regarded as property and that it is precisely through their vindicability that they can make good their claim to be so. Our discussion will show that that position is not maintainable. We will also seek to show that the imperative which has distorted the analysis underlying this contention is less absolute than has been supposed.

## 2 The Benjamin Thesis and its Motivation

Dr Benjamin's book entitled *Interests in Securities* is both a study of the structure of modern shareholding and an assertion that shares and sub-shares are indeed property. The full title asserts that that is indeed the nature of her project.<sup>3</sup> Her focus is chiefly on interests in securities, in the present book called sub-shares, because it is in relation to them that the danger is chiefly perceived that they might be understood as no more than rights *in personam*.

It is important to notice from the outset that the author acknowledges the importance of the difference between property and obligations and sets herself the task of showing that sub-shares are property in the sense which respects that opposition. Not only does the distinction between property and obligations run through the whole of chapter 13, which is where she imposes her proprietary analysis on the data previously presented, but in the following chapter, where she is summarizing her conclusions, she explicitly pays tribute to the importance of that opposition:

Some commentators have argued that the traditional law of property is unequal to the challenge of the computerisation of the financial markets. Chapter 13 has argued that it is. This is a pleasing result, both in the interests of credit risk management in the highly intermediated securities markets, and also in the interests of legal continuity, for today '[t]he distinction between property and obligations lies at the heart of our jurisprudence'. Indeed it always has: as Professor Birks has argued, 'when the truth is that those same categories of legal thought have been surviving critical onslaughts in different jurisdictions and under different political systems since the time of Justinian in the sixth century and Gaius in the second, we are bound to approach the issue of radical reform at least with some doubt'.<sup>4</sup>

The conclusion that it is nonetheless possible to have property rights in obligations is achieved through a species of relativity. The core of Benjamin's position is that, while it is no doubt correct that as between a shareholder and

<sup>3</sup> J Benjamin *Interests in Securities: A Proprietary Law Analysis of the International Securities Markets* (OUP Oxford 2000).

<sup>4</sup> *Ibid* [14.48] (footnotes omitted).

the issuing company or as between the sub-shareholder and the intermediary the share or sub-share lies in contract and therefore in the law of obligations, it is nevertheless equally true that as against third parties the entitlement to the share can be asserted:

[A]n intangible asset may be the subject of a real action, but only as against a third party.<sup>5</sup>

[O]bligations can only be subject to property rights as against someone other than the obligor. Personal or proprietary status is not unchangeably inherent in the asset, but depends upon whom one is suing. In other words, property is a function of particular actions, and not of particular assets.<sup>6</sup>

This assertion of entitlement against third parties shows that shares and sub-shares have two natures. Though they are contracts and hence rights *in personam*, yet their being protected in relation to the world outside that contract shows that they are in that perspective property-as-opposed-to-obligations. In short, in our terms, because they are *vindicanda* they are property in the strict sense, not merely property-as-wealth.

The force which drives this analysis is the same as that which led to the legislative assertion in the revised American UCC Article 8 that intermediated interests in securities are property interests. Similar thoughts must have crossed the minds of the members of the Financial Markets Law Committee when they enriched their definition of sub-share with proprietary implications. Principle 2 of the Draft Statute on investment securities reads as follows:<sup>7</sup>

#### Interests in Securities

(a) *Customer's rights*. The rights of each customer in relation to securities held by it through an intermediary are together called 'interests in securities'. Interests in securities include both personal rights against the intermediary and property rights in relation to the securities.

(b) *Property rights in pool*. Each customer holding securities of a particular type through an intermediary has proportionate property rights in the pool to the extent of its entitlement.

A more moderate position, in the politics of property as applied to intermediation, is that of Unidroit. In its attempt to create substantive rules to regulate the field, the institute speaks of 'rights arising from credit of securities to a securities account'. The text of the draft Convention then proceeds to list all such

<sup>5</sup> Ibid [13.10].

<sup>6</sup> Ibid [13.51].

<sup>7</sup> Financial Markets Law Committee *Property Interests in Investment Securities: Analysis of the Need for and Nature of Legislation relating to Property Interests in Indirectly Held Investment Securities, with a Statement of Principles for an Investment Securities Statute* (FMLC c/o Bank of England July 2004) <[www.fmlc.org/papers.htm](http://www.fmlc.org/papers.htm)> (accessed 31 Oct 2004) Principle 2. Cf ibid [6.1]: 'We believe that it would be helpful to embody a specific rule in the statute that unless otherwise agreed an investor enjoys a bundle of co-proprietary and personal rights in and to securities held by his intermediary, including income and other benefits associated with the securities'.

rights—from receiving dividends to withdrawing the securities—as they are enjoyed by the account holder in an unequivocally contractual framework.<sup>8</sup>

It is obviously essential in the conditions of the modern market that such intermediated interests must be in no way inferior to the old directly held securities.<sup>9</sup> The specific context in which the anxiety arises is the insolvency of the intermediary which holds them. In that undesired contingency the holder of interests in security must on no account be reduced to the level of an unsecured personal creditor. For the investor's 'interests in security' to achieve priority over the claims of ordinary creditors of the custodian, it is said that they must be his 'property'. In Benjamin's words:

In the financial markets, the significant purpose of asserting property rights in [interests in securities] relates to . . . insolvency.<sup>10</sup>

If the investor were to hold merely personal rights, that is, the correlative of obligations, he would on this view have to join the queue of unsecured creditors. If it were concluded that intermediated interests had only obligatory status, in Benjamin's view they would lose the priority inherent in rights which are proprietary. As she put it in her recent book on global custody:

[T]he client's interest in the securities is characteristically unallocated and indirect. Rather than owning particular securities, the client has commingled rights in a fungible bulk, often held on a cross-border basis through one or more intermediaries. . . . However, her rights are protected in the insolvency of the global custodian, and in this sense they are proprietary.<sup>11</sup>

This analysis which seems to rest upon the well-established principle of corporate insolvency law that 'security interests and other real rights created prior to the insolvency proceeding are unaffected by the winding up',<sup>12</sup> appears to fall into some error. Moreover, if the bad consequences which are feared were inevitable, forced reclassification in terms of 'property' could not cure the problem. The remedy, far from resting upon the nominalistic solution of terming something 'property' which is not property in the sense that attracts the desired priorities, would rather be a legislative reform of insolvency law.

<sup>8</sup> Unidroit Study Group for the Preparation of Harmonised Substantive Rules on Transactions on Transnational and Connected Capital Markets (Restricted Study Group on Harmonised Substantive Rules regarding Securities Held with an Intermediary) *Draft Convention on Substantive Rules regarding Securities Held with an Intermediary* (Rome, April 2004) part of Study 78 <<http://www.unidroit.org/english/workprogramme/study078/main.htm>> (accessed 31 Oct 2004) art 3.

<sup>9</sup> This concern is being addressed by Unidroit (n 8 above) art 8.

<sup>10</sup> Benjamin *Interests in Securities* (n 3 above) [14.51].

<sup>11</sup> J Benjamin and M Yates *The Law of Global Custody: Legal Risk Management and Securities Investment and Collateral* (2nd edn Butterworths Lexis Nexis London 2002) [11.3].

<sup>12</sup> R Goode *Principles of Corporate Insolvency Law* (2nd edn Sweet & Maxwell London 1997) 55. This is the third principle of corporate insolvency law. It is said to follow from two others, according to which (first principle) 'corporate insolvency law recognises rights accrued under the general law prior to liquidation' and (second principle) 'only the assets of the debtor company are available for its creditors' (ibid 54–55).



However, the undesirable consequence prescribed by Dr Benjamin for the failure of shares and sub-shares to accommodate themselves to her property language does not necessarily eventuate.

Similarly preoccupied about the possible insolvency of the custodian, Dr Austen-Peters is concerned to establish that securities remain the investor's 'property' even when held beneath intermediated custody. Without attempting a sustained jurisprudential proof that this is so, he does give indications as to his proposed understanding of proprietary rights. For him, two features seem to distinguish them from personal rights, that is, their being exercisable against the generality of mankind and their being capable in their nature of assumption by third parties.<sup>13</sup> The latter requirement welcomes the idea of property as *alienanda* which has been refuted in Chapter 8. The former notion prepares the ground for a law of property as the law of *vindicanda*, or things capable of being vindicated.

Reliance on alienability and vindicability to establish the nature of shares, and hence sub-shares, as property in the strict sense, is epitomized in the following words by Professor Worthington:

This bundle of contractual and statutory rights against the company is regarded as 'property' rather than 'obligation' largely because commercial practice demanded that these rights be generally transferable, assignable and enforceable against third parties. . . . The modern view that shares . . . are 'things', not just personal rights of action, follows from this recognition.<sup>14</sup>

### 3 Refutation

The Benjamin analysis is built on one or two propositions from which we would dissent. The first of these concerns the association between property and specific recoverability. In the presentation of her argument an essential aspect is the fact that the quality of proprietary is a 'procedural' quality which inheres to actions:

[T]he proprietary/personal distinction applies to actions (and the legal rights that are asserted in actions). Because the same asset can be subject to different kinds of legal action, proprietary status does not inhere in the assets, and the same asset may be subject to both personal and proprietary claims.<sup>15</sup>

In following this through, she commits herself to the view that there is a necessary link between property and specific recovery. It is the recoverability of shares and sub-shares from third parties which she takes as one sure sign of their proprietary nature. Applying the language adopted in the previous chapter, we may say that, in her view, the investigation of the proprietary quality of a claim

<sup>13</sup> AO Austen-Peters *Custody of Investments: Law and Practice* (OUP Oxford 2000) [2.17–18].

<sup>14</sup> S Worthington 'Shares and Shareholder: Property, Power and Entitlement (Part I)' (2001) 23 *Company Lawyer* 258, 260.

<sup>15</sup> Benjamin *Interests in Securities* (n 3 above) [14.49].

is therefore conducted at ‘phase two’, that of the order or outcome, instead of being properly conducted at ‘phase one’, that of the assertion of the right. She takes this, incorrectly, right back to Roman law:<sup>16</sup>

[P]roperty rights originated in real actions, and the original real action was vindication. Vindication enabled the plaintiff to recover a specific asset *in specie* from the defendant.

Earlier in this book we have dealt at some length with the long history of this error.<sup>17</sup> It will be sufficient to observe again that the Roman *vindicatio* itself did not lead into specific recovery. The Roman action simply involved the assertion that the thing was the claimant’s, but the commitment to the principle of *condemnatio pecuniaria* prevented his obtaining an order for delivery of the thing itself. The judge was empowered to allow the defendant to surrender the thing but, if it came to giving judgment against him, he could in classical law only make an award in money.<sup>18</sup> Even the wider Roman term *actiones rei persecutoriae* (actions to recover a thing, or realize an asset) signified not so much the restoration of the thing *in specie* as the re-establishment of patrimony as a whole. This was done in money not in kind.<sup>19</sup>

The association of property and specific recovery, if insisted upon, would require the conclusion that classical Roman law had no law of property at all. The error of that association can be underlined by a precisely inverted argument from English law. If the absence of specific recovery were taken to indicate non-property, then the low incidence of orders for delivery up of chattels in the traditional common law would have to be read as meaning that the common law had almost no law of personal property. Until the Torts (Interference with Goods) Act 1977 actions for trespass and conversion never led to orders for delivery up. In detinue, abolished by that Act, the defendant could evade a judgment for damages if he surrendered the thing, but no orders were made for surrender *simpliciter*.

It must be conceded, however, that Benjamin’s proposition that proprietary rights can subsist in obligations, and hence in sub-shares, is not refuted by proof that there is no such necessary association between property and specific recoverability. Even if the order to be made by the court by way of realization of the right were still invariably expressed in money, it would remain possible to suggest that vindicability against third parties was the mark of property. In other words Benjamin’s central proposition is not fundamentally affected by the nature of the ‘phase two’ order that the court is empowered to make. Nevertheless, the proposition encounters further objections.

<sup>16</sup> Ibid [13.17].

<sup>17</sup> Ch 2 text to nn 31–40.

<sup>18</sup> B Nicholas *An Introduction to Roman Law* (Clarendon Press Oxford 1962) 101: ‘An *actio in rem* is not, in form, one which compels the defendant to return the *res*. (This is the sense in which the Common Law uses the term “real action”).’

<sup>19</sup> V Arangio-Ruiz *Istituzioni di diritto romano* (11th edn Napoli 1952) 160: ‘l’integrità patrimoniale’. Cf C Sanfilippo *Istituzioni di Diritto Romano* (3rd edn Jovene Napoli 1955) [79].

The second objection is that, even if it were true that the vindicability of an obligation as against persons other than the person under the obligation sufficed to show that obligations could be property, it would not follow that intermediated obligations were therefore property. Benjamin says:

[A]s against the debtor, the creditor can only assert personal rights in relation to the debt. However, if the debt is held through an intermediary, the creditor can assert real rights in relation to the debt, as against the intermediary. On this basis, intermediation is [the precondition of] property rights in relation to intangibles.<sup>20</sup>

There is a *non sequitur* here. Intermediation does not necessarily suggest more than a chain of separate contracts. The creditor could merely have a personal right against the intermediary, and the intermediary a further personal right against the debtor. If that is the analysis which one wishes to resist, one cannot simply assert that in that configuration the intermediary is to be regarded as a third party against whom the creditor's right can be vindicated. Such an assertion amounts to a *petitio principii*—the assumption of the very thing sought to be proved.

The third objection can be stated in general terms as follows: the assertion that assets which are *vindicanda* thereby become property does not in fact respect the line between property and obligations. It therefore fails to achieve the goal which Benjamin herself appeared to proclaim. Her proposition requires it to be said that the fact that an investor can ask a court to declare that someone holds a given asset on trust for him must mean that that asset is property-as-opposed-to-obligations. Yet it is elementary that almost any obligation can be held on trust. Hence it is impossible to commit oneself to the proposition that the entitlement to an obligation is property while at the same time subscribing to the proposition that the opposition between obligations and property must be respected. This inconsistency requires a section to itself.

## B PROPERTY-AS-OPPOSED-TO-OBLIGATIONS

There is undoubtedly an entitlement relation between every right *in personam* and the person entitled to the benefit of its realization.<sup>21</sup> Talk of 'my right *in personam*' is admittedly infrequent, but that is only because talk of rights *in personam* is itself not so frequent. 'My claim' is, by contrast, perfectly familiar. 'My share' and 'my debenture' are not propelled into the law of property by the possessive which highlights the entitlement relationship. Nor does the availability of a procedure which asks the court to rule upon that relationship alter

<sup>20</sup> Arangio-Ruiz *Istituzioni* (previous n) 160: 'l'integrità patrimoniale'. Cf Sanfilippo *Istituzioni* (previous n) [13.10].

<sup>21</sup> 'Entitlement' describes the fact that an entity belongs to someone. The more complex definition in JW Singer *Entitlement: The Paradoxes of Property* (Yale University Press New Haven CT 2000) 56–94, centering on the opposition between entitlement and title, is only echoed here.

its nature. ‘My share’, ‘my sub-share’, and ‘my debenture’—and, for that matter, ‘my child’—are taxonomically neutral phrases. They do not tell us how to classify the entitlement in question.

In most contexts it would strike us as absurd to set up a claim to a contractual debt in the following manner: ‘I say that I own the right to demand that you pay me £1000’. The entitlement relationship between me and that personal claim, or, in other words, the fact that that personal claim belongs to me, is more often expressed in the form ‘I say that you ought to pay me £1000’. This is a paradigmatic example of an obligation. Its nature as an obligation could not possibly be changed if I used the vindicatory form of words which was just hypothesized. Nor could it make any difference in that regard whether my vindicatory form of words was directed to the person under the obligation or to a third party. Benjamin spends some time explaining that the Romans did not in fact vindicate obligations,<sup>22</sup> but she never points out the obvious reason that the pleonasm would be absurd.

The previous chapter explained how English law has recourse to oblique protection of entitlements to chattels, chiefly by suing for the wrong of conversion. However, a contractual right cannot be the subject of the tort of conversion, because it is not susceptible of possession. There is nonetheless parallel protection of contractual rights within the law of tort, through the tort of interference with contractual relations.<sup>23</sup>

Just as one’s sheep is vindicated, in the oblique third sense of that word, through actions for the tort of conversion, so a simple contractual right to a performance of some kind can be vindicated in the same weak sense through an action for inducing breach of contract. The leading case in this sense is *Lumley v Gye*.<sup>24</sup> The manager of an opera house, Lumley, had made a contract under which a famous opera singer agreed to appear for him in his London theatre. A second impresario, Gye, offered her better terms to induce her to alter her allegiance. The claim stated that Gye, knowing of the contract with Lumley, had ‘wrongfully and maliciously enticed and procured’ the singer to break her contract. The court decided in Lumley’s favour and held that Gye was a wrongdoer. In reaching this conclusion, the judges flirted with the notion of property.

In order to understand why, it will be useful to note that the case was preceded by another tier of litigation, called *Lumley v Wagner*,<sup>25</sup> which had ended with an injunction issued both against the singer and against Gye for the sake of the protection of Lumley’s legitimate interest. A recent study of *Lumley v Gye* by Waddams has shown how property notions can creep in:<sup>26</sup>

<sup>22</sup> Benjamin *Interests in Securities* (n 3 above) [13.25].

<sup>23</sup> T Weir *Economic Torts* (Clarendon Press Oxford 1997) 21–43; T Weir *Tort Law* (OUP Oxford 2002) 180–81.

<sup>24</sup> (1853) 2 El & Bl 216, 118 ER 749.

<sup>25</sup> (1852) 5 De G & Am 485, 64 ER 1209.

<sup>26</sup> S Waddams ‘Johanna Wagner and the Rival Opera Houses’ (2001) 117 LQR 431.

Can it be said that Lumley had a proprietary interest? Certainly no pre-existing account of property law would have included such a case, and the *Lumley* cases do not appear in modern books of property law, but ‘property’ is not a self-explanatory nor a clearly defined concept, and it may plausibly be maintained that the willingness of the one court to grant an injunction, and the willingness of the other to hold Gye liable in tort, can be described as a recognition of something like a proprietary interest in Wagner’s services in London for the three-month period. The link between equitable remedies and proprietary interests is well-established, and modern commentators have extended it, suggesting that one mark of what we may reasonably call a proprietary interest is an interest that the law protects by injunction.<sup>27</sup>

This is very like the Benjamin thesis. In other words, the name ‘property’ is applied to a contractual obligation protected from the interference of third parties, as though a duty would have imposed ‘against the whole world’ not to interfere with that obligatory tie. The assimilation of rights *in personam* to proprietary rights no doubt relies on the analogy with the notion of rights *in rem* as rights ‘against the whole world’. Waddams notes that Sir William Anson doubted *Lumley v Gye* precisely because he thought it created a right *in rem*. He cites a passage from *Anson on Contract*:

[A] considered judgment of the Court of Queen’s Bench has laid down that a contract confers rights *in rem* as well as *in personam*; that it binds together the parties by an obligation, but that it imposes upon all the world a duty to respect the contractual tie.<sup>28</sup>

By insisting that rights *in rem* be reattached to a corporeal or naturally locatable thing, this book has, from an early stage, distanced itself from this Austinian and, later, Hohfeldian notion, whose fallacy has been demonstrated.<sup>29</sup> The two *Lumley* cases are authority for the fact that a contract may be protected by way of injunction and through the ‘oblique’ reaction to tortious interference. The availability of this protection makes a contract a vindicable thing. It does not make a contract ‘property’.

The characteristic of a property right is not to be found at the right-holder’s end. That is, its proprietary character does not consist in its being vested in a person or in being alienable from one person to another. The characteristic feature is rather to be found at the negative or liability end. My ownership of my car is a proprietary right, not because the car is vested in me, but because the exigibility of my right follows the car. The liability to recognize my right and honour it attaches to anyone into whose hands the car comes. If I say that I own my right to claim money from you, the fact of my entitlement to that right in no way alters the fact that what I have is a mere right *in personam*. And even if I can defend that relationship with you against interference from third parties what I

<sup>27</sup> Ibid 449 (fn omitted).

<sup>28</sup> Ibid 450 citing from WR Anson *Principles of the Law of Contract* (Clarendon Press Oxford 1879) 199.

<sup>29</sup> Ch 5 text to nn 23–28.

am defending is still a mere right *in personam*. It cannot become property except in the sense of ‘wealth’. The attempt to argue both that obligations and property must be kept distinct and that an obligation becomes property as soon as it can be defended against third party interference originates a tautology.

These arguments show, therefore, that the category of *vindicanda* is incapable of drawing the boundary between the law of property and the law of obligations. The fact that ordinary contractual rights can be vindicated against third parties shows that no proprietary inference can be drawn from the vindicability of shares and sub-shares. Vindicability is consequently no mark of property *strictu sensu*. Property in the strict sense must be vindicable, but vindicability does not necessarily indicate property. In order to separate property from obligations we are driven back to saying that that which is vindicated must be a right *in rem locabilem*, a right in a thing locatable in space. It will be recalled that in Chapter 5 we reached the conclusion that rights in *locanda* did form a coherent category, albeit a narrow one.

### C PROPERTY-AS-WEALTH

If property is understood in the much wider sense of ‘wealth’, the difficulty of relating that large category and the category of *vindicanda* disappears or is remitted to a few marginal cases. But on this level, because ‘wealth’ encompasses all patrimonial rights, including rights *in personam* (obligations), the contrast between property and obligations must inevitably be renounced. Benjamin quite rightly says that it cannot be renounced, but, so long as one remains aware of the transition from one to the other, there is no necessary objection to the co-existence of a broad and a narrow conception of property. The relation of *vindicanda* and property-as-wealth turns out on examination to be very similar but not quite identical to the relation between *alienanda* and wealth as discussed in Chapter 8.

It is tempting to propose that *alienanda* and *vindicanda* form identical categories. That turns out to be imperfectly accurate. Chapter 8 concluded that alienability serves as an approximate criterion for property-as-wealth. In 99 cases out of 100 it produces the right answer. In the 100th case we are forced to admit that there is such a thing as inalienable wealth, and that the proper criterion is really the possibility, in however few circumstances and perhaps only in the context of litigation, of turning the thing in question into money. We also noticed somewhat cautiously that the 1-per-cent inaccuracy might include cases, not of inalienable wealth, but of alienable non-wealth. Organs can be donated and children can be given in adoption. In such cases something which cannot in any event be turned into money is alienated—that is to say, something which is mine is caused to become thine.<sup>30</sup> In summary the category of all things

<sup>30</sup> Ch 8 text following n 52.

alienable is almost co-terminous with the category of property-as-wealth. Yet to take the two to be identical would be to tolerate marginal inaccuracies.

The category of *vindicanda*, all things vindicable, is identical in one respect, in that it is also approximately the same as the category of all things which count as property in the sense of wealth. However, the imperfect correlations between *vindicanda* and wealth appear not to be identical to those between *alienanda* and wealth. If that is right, it is not possible to say that vindicability and alienability are two sides of the same coin. They do not form perfectly identical categories.

In the field of inalienable wealth, it is true that unassignable obligations are also not vindicable. If you run over my foot, I can maintain that you are under an obligation to pay me damages, but I cannot vindicate that obligation in any of the three senses of vindication identified at the beginning of this chapter. However, the inalienable usufruct was indisputably vindicable in Roman law. Again, in the field of alienable non-wealth, organs can be donated but body parts cannot be vindicated.<sup>31</sup> Furthermore, although actions are constantly brought to recover children who have been abducted, usually by the other parent, it is open to dispute whether such procedures could ever be brought within one of the senses of vindication, for the inquiry is directed more to the interests of the child than the entitlement of the claimant.<sup>32</sup>

The conclusion must therefore be that the category of *vindicanda* is no more than an approximation for 'property-as-wealth'. The latter, as was already observed in the case of *alienanda*, includes obligations and is therefore not significant in detecting 'property-as-opposed-to-obligations'. It is the super-category which, in the scheme which goes back to Gaius's *Institutes*, was the *ius rerum*, the law of things. Within the law of things there is no escaping the need to differentiate between property *stricto sensu* and obligations. But there is no need on that account to despise the notion of property-as-wealth or dismiss it as the colloquial usage of the layman. It is true that it does conform more closely to lay usage but the occasion has already arisen in this book to observe that in some contexts property means wealth even for legal purposes.

There are several contexts where this is true. We have been using two examples. One is the human rights notion of property, which, under the European Convention and hence under the Human Rights Act 1998, extends to contractual rights.<sup>33</sup> The other case is of immediate importance for this book. In an insolvency the estate of the insolvent which is gathered in for the benefit of the creditors consists of the property of the insolvent, and 'property' is defined so widely as undoubtedly to mean property-as-wealth, not property-as-opposed-to-obligations.<sup>34</sup> This is a concern of the next section of this chapter.

<sup>31</sup> *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596 (CA).

<sup>32</sup> G Douglas *Introduction to Family Law* (OUP Oxford 2001) 124–25; A Briggs 'Private International Law' ch 17 in P Birks (ed) *English Private Law* (OUP Oxford 2000) 723 [17.245].

<sup>33</sup> See Ch 2 n 111; Ch 8 text to nn 54–55.

<sup>34</sup> See Ch 2 text to nn 83–87; Ch 8 text to n 58.

It is an irony that failed attempts to prove that sub-shares must be property-as-opposed-to-obligations turn out in all likelihood to have been unnecessary. Those attempts are driven by the fear of the consequences of the insolvency of an intermediary. The argument of the next section is that those fears are better met by admitting that sub-shares are creatures of the law of obligations and are only property in the wider sense. That failing, only a legislative solution can be pursued.

#### D CONSEQUENCES FOR SHARES AND FOR PERSONAL PROPERTY

It has been a recurrent theme of this book that the external boundary of the law of personal property has to be drawn so as to preserve the line between property and obligations. Having explored the potential of alienability and vindicability, we have found that they serve only to identify property-as-wealth and, even then, with marginal inaccuracies. We are driven back to Part II: the law of personal property has to be the law of rights *in rem*, where the *res* is either a corporeal thing or one of very few ideational things which are naturally capable of being located in some place. Personal property is thus confined to *locanda* and, more exactly, to rights *in rem locabilem*.

The conclusion was that the only regrettable consequence of the boundary so drawn was the considerable departure from ordinary usage of the word 'property' which it implied. More particularly, although shares and other company securities are invariably referred to as property, they necessarily fell outside that boundary. Having without success attempted to define a more generous boundary, we have to accept that when the law of personal property is defined in its strict sense, in contrast with the law of obligations, shares and sub-shares are not property except in the few and ever fewer cases in which they can be said to be embodied in paper. They lie in the law of obligations. To hold a share is to be entitled under and bound by a contract.<sup>35</sup> What is true of shares is necessarily true of sub-shares as well.

This merely recapitulates the conclusions of Part II, which, so to say, now take effect by virtue of the failure of all attempts to escape them. Shares and sub-shares are not property except when property is used to mean wealth. They could not be turned into property in the narrow sense even by a statute, but they could by statute be given all the priorities enjoyed by property in that sense.<sup>36</sup> Even a statute cannot change facts. As Gaius put it:

[S]tatutes can no more turn a thief who is not manifest into a manifest thief than it can turn into a thief one who is not a thief at all, or into an adulterer or homicide one who

<sup>35</sup> *Money Markets International Stockbrokers Ltd (in liq) v London Stock Exchange Ltd* [2002] 1 WLR 1150 (Ch D).

<sup>36</sup> This is precisely what reformed American UCC Art 8-102(a)(17) has attempted to do through the definition of 'security entitlement', defined as the 'rights and property interest of an entitlement holder with respect to a financial asset . . .': Ch 3 text to nn 47–50 above.



is neither the one nor the other. What statute can do is simply this: it can make a man liable to a penalty as if he had committed theft, adultery, or manslaughter, though he has committed none of these crimes.<sup>37</sup>

The pressing fears that, in the insolvency of an intermediary, modern shareholders—strictly sub-shareholders—might turn out to be no more than unsecured creditors must be addressed without falsehood. That fear will not eventuate so long as the intermediary is understood to be a trustee of its interest for the investor. This follows from the interaction of Insolvency Act 1986 s 283(3)(a) and the very broad definition of property in s 436 of the same Act. The former provision preserves the long established principle that nothing which an insolvent individual held on trust can ever fall into the estate which is available for distribution to creditors:

- 283(1) [A] bankrupt's estate . . . comprises—  
 all property belonging to or vested in the bankrupt at the commencement of the bankruptcy . . .  
 (3) Subsection (1) does not apply to—  
 (a) property held by the bankrupt on trust for any other person . . .

So far as that section mentions property, its meaning is to be derived from s 436 which defines property to include obligations:  
 In this Act . . .

‘property’ includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property.

‘Property’ is understood in the wide and non-exclusive sense of property-as-wealth.<sup>38</sup> It is therefore perfectly safe to admit that sub-shares are not property in the narrower sense. So long as sub-shares are conceived as interests under a trust of the shares or, in the case of multi-tiered intermediation, of sub-shares higher up the pyramid, they will be kept out of the bankruptcy of the trustee-intermediary. The same protection is achieved in Italian law, without distorting the definition of property, through the device of patrimonial segregation.<sup>39</sup>

The applications of this ring-fencing mechanism are manifold.<sup>40</sup> Whilst, however, the principle is expressly stated in s 283(3)(a) with regard to bankrupt individuals, one must rely on case law to find an equivalent proposition in

<sup>37</sup> Gaius *Institutes* 3.194:

[N]eque enim lex facere potest ut, qui manifestus fur non sit, manifestus sit, non magis quam qui omnino fur non sit, fur sit, et qui adulter aut homicida non sit, adulter vel omicida sit. At illud sane lex facere potest, ut proinde aliquis poena teneatur atque si furtum vel adulterium vel homicidium admisisset, quamvis nihil eorum admisserit.

<sup>38</sup> IF Fletcher *The Law of Insolvency* (3rd edn Sweet and Maxwell London 2002) [8–003], [8–008].

<sup>39</sup> Ch 3 text to nn 22–27.

<sup>40</sup> Fletcher (n 38 above) [8–037], eg a bankrupt who has been constituted trustee of an express trust, or a solicitor in charge of clients' money as a fiduciary.

respect of insolvent companies.<sup>41</sup> The possibility of successfully drawing an analogy is especially important if one considers that the vast majority of financial intermediaries entrusted with investors' wealth are corporate bodies.

Some cases are of assistance. In *Re Kayford Ltd*<sup>42</sup> a company carrying on a mail-order business in bedding quilts found itself unable to meet customer demand due to the difficulty in getting supplies. Meanwhile, customers continued to pay either the full price in advance or a deposit. The company was therefore advised to open a separate bank account into which these moneys should be paid. The company subsequently went into voluntary liquidation. Megarry J held that the money in the bank account was not part of the company's assets. A trust in favour of the customers had been created, the purpose of which had been to ensure that the moneys remained in the beneficial ownership of those who paid them. Unfortunately, the learned judge felt the need to justify his conclusion by attributing to clients' money the quality of 'property-as-opposed-to-obligations':

No doubt the general rule is that if you send money to a company for goods which are not delivered, you are merely a creditor of the company unless a trust has been created. The sender may create a trust by using appropriate words when he sends the money . . . or the company may do it by taking suitable steps on or before receiving the money. If either is done, the obligations in respect of the money are transformed from contract to property, from debt to trust.<sup>43</sup>

The instantaneous permutation of a contract (*rectius*: of rights *in personam*) into property (*rectius*: rights *in rem*) when a trust appears in the story is as likely as that of a handkerchief into a rabbit when the former is put through a top hat. A misperception lies in thinking of 'trust' as co-terminous with 'property' but opposed to 'contract' or 'debt'. This reasoning is unnecessary, for protection in insolvency may be secured for both proprietary and obligatory rights by holding them on trust. A trust as a mechanism is neutral as to the nature of the interest held within it. Immunity from insolvency is not a feature of property rights *per se*, but rather of ring-fenced rights howsoever characterized.<sup>44</sup>

In *Re EVTR*<sup>45</sup> money was lent to a company for the specific purpose of purchasing new equipment. The equipment was not bought and the money was repaid to the company. The company subsequently went into receivership. The money was held on resulting trust for the lender, because the purpose of the

<sup>41</sup> R Stevens 'Insolvency' in W Swadling (ed) *Quistclose Trusts* (Hart Publishing Oxford 2004) 153, text to fnn 1–2.

<sup>42</sup> [1975] 1 WLR 279.

<sup>43</sup> *Ibid* 282.

<sup>44</sup> Financial Markets Law Committee *Property Interests in Investment Securities: Analysis of the Need for and Nature of Legislation Relating to Property Interests in Indirectly Held Investment Securities, with a Statement of Principles for an Investment Securities Statute* (FMLC c/o Bank of England July 2004) <[www.fmlc.org/papers.htm](http://www.fmlc.org/papers.htm)> (accessed 31 Oct 2004) 22–23 and Principle 3 of Draft Statute; Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition art 2(a).

<sup>45</sup> *Gilbert v Barber* (1987) 3 BCC 389; [1987] BCLC 646 (CA).

lender's payment was for the company to acquire new equipment, and not for the company to enter into an abortive contract for the lease or purchase of new equipment.<sup>46</sup> The specialty of this money as 'untouchable wealth' lay in its being confined within a certain mechanism for a special purpose, regardless of the fact that the lender's right to the money was *in personam* or *in rem*.<sup>47</sup>

## E CONCLUSION

The fact that shares are vindicable against third parties does not necessitate the conclusion that they can be treated as property in the strict sense. The category of *vindicanda* lies across the boundary between property and obligations. The strict sense of property is that which preserves that opposition.

One consequence is that it becomes logically impossible to refer to shares and sub-shares as property in any other sense than wealth. Personal property must be restricted to rights *in rem locabilem*. A share or sub-share can hardly ever be so described. This does not have to mean that sub-shareholders are merely unsecured creditors of their intermediary, as the customers of a bank are unsecured creditors of their bank. In English law, so long as the intermediary is regarded as a trustee there will be no need for a legislative affirmation of the client sub-shareholders' priority over the general creditors.

<sup>46</sup> [1987] BCLC 646 (CA) 650 (Dillon LJ).

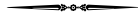
<sup>47</sup> Cf *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207. Cf also the scenario known as 'Quistclose trust', whereby money is lent to a company so that the borrower can pay off other creditors and thus fend off winding up: Stevens (n 41 above) 160. In *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 the borrowing company Rolls Razor Ltd went into liquidation before having satisfied the purpose for which the money was paid, namely the payment of a dividend to the shareholders. The lender Quistclose could claim the whole money back as on a resulting trust. The story of the borrower is graphically told in R Stevens 'Rolls Razor Ltd' in Swadling (n 41 above) 1.

Part V

## **Retrospect**



## Conclusion



THIS ‘RETROSPECT’ IS intended as a symmetrical look back to the aims set in the initial ‘prospect’. It is conceived as a reflection upon the three phases—*locanda*, *alienanda*, *vindicanda*—through which those aims have been pursued, and it draws together the partial conclusions reached at each stage.

### A THE INWARD-LOOKING PERSPECTIVE

The two perspectives of this book were initially introduced as ‘inward-looking’ and ‘outward-looking’, the former servient, the latter dominant. The inward-looking investigation first established the necessary terminology (Chapter 3) and then studied shares and sub-shares with particular reference to three aspects of their nature, their being things, being alienable, and being vindicable in court (Chapters 4, 6, 7, and 9).

These three aspects were chosen because of their bearing on the outward-looking concern of the book, all three having been the focus of opinions as to the proper understanding of the boundaries of the law of property. Quite apart from that, at the beginning of the 21st century they attract the close attention of lawyers because of the changes precipitated by the computerization and globalization of the market. Not for the first time the law merchant has run ahead of national courts and law schools, which now find themselves hastily adapting old orthodoxies to provide concepts and terminology capable of explaining and upholding practices which the markets already take for granted.

These inward-looking chapters take a comparative perspective designed to emphasize the need for different national systems, armed with different conceptual weapons, to come to terms with what is in effect a single globalized revolution in investment. Given the astonishing rate of change, in this field description and understanding go hand in hand. These chapters name and describe the now ubiquitous sub-share, introduce the pyramid-like structures of intermediation within which sub-shares find their origin and being, explain the problems of moving to paperless trading, and examine the protection of these new entitlements in court.

From these analytical, inward-looking chapters some conclusions emerge as being of special relevance to the outward-looking quest for a defensible boundary around the law of personal property. The first has to do with intangibility. The new market structures, bringing with them the massive proliferation of sub-shares, emphasize and render unequivocal the proposition that shares and sub-shares are by nature intangible things. In their history shares have conducted more than one flirtation with the contrary proposition. The book shows that, with very few and unimportant exceptions, shares have no claim at all to be corporeal things. For sub-shares the same truth follows *a fortiori*. Shares and sub-shares being intangible rights, the outward-looking question is whether those rights can count as personal property or, more accurately, in what if any version of personal property they can so count.

That shares and sub-shares, as one of the principal forms of wealth, must be alienable, there is no doubt. One dramatic aspect of the computerized revolution has indeed been the acceleration of the procedures for alienation. Paperless procedures pose legal problems but maximize speed and convenience. Similarly, wealth must be protected in the courts. The vindicability of shares has been integrated with a new classification of the legal, and equitable, protection available for corporeal chattels. Sub-shares have certainly brought considerable, though not discontinuous, changes. However, as with alienability, beneath the changing modalities the basic fact of vindicability remains unchanged. In both cases it is that unchanged fact which has to be taken into consideration in the outward-looking aspect of the book.

## B THE OUTWARD-LOOKING PERSPECTIVE

The outward-looking inquiry uses shares to test the boundaries of the law of personal property. The first boundary has to be found within the law of property itself, dividing personal property from real property (Chapter 2). It presents few problems but one great danger. Experience shows that every effort has to be made to confine to this single context the criterion which gives meaning to 'real' in 'realty' and 'real property', namely recovery *in specie*. Otherwise it all too easily filters into the investigation of the more difficult external boundary between the law of property and other areas of the law (Chapters 5, 8, and 10).

A theme running through the search for the external frontier is the co-existence of different conceptions of property. 'Property' can mean wealth, in which case the contrast is with non-wealth, and it can mean something, more narrowly, 'property-as-opposed-to-obligations'. 'Property-as-wealth' encompasses both 'property-as-opposed-to-obligations' and the law of obligations itself. Property-as-wealth is the layman's understanding of the concept of property. It is also one of the competing legal usages of the word, yielding technical consequences in some areas of the law. Laymen need not refine their usage, whereas the law, precisely because consequences turn on the applicability of the

word, must know what counts as wealth and what does not. This is the third frontier of property (Chapter 8). Shares and sub-shares are wealth.

If the first frontier is between real and personal property and the third is between wealth and non-wealth, the second is that which draws the line between property and obligations. Our main concern has been to discover whether the law of personal property in this strict sense can be regarded as the law of all things locatable in space (*locanda*), of all things alienable (*alienanda*), or of all things vindicable (*vindicanda*).

Part II, ending with Chapter 5, proves that a clear conception of personal property, excluding the law of obligations, can be formulated by confining it to rights *in rem* with *res* in its turn confined to corporeal things. On the other hand if *res* is taken to include all incorporeal things the contrast with the law of obligations breaks down. In the attempt to enlarge the category while preserving the contrast with obligations, a middle position is found to be defensible, taking *res* as including all things capable of being located in space.

The category of *locanda* includes, besides all corporeals, an additional handful of ideational incorporeal things which can be spatially identified. However, the question whether shares and sub-shares, as bundles of personal rights against the issuer or the intermediary, are *locanda* has to be answered negatively. The consequence is that they have to be expelled from property strictly so-called and remitted to the law of obligations. Although on this view they cannot be property in the technical sense, they remain property-as-wealth, as are most obligations. Chapter 5 concludes by accepting that to deny that shares and sub-shares are property in the technical sense seems to defy both common sense and current scholarly opinion. The rest of the book is essentially an attempt to escape that uncomfortable necessity.

Part III seeks to enlarge personal property without erasing the external frontier between property and obligations. The tentative equation of the law of property-as-opposed-to-obligations to the law of *alienanda*, although attractive even to great property theorists, fails. The chief reason is the recognition that alienability of an entitlement is not a peculiarity of rights *in rem* but a feature common to both rights *in rem* and rights *in personam* (obligations). Since contractual rights can be alienated, the alienability of shares and sub-shares cannot suffice to place them in a category which is opposed to obligations. Furthermore, alienability turns out to be only a partially satisfactory indicator even for the broad notion of property-as-wealth, the inaccuracy being due to the existence of inalienable wealth and of alienable non-wealth. Once again, therefore, shares qualify as members of the category of property-as-wealth, but not of property-as-opposed to obligations.

Part IV explores the possibility of an alternative enlargement of the external boundary of personal property, to include of all things vindicable, in which category shares demonstrably belong. 'Vindicable' denotes the availability of a claim which puts entitlement in issue, either directly in the form 'I say that thing is mine' or, more obliquely, 'You have incurred an obligation through interfering with my



thing'. This version of the boundary has been heavily relied upon in recent years, and at first sight it seems promising, for obligations are typically asserted rather than vindicated. That is, a claimant says the defendant ought to perform, not that he owns a claim to the effect that the defendant ought to perform or, more obliquely, that the defendant has interfered with his claim that a performance is owed. Nevertheless, on further examination it turns out to be an illusion that ordinary contractual claims are not vindicable. Against third parties who interfere with them they are no less vindicable than corporeal chattels. The conclusion therefore follows that vindicability also obliterates the distinction between rights *in rem* and rights *in personam*. That being so, *vindicanda*, like *alienanda*, only count, again with a degree of approximation, as property in the sense of wealth, instances of non-vindicable wealth accounting for the imperfection of the correlation.

Parts III and IV thus assess the potential of alienability and vindicability in drawing the external frontier of personal property. Both are found wanting as criteria for defining the boundary of property-as-opposed-to-obligations and inaccurate as indicators of property-as-wealth. One theme common to both is the error arising from failing to understand that entitlement is not the essence of proprietary rights in the technical sense. That is to say, a right *in rem* is recognized from the behaviour of the burden in following a thing, not from the existence of an entitlement relationship with a thing. Neither the alienability of entitlement nor the vindicability of entitlement can therefore show that *vindicanda* and *alienanda* are property in the strict sense opposed to obligations. There is invariably an entitlement relationship between a person and that person's right *in personam*. Equally important, or indeed the same thing said in different words, the affirmation that X owns an entitlement *in personam* such as correlates with Y's obligation to pay him £1000 makes perfectly good sense, but the ownership to which it refers is not an indication of property in the strict sense. A bank owns many debts. But what it owns is not property in the strict sense. An obligation cannot be property in the sense in which that word is opposed to obligations. One can own all kinds of property-as-wealth, but wealth is often not property-as-opposed-to-obligations.

The point at which this book, and this retrospect, finally arrives necessitates a return to the conclusion which was provisionally accepted at the end of Part II. Property in the strict sense cannot be stretched beyond rights *in rem locabilem*. This conclusion may be subject to criticism of two related kinds. It may meet the objection that it does violence to language. And it may encounter rejections of its whole approach to legal taxonomy. The final paragraphs anticipate these oppositions.

First, it cannot be denied that a definition of the law of property as narrow as 'the law of rights *in rem locabilem*' involves considerable departure from the current usage of the word 'property'. Laymen like to call their wealth, among which will be found their shares and sub-shares, 'property'. The answer to that is that they may continue to do so, undisturbed. Lawyers cannot afford that

luxury, lest they would renounce the law's indisputable need for precision. A finer focus on language has to be pursued to avoid the danger of its yielding technical consequences which attach only to the law of rights *in rem*. The opening of a gap, even of a wide one, between property in its strict legal sense and property as understood by laymen, is a reasonable price to pay for legal precision. Furthermore, the gap is less dramatic and more complex than may at first appear, for there are two legal usages of 'property', the second of which is barely narrower than the layman's save only in being more refined. Shares and sub-shares remain within the legal sense of property-as-wealth. The law will not discontinue its use of that wider concept, but it is hoped that in any one context it will become more aware of the need for explicit choice between the narrower and the wider version.

It is essential to cultivate that awareness of the contrast between the different but co-existent legal senses of property. Shares are not property-as-opposed-to-obligations, they are property-as-wealth. This has implications for future books and courses on personal property in England, as the long neglect of that subject is overcome. Shares and sub-shares can be included in such a course or book, provided only that it is made clear that it is not confining itself to property *stricto sensu*. A choice of that kind would necessarily entail an explanation of the omission, if they were omitted, of contractual and tortious obligations. The law of property-as-wealth is the whole of the Roman law of things, and personal-property-as-wealth is the whole of the *ius rerum* less the law of real property. It should not be regarded as acceptable to tack single items on to property-as-opposed-to-obligations without saying why it has been chosen for that special treatment.

### C A POST-MODERN POSITION

By its nature this book is a contribution to the debate about the role of taxonomy in the law. Classification and property are its concerns. It takes its stand on the side of those who cultivate precision in both matters. Taxonomy is currently both fashionable and controversial in legal scholarship. Those who regard orderly classification of the law as a necessary precondition of improving its rationality in operation have found themselves opposed by others who deprecate the dogmatism of 'concepts' and of 'rigid taxonomy'. This derogatory language presupposes, dubitably, that 'non-rigid taxonomy' is a meaningful idea and in some sense preferable.<sup>1</sup> Thus a notion of property restricted to things which have a physical as opposed to an otherwise defined juridical character has

<sup>1</sup> In Scotland KGC Reid 'Obligations and Property: Exploring the Border' [1997] *Acta Juridica* 225, 245 has expressly invoked a compromise between 'certainty and rigidity' in the demarcation of the category of property.

been sometimes deplored as having negative taxonomical value and treated with impatience, sometimes dusted off and rediscovered as viable.<sup>2</sup>

This book distances itself from the oxymoron 'flexible taxonomy' and barely moves a single step from the requirement of 'physicality'. It has taken a post-modern position, in that it has sought to revive ideas which allow the province of the law of property to be understood as standing clear of other areas of the law. The line between property and obligations has to be defended, on pain of being immediately reinvented one taxonomic level down. The book hopes to have shown that no weakening of the idea of property follows from insistence on the physical or, more accurately, 'locatable' conception of the object of property rights. Quite to the contrary, the price of flexibility in the use of legal language is confusion. In this area indifference to precision conceals the plurality of the senses in which 'property' is used. Instabilities of that kind never served the interests of justice.

<sup>2</sup> Recent criticism of the physical conception, held responsible for the atrophy of the notion of property, is in U Mattei *La proprietà* in R Sacco (ed) *Trattato di diritto civile* (Utet Torino 2001) 137.

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