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# *Things as Thing and Things as Wealth*

BERNARD RUDDEN<sup>1</sup>

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## 1 *Introduction*

What the law does well is blind its servants. Judges, practitioners, and even jurists grow so accustomed to its rituals that they do not see how deeply weird they are. Take, for instance, the names of statutes. The English have a Supreme Court Act 1981, but no proper Supreme Court. They have a lengthy Settled Land Act of 1925, although since 1882 the one thing they cannot settle is their land. They cannot learn the law of property from the Law of Property Act. The Animals (Boarding Establishments) Act of 1963 defines animals to mean only dogs and cats.

Such curiosities are not confined to the English. The May 1993 index to the thirty-four looseleaf volumes of the *Canadian Encyclopedic Digest* (Ontario) has, like its predecessors, no entry for property. It contains nothing for 'personal property', although the sub-set of 'personal property security' merits a mention. While prolix on 'choses in action', its advice under 'chattels' is terse: 'see Bailment; Trespass'. Tucked away between 'Real Evidence' and 'Receiving Orders', we find of course 'Real Property' with its necessarily long list of cross-references to such topics as 'free and common socage', 'estates tail' and 'Shelley's Case'.

The traditional civil law is not strikingly different. Certainly in the realm of property the older versions have their own incantations that the student soon takes for creed, learning, for instance, that rabbits, fish, and pigeons are immovable, while the word movable used by itself does not include books, horses, or clothing (French Civil Code §§524,533; Lower Canada CC §395).

Both major legal systems, then, have their oddities. Yet it is unlikely that we are wiser than our forebears, for the rules and rituals they devised must have had reason in their day; perhaps it is our unthinking repetition that turns them into riddles. In common-law countries, the formal presentation of the law of property, derived from long tradition and offered still by much modern doctrine, is based on four propositions. First, that the essential division is that between

<sup>1</sup> Professor of Comparative Law in the University of Oxford and Fellow of Brasenose College. A draft of this paper was presented to the W. G. Hart Workshop on property law held at the Institute for Advanced Legal Studies, London, 6-8 August 1993. The author was greatly assisted by the comments of several participants and in particular by those of James Harris, of Keble College, Oxford.

real and personal property. Second, that a string of special concepts applies always but applies only to real property: the learning of estates (for life, in tail, in fee; in possession, remainder, or reversion; absolute, determinable or conditional), the use of powers of appointment (general and special), and, to control contingent vesting, the rule against perpetuities. Third, that an essential division of property entitlements is between those recognized at law and those which subsist in equity. Fourth, this last distinction turns on the concept of the trust, and a trustee is a 'legal owner'.

Depending on the authority and the purpose of the work, these four notions may be stated as axioms or may operate simply as background assumptions shared by expositor and reader. This paper puts forward some hesitant arguments against all of them. Its thesis is that when things are treated as thing, and whatever vocabulary the common-lawyers use, the modern law operates with a fairly uncomplicated set of basic concepts: ownership, trustee-holding, possession, servitude, charge, and publicity (through registration or possession). By contrast, when things are treated as wealth (whether they themselves be 'real' or 'personal') they attract the concepts and utilize the techniques of estates, powers, and perpetuities outlined above. It is further suggested that it is both inaccurate and unhelpful to explain the trust by calling the trustee a legal owner.

This point needs preliminary clarification. It is true that, in relation to the trust property, a trustee has the powers to pursue and recover it which are one mark of ownership; but if the property vanish, or perish through some natural calamity, the loss does not fall on the trustee. Furthermore, there are two other essential features of the ownership relation, and one important consequence of each. First, someone who owns a thing may, with impunity, destroy it; and so may, of course, give it away for nothing. Second, by judicial execution an owner's things may be taken from her or him to serve as substitute performance of obligations incurred; and so, before that happens, things may be used by their owner as security for the performance of obligations. None of these propositions holds good in general for a trustee's relation to the trust property. It is not the trustee's to give away, and indeed in principle cannot even be lent without security. A trustee's *own* creditors—the epithet is both precise and revealing—may never levy execution on the things their debtor holds as trustee.

The traditional concepts of the common law of property were created for and by the ruling classes at a time when the bulk of their capital was land. Nowadays the great wealth lies in stocks, shares, bonds and the like, and is not just movable but *mobile*, crossing oceans at the touch of a key-pad in the search for a fiscal utopia. This is not to make light of the need for a home, or of the difficulties encountered by English judges in the absence of any customary or legislative system of matrimonial or quasi-matrimonial property. Nor is it meant to denigrate the importance of land as one of the bases of the economic structure, and a factor whose cost enters into the price of everything. In terms of legal theory and technique, however, there has been a profound if little discussed evolution by which the concepts originally devised for real property have been

detached from their original object, only to survive and flourish as a means of handling abstract value. The feudal calculus lives and breeds, but its habitat is wealth not land.

The argument can be more precisely stated by distinguishing, not between things as such ('corporeal/incorporeal', 'movable/immovable'), but in terms of their function. A thing may be treated for itself and be possessed, used, and disposed of for its own qualities, however banal they be. In this case the legal regime applicable treats the object as unique: it is this house we own and live in, this book we sell and no other. On the other hand every thing may be treated merely as the clothing (*in-vestment*) worn by a certain amount of wealth. In this case the relevant law accords it the modest role of a member of a class, perfectly replaceable and subject to an implacable regime of real subrogation.

The distinction between the uniqueness of things considered for themselves and their total convertibility when treated as wealth does not follow the classic lines of fungibility: a pound of flour is unique if its owner wants to make bread with it; a Vermeer in the hands of a pension fund is just another investment. Nor is the distinction necessarily tied to the nature of the object in question: most things can be either possessed for their own sake or held as investments for their income stream or in the hope of capital appreciation. The law of property covers impartially the things we own because we need them—our home, food, and clothing—and those we own but could exist without—the flat we lease and do not live in, the first editions that we dare not read. In other words, in most legal systems things of the same type may be held by some as necessities and by others as investments, while many persons hold part of their property as both. In defining and protecting entitlements, powers, and so on, the law does not need expressly and initially to distinguish between these purposes.

Nonetheless, such a distinction is attempted in what follows. It is beyond the author's powers to render the difference in simple English. In 1901 Josef Kohler used the terms *Substanzrecht und Wertrecht*, but the words do not translate readily.<sup>2</sup> In English, then, and for want of better, the expressions used are 'things as thing' and 'things as wealth'.

## 2 *Things as Thing*

The thesis advanced is that, when faced with things treated for themselves, the common law employs a set of concepts familiar to jurists from any country, such as ownership, possession, and publicity. But this approach is masked by certain habits which are bred into the common-law systems and have laid down patterns of vocabulary which tend to control perception. Firstly, when dealing with

<sup>2</sup> 91 *Archiv für die Civilistische Praxis*, 155–208 (1901). Kohler's lengthy and lively account will be referred to below, but it covers only a few of the issues here addressed, and does so in the very different context of German legal dogmatics. Basically he classes as substance rights the traditional figures of ownership, usufruct, and usus. The oldest value right is the pledge, but Kohler extends the general category to cover certain land burdens and the interests of some partners and of company shareholders. He emphasizes the way in which the growth of value rights has greatly facilitated transfers of wealth, but does not develop any general concepts of real subrogation or the fund.

tangible things, a tenacious common-law tradition commands us to distinguish most scrupulously real (ie immovable) property from personal. The orthodoxy will be briefly summarized and followed by some notes of respectful disagreement.

### *Tangible Immovables*

The familiar doctrine attributes to the law of real property two sets of distinctive features concerning on the one hand the concepts said to be applicable, and on the other the remedies said to be available. As to the first, it is traditionally taught that real rights are to be classified by time: the learning of the 'estate in land'.<sup>3</sup> More precisely, all the holders of a *jus in re sua* have similar rights in space, rights of possession and use; it is the time from or for which these rights may be enjoyed that distinguishes one interest from another. Thus, some may hold them for ever, some for life, some for a time certain, from now, or from some future moment. All possess the power of alienation, but what they transfer is the entitlement to exercise the rights only for and from the relevant time. As to judicial protection of real rights, traditional doctrine insists that the courts are bound to restore them in kind only to the person ousted from real property. Those dispossessed of other things must, in principle, be content with substitute protection in the form of money.

A quite different view may be put forward. To treat immovable property as the object of entitlements corresponding to the classic estates in land (and all the possible combinations thereof) was found to be bad for the land, for families, and for the market, and was forbidden in England in 1882. The property legislation of that year (above all the Settled Land Act) is largely and fundamentally *jus cogens*—its application cannot be set aside by private parties—and it sets up a legal regime under which the object itself can always be sold. This statutory technique was strengthened and extended in 1925<sup>4</sup> so that it applies to virtually all situations where the legal relation between a person and an immovable object is less than that of absolute individual ownership. If the entitlement amounts to such an interest then, of course, it needs no legislator to say that the thing can be disposed of.

The details of the relevant legislation are too technical to be rehearsed in a brief paper. In general, however, the statutes ensure that where more than one person is entitled to the immovable, whether successively or concurrently, then their legal relation is shifted from the immovable treated as thing to the immovable treated as wealth. The thing itself can always be sold, though not for the exclusive benefit of the seller, and not automatically at the behest of the seller's creditors. To curtail the risk of this being attempted, the practice imposed by the legislation seeks to ensure that the price will be paid into safe hands.

<sup>3</sup> See for instance F. H. Lawson and Bernard Rudden, *The Law of Property* 88–98 (1982).

<sup>4</sup> By the Law of Property Act, the Settled Land Act, and the Administration of Estates Act.

*Tangible Movables*

Where chattels are concerned, orthodox theory tells us that they may not be subjected to the conceptual structure appropriate to realty. In other words the relation between a person and a tangible movable is not that of the estate concept, but is one of ownership, possession, or security. This view is put forward by deservedly eminent jurists such as Roy Goode<sup>5</sup> and J. C. Gray,<sup>6</sup> yet it provokes two responses. First, the relation just described is virtually the same as that which today applies to realty when the immovable is treated for itself. Secondly, movables treated as investments are subject to the same legal regime as that of realty when treated as wealth: ie each movable is merely an entirely replaceable element in a portfolio. As such it may be held for life, in tail, and so on—in other words is subject to the familiar calculus of estate, and the risk of perpetuity.

*Industrial/Intellectual Intangibles*

When we turn to intangibles, we see first that the fundamentals of the law of industrial and intellectual property are similar everywhere. Since the field developed outside the heartland of the two great traditions (it is in neither the Digest nor Coke's Institutes) both civil and common law have some initial difficulty in applying to it their basic concepts. Thus it is not treated at all in the great models supplied by the Code Napoléon and the Bürgerliches Gesetzbuch. It is covered in some civil codes of this century (Italy 1942, Russia 1964) but is dealt with, not in the section on property law, but in its own separate chapters. Furthermore, traditional civil-law jurists are reluctant to speak of owning a patent or copyright.<sup>7</sup> In somewhat similar fashion, the common law hesitates to apply to this field the sacred learning of estates.

Yet all the doctrine accepts that the modern law allocates protection to those who hold patents, trade-marks, copyrights and the like; that this protection is available *erga omnes* and thus constitutes, for a number of years, a zone of monopoly; that the person entitled can so to say 'abandon' the good by giving it away for nothing; can sell it outright or make another person pay for a licence to use it; and that the economic value which it has is available to its holder's creditors and so can be used as security for debts owed to them. What is noticeable is that, in general and as far as possible, the same basic notions of ownership, trustee-holding, possession, and security can be applied to all these intangible assets when they are treated for themselves. As their name, the noun 'property' is now accepted, and German jurists describe a patent-holder's entitlement as a 'real right'.<sup>8</sup> At the same time these things may play the role of investments for a pension fund or private fortune and so may become, at one

<sup>5</sup> *Commercial Law* 54-6 (1982).

<sup>6</sup> *The Rule against Perpetuities* §§821-6 (ed) R. Gray, 1942.

<sup>7</sup> For instance Kohler, *op cit* above, n 2, 162.

<sup>8</sup> Wolfgang Mincke, *Die Akzessorietät des Pfandrechts* 94 (1987).

remove, the objects of estates, contingent interests, and the whole traditional gamut of the classic land law.

### *Intangible claims*

There is another great class of intangible objects for which English seems to have no intelligible word. For the simple *créance* or *Forderung*, our legislator uses the enigmatic phrase 'things in action' (Law of Property Act 1925 s136). Yet English has one short verb to denote the relation between the object and the person entitled to it: what is owed me, I *own*: I can 'destroy' it by presenting it to the debtor; I can give it away; and it is, of course, available to my creditors and can be used as security for my debts. For well over a century these intangible entitlements, together with stocks and shares, have constituted by far the larger part of the wealth of any modern economy: the National Debt must have its correlative creditors.

Furthermore, although these assets are intangible, long custom reifies them: from about 1200 to 1800 claims on the public purse were embodied in bits of wood—tallies—and were assignable at common law by simple delivery. Since then the practice of treating such assets as corporeal is facilitated by the fact that their existence is normally attested by writing—treasury bonds, share certificates, commercial paper and so on. Today's short-dated gilt is quite recognizably the descendant of the tally. These intangible entitlements are thus brought into the physical world and recognized by their papers. All of this is merely a practical expression of the fact that, when treated for themselves, they are as far as possible subject to the same legal regime of ownership, possession, and security or pledge as that which governs tangible objects. However, such assets have usually no significance beyond pecuniary value. Unlike other things, therefore, their primary function is to be treated as investment, as vessels into which wealth is poured and stored. As replaceable elements of a portfolio they may be the object, along with tangible things, of any legal relation, including that of estates.

### 3 *Things as Wealth*

In examining things treated as wealth, or as investments of wealth, they must be considered first as members of a class and then as a class properly so-called. When treated as wealth, things do not, of course, change their physical form: they are still tangible or intangible, movable or immovable. But as each is perceived only as the external form of a value, no member of the class enjoys any privileged status. As an investment each individual object is treated in terms, not of its own inherent qualities, but of its opportunity cost. This last function betokens an important fact: as an item in a portfolio every thing can be changed or converted. Nothing is unique.

When one such object is replaced by another we must turn momentarily to the legal regime applicable to things treated as thing. If, for instance, it is decided—for reasons of investment strategy or tax planning—to sell a mansion house and a racehorse so as to buy some shares and an aeroplane, each of the four transactions will be governed by its particular legal rules, with its own form of transfer, its own register, and so on. But from the point of view of the portfolio, the sales and subsequent purchases effect merely a real subrogation whereby the things sold are transmuted into the sale price which then becomes the things bought. The fund has not changed: the accounts record on one side the disappearance of two assets expressed as sums of money, and on the other the acquisition of the price; the purchase money then leaves the accounts and the shares and patent enter them at asset value. The overall balance is still the same. Maitland said all this first, and put it best: ‘The idea of the trust-fund which is dressed up (invested) now as land and now as current coin, now as shares and now as debentures seems to me one of the most remarkable ideas developed by modern English jurisprudence’.<sup>9</sup>

This is all very obvious when the portfolio has a single owner. But it is equally true if the fund has been settled (to put it succinctly) ‘on A for life without impeachment of waste, remainder to any widow who may survive him for life, remainder to his first and other sons successively in tail male, remainder to his sons in tail general, with cross remainders to his daughters in tail, remainder in fee simple to the right heir of A’. The entitlement of each, in terms of rights, powers, and value, survives any replacement of one member of the class of investments by some other. The relation between the beneficiaries and the trust property is one which treats things as wealth and not as thing. What matters is not the object as member of the class but the class itself as the object of inherence of the estates intoned above. This class deserves attention both in its function and its management.

### *Function*

As to function, what needs to be emphasized is the implications of the legal regime utilized by the common law to govern the birth, death, and transfer of the rights whose object is a class of investments. That branch of the law was born to deal with land, but it now affects real property not at all. When treated as thing, land can be owned, leased, and mortgaged but since 1882 it cannot be the object of any particular freehold estate: the phrase ‘fee simple absolute in possession’ is merely traditional jargon for ownership or trustee-holding. The sacred Rule against Perpetuities has suffered the same fate. It never applies to things as thing, because as such they are not the subject-matter of conditional limitations: the thing itself can always be sold. What the rule affects is the contingent entitlements to the subjacent value represented now by the thing, then by its price, and

<sup>9</sup> Maitland: *Selected Essays* 134 (ed) H. D. Hazeltine et al, 1936. See also Savigny, *System des heutigen Römischen Rechts* i §56, 1840 edn 375–6; Werner Sombart, *Der Moderne Kapitalismus* ii 1 (2) §2, 1919 edn 119–20.



then by some new thing. Our very vocabulary reveals this. In Latin the word *fundus* meant a farm; but 'fund' means the abstract value represented by a portfolio of investments. It is this fund whose function it is to form the object of the old concepts of estates, powers of appointment, conditions, and perpetuities.

This can easily be demonstrated from *Berry v Warnett*, which came before the House of Lords in 1982.<sup>10</sup> It was a case on capital gains tax, and that law is of no concern in this paper. What is interesting is the facts. The tax-payer owned shares and debentures in Rothschild Investment Trust Ltd, part in his own name and part through Lloyds Bank (Branches) Nominees Ltd. The two registered holders transferred the property to a company in the tax haven of Guernsey, Investors Trustees Ltd, which was to pay the dividends to the tax-payer for life. This leaves, by the application of legal logic, a fee simple absolute in remainder, which was sold to a Jersey company (another tax haven). The life estate was then transferred to a company (which held *pur autre vie*) in an even sunnier haven, the Bahamas. In contemplating the case, the reader is struck by five facts. First of all, this type of scheme is not at all uncommon. Second, three companies are created and manipulated as puppets, rather like the slaves to whom the Roman rich would entrust a *peculium*. Third, although the objects involved are the intangible claims represented by shares and debentures, their owner used the ancient conceptual structure of life estate and remainder and then transferred separately each of these entitlements. One arrived in Jersey and one in the Bahamas but, fourth, the investments as thing (and the share certificates) stayed in Guernsey. And finally, the only authority cited by their Lordships was William Shepherd's *Touchstone of Common Assurances*, first published in 1648.

### *Management: the Trust*

While fulfilling the function of being the object of inherence of these limited entitlements (identical with the old freehold estates), the fund needs to be managed. Here, of course, the common law uses the trust, a concept which is very hard to analyse. For the reasons given in the Introduction, it seems misleading to explain the trust by speaking of the trustee's legal *ownership*. Although trustees are far more than agents and hold more than a merely obligational claim in relation to the property, they cannot, with impunity, destroy or convert it (and if they do, time never runs in their favour). Nor is the property available to their creditors. One way of looking at the structure is to see the trustee as an office-holder and the property as going with the office. We are familiar enough with this technique in public law, and Honoré in fact points out that 'trusteeship is a quasi-public office'.<sup>11</sup> Furthermore, that shrewd outsider Max Weber describes the trust concept as '*ein Surrogat des Amtsbegriffs*'.<sup>12</sup>

<sup>10</sup> 55 TC 92.

<sup>11</sup> Honoré's *South African Law of Trusts* §31, 44 (ed) Tony Honoré and Edwin Cameron, 4th edn 1992.

<sup>12</sup> *Rechtssoziologie* 162 (ed) J. Winckelmann, 1960.

Another approach is to see the relation between the trustee and the trust property as one between a person and things treated as thing but not as wealth. The utility of this view can be tested by applying it to the strangest thing of all: money. As regards the currency in our pockets, we own a number of tangible objects, coins and notes. We also own the thing in action—the (public-law) claim—which the currency embodies (expressly, in the case of English bank-notes, which still bear the words ‘I promise to pay the bearer on demand . . .’). We have unfettered access to all of money’s functions. As it is a means of exchange, we can hand it over in return for other things. As it is legal tender, we can use it to extinguish our debts as they fall due. And it is a store of value which we can enjoy to the full by acting irresponsibly—we can throw it into the sea, or simply give it away.<sup>13</sup> Trustees, by contrast, seem to have no access to the value stored in money. They ‘own’ the chattels to the extent that they can recover them from thieves and the like, but if this proves impossible it is not the trustees’ fortune which is diminished. They can utilize the currency as a means of exchange and a universal method of payment. But they cannot lawfully get at its value, for that must be stored in whatever replaces the currency, whether a tangible object, or stocks and shares, or the claim represented by a bank account in credit.

The orthodox explanation, given in terms of the traditional distinction between law and equity, provides only an historical and not a rational account of the trust. First, it does not explain the Scottish trust. Second, the separate English jurisdictions were fused long ago. And third, the split between legal and equitable ‘ownership’ seems to reflect that between things as thing and things as wealth for, as we have just seen, the trustee has no lawful access to the latter. There is a trace of this in the Law of Property Act 1925 which defines legal estates as ‘interests . . . in or over land’, and calls equitable interests those ‘in or over land or in the proceeds of sale thereof’ (s 205(1)(x)).

It will be objected that the crucial distinction between law and equity makes its appearance in the first clause of the first sentence of that statute, which is, after all, still the major English legislation in this field. Only a limited number of entitlements are, says LPA s 1(1), capable of subsisting ‘at law’. All the rest ‘take effect as equitable interests’. The counter to this objection is to point to section 2 which introduces a quite different, but more important, distinction: that between interests ‘capable of being over-reached’ and the rest.<sup>14</sup> An interest capable of being over-reached is one that treats its object not as thing but as wealth. The same section’s machinery for handling this over-reaching is expressed in terms of ‘capital money’ which must, depending on the situation, be paid to the correct person—mortgagee, personal representative, or trustees. Thus what emerges as the crucial distinction of 1925 is cast in terms of the law of *things*, not that of *jurisdiction*. Things are divided, not according to any physical or innate characteristics, but according to their function in the legal relation: are they regarded

<sup>13</sup> It may be a crime to deface currency, but it seems, in England and Wales, to be lawful to destroy it.

<sup>14</sup> See section 5 below, ‘co-ownership’.

for their own sake or as interchangeable investments of capital money. The juridical figures within the first class include a number of entitlements which can be 'legal' (easements) or 'equitable' (restrictive covenants). Those within the second class are interests which can amount to a fee simple absolute in possession (or any lesser estate) but whose function is to act as entitlements over wealth in a fund which may be invested from time to time in all manner of objects.

However it be analysed, the trust concept enables us to organise efficiently the relations between the trustee and a third party, and those between the trustee and the owners of beneficial entitlements. The contract of purchase of any object which forms part of the trust property treats it as thing—the buyer wants to acquire ownership and the usual guarantees of title, quiet possession, freedom from latent defects and so on. Similarly, a mortgage or charge of that object can confer a real right over the thing itself—but it is balanced by the sum advanced which swells the asset value of the fund. For their part the owners of beneficial interests (and their creditors) are concerned with the object as wealth and want their own fortune to be protected. The trust suits both sides because it is at once a screen and a pivot.

#### *The trust-screen*

In relation to a buyer, the trustee has the key legal power of sale, given by the trust instrument or by mandatory enactment. If the rights in the fund are held by co-owners, the trustees—who may be the co-owners themselves—hold under a statutory trust for sale of any immovables in the portfolio. If the rights arise among those entitled by succession on death, the personal representatives of the deceased are free to sell any given object in the inheritance; and if they arise by succession *inter vivos*, the life tenant has the statutory power of sale of land and (with judicial consent) of any tangible movables settled with the land. Similar techniques are incorporated by private (as distinct from statutory) provisions into *inter vivos* trusts of personalty, and all these powers of sale are accompanied by the capacity to incur the usual obligations in respect of warranties of title, quiet possession, and so forth.

#### *The trust-pivot*

Having disposed of the things and received their price, the trustee turns back to those who own the wealth. The sale has not impoverished them: *pretium succedit in loco rei*, and their rights are simply shifted to the money and to whatever is acquired with it. If they are life tenants they take the dividends, while the remainder (the 'bare ownership' of civil law) is still the absolute entitlement to a capital value and to the income it will produce when the life interest ends. Its present 'discounted' value can be readily determined.

If, despite all statutory and other precautions, a dishonest trustee sells an object and wrongfully appropriates the price, the buyer is safe. There is nothing particularly English, or 'equitable', about the rule protecting a *bona fide* purchaser, for an even wider version is found in many legal systems for the

situation where someone who holds a tangible movable with the consent of the owner transfers it (even for nothing) to an innocent acquirer. Furthermore the civil law of unjustified enrichment ensures in this situation that if the thing is sold the seller owes its previous owner the price, and if given away the donee owes that owner the value. The debt, however, remains just that, ie part of the law of obligations, so that the defrauded owner is merely an unsecured creditor (eg Bürgerliches Gesetzbuch §§816,932). What may be peculiar to the common law is that it protects the injured beneficiaries also through the law of property, or at least by giving them priority. First of all, they may claim compensation for damage caused them by breach of the trustee's obligation and, to satisfy their claim, may go as unsecured creditors against the trustee's own property; and time never runs against them. But secondly, their relation to the asset sold is shifted to the money received, and they may follow this wealth into a bank account or into anything bought with it. Their right to this substitute thing takes precedence over claims by other creditors of the trustee.

Thus in the trust regime the technique of real subrogation has two functions. The first is peaceful: in an authorized sale by an honest trustee the price replaces the thing sold. The second is more hostile, enabling the beneficiaries to trace and seize anything acquired by breach of trust and, in priority to the trustee's creditors, to use it to satisfy their entitlement. Of course if the trustee destroys the trust property or sells it and squanders the proceeds, the beneficiaries are merely creditors of his or her private assets. But all real rights end with the destruction or disappearance of the object—here, the fund—in which they subsist.

### *The Trusts Convention*

As a useful summary, it is worth recalling the 1984 Hague Convention on the Recognition of Trusts, which gives us, if not a definition, at least a description of the trust and its functions. The following key extracts help to show the two ways in which things can be treated: as thing or as wealth. Article 2 describes the trust and does so in terms of asset and fund, without mentioning 'law' and 'equity'. The trust's main characteristics are (emphasis added):

(a) the *assets constitute a fund* and are not a part of the trustee's *own* estate;  
 (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

(c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed on him by law.

Article 11 imposes on the High Contracting Parties a duty to recognize a trust which, by its own law, has been validly created and continues:

Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund . . . [and] shall imply in particular—

- (a) that personal creditors of the trustee have no recourse against the trust assets;
- (b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy;
- (c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death;
- (d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property . . .

These provisions thus protect the trust property from the trustee or the trustee's own creditors. Guarded by these rules, the fund as wealth (but no particular object as thing) may flourish as the object of inheritance of the most elaborate—and old-fashioned—complex of 'freehold estates'. During the life of the trust each item in the fund may be disposed of for value, for it is the subjacent wealth which is the object of the beneficiaries' rights.<sup>15</sup> Those rights are still evaluated (as the freehold estates have long been classified) in terms of the time for which they entitle their holder to the income stream produced by the fund. They may be separated into bundles and allocated to different people, alive or unborn (subject to the perpetuity rule). The determinable, conditional, or absolute life estates, entails, and fees, whether in possession, remainder or expectancy, may all be given away by their owners, or sold, mortgaged or settled, and each owner's creditors may reach his or her share.

### *Private Publicity*

Transferees of these interests protect their entitlements in the fund by giving notice to its trustees, so that the trust instrument becomes a private register of dealings in aggregates of wealth, which happens to be invested in individual objects. This simple and inexpensive machinery furnishes a sort of 'private publicity' whereby the transferees' rights come to the notice of, and so prevail against, all possible later acquirers of interests in the fund. Were it not so bad a joke, we might suggest that land as thing has its Grundbuch, but as wealth its Fundbook.

## *4 Some Hesitations and Refinements*

It would be preposterous to propose that the suggestions advanced above reveal some new and profounder vision of the law of property; no crudely dyadic system can capture the many complexities of a living law. It is obvious, for instance, that the notion has little to offer as regards the interrelation of private and public law in such fields as planning, public housing, and compulsory purchase. In order to guard against misunderstandings, then, it may be useful to

<sup>15</sup> Writing within a very different tradition, Kohler comes close to the view in the text: 'value rights have their own nature, quite different from the rights in things; they can be movable while the thing is immovable, and vice versa . . . It is in fact a general feature of a value right that it goes its own way, different from that of the substance right' (op cit above, n 2, 160-1).

attempt some slight refinements of the distinction proposed and to make a few general observations on its relation to some contemporary complexities, particularly as they appear in the English land law of the late 20th century.

### *Corporeal/Incorporeal*

The distinction between things as thing and things as wealth is not the same as that between tangible and intangible (or corporeal/incorporeal). True, it may be rare that an intangible thing will be held for its own sake (although the moral right of an author provides an example). But tangible objects can certainly be held for their own sake or as wealth.

### *Use Value/Exchange Value*

A related comment might well be that the scheme put forward is no more than a ponderous restatement of the distinction between use value and exchange value found in some modern English property texts.<sup>16</sup> All that can be said is that neither of these two terms seems quite to express the points made above. Exchange value suggests a momentary monetary assessment at the time of purchase or sale, whereas the notion of a thing functioning as wealth is intended to detach the act of receipt from that of expenditure and to suggest the enduring subjacent value stored in a fund, where any given thing is merely a transient and entirely replaceable investment. Use is not hard to understand, but use value is very problematic, and its relation with exchange value is quite obscure. 'The things which have the greatest value in use have frequently little or no value in exchange. Nothing is more useful than water; but it will purchase scarce anything; scarce any thing can be had in exchange for it. A diamond, on the contrary, has scarce any value in use; but a very great quantity of other goods may frequently be had in exchange for it'.<sup>17</sup> The problems raised so squarely by Adam Smith are beyond the present author's wit to solve.

### *A Functional Distinction*

After a careful examination of the use of the word, Honoré concludes that 'the investigation of things seems to peter out in a false trail'.<sup>18</sup> This paper's distinction between things as thing and things as wealth is cast in terms, not of the meaning of the word thing, nor of the physical nature of any given object, but of the function attributed to the object in the relation being considered. It may well have no part to play in the situation where one person is undisputed, absolute, and unlimited owner, for, as there are no competing interests to

<sup>16</sup> See for instance Kevin Gray, *Elements of Land Law* 375–6 (Butterworths, 1987).

<sup>17</sup> *The Wealth of Nations* i 31 (1904 edn OUP).

<sup>18</sup> 'Ownership' in A. G. Guest (ed), *Oxford Essays in Jurisprudence*, 107 at 130 (1968).

manage or protect, there is little point in asking why its owner holds it; in fact, the joy of being absolute owner is that one does not have to answer that kind of question. It is clear, of course, that some things by their very nature are more fitted for one function than the other: we would be unwise to invest our life savings in milk, and unlikely to hold government stock for pure enjoyment. It is very difficult, however, to think of anything which could never, for some eccentric in a liberal legal system, serve one or other of the purposes.<sup>19</sup>

As always, money is the mystery since it may be treated as an object or as a function.<sup>20</sup> It is tempting to say that, when considered as a measure, or a store, of value, money is never treated as thing, and that therefore currency held for its own sake would in that regard be chattel, not money. But this does not quite address one of the points made in this paper, namely that even chattels may be treated as things or as wealth. Thus I may hold the currency because I like to look at the coins and notes—treating them as thing—or because I expect their value to rise—treating them as wealth. Yet even here it seems we must distinguish: if their *price* rises, they are being treated as wealth but not as money; if, because of deflation, their *purchasing power* rises, they are money, pure and (anything but) simple.

### 5 *Some Modern English Land Law*

This final section offers a few observations on the relation between the theory here proposed and some concepts and problems found in today's land law in England. For reasons of space, the basic background knowledge is taken as read.

#### *Fee Simple Absolute in Possession*

The distinction between things as thing and as wealth is not the same as that between realty and personalty, nor as that between land and its purchase price. The contours may overlap, however, and the traditional common-law concepts can be found on both sides of the division. Thus 'fee simple absolute in possession' may denote a relation to land both as thing and simultaneously as wealth (the ordinary single absolute owner); or to the land as thing alone (where a trustee is tenant in fee simple absolute in possession, the trustee's creditors having no claim against the land's inherent value); or to the land as wealth alone (where it is held on a bare trust, with power to sell). In this last case we have two fees simple absolute in possession, that of the trustee (called 'legal') and that of the beneficiary (called 'equitable'); but only the latter and his or her creditors have access to the value of the land.

<sup>19</sup> It is within the author's personal knowledge that at least one shareholder in the New River Company Ltd declined to surrender his share certificates when the company was taken over in 1974. The holder preferred the things themselves, worthless as wealth but rich as symbol, to the expectation of dividends offered by the new shares in London Merchant Securities PLC.

<sup>20</sup> See Bernd von Maydell, *Geldschuld und Geldwert* 8–10 (Munich, 1974); Spiros Semitis, 'Bemerkungen zur rechtlichen Sonderstellung des Geldes' 159 *Archiv für die Zivilistische Praxis* 406 (1960). R. M. Goode, *Payment Obligations in Commercial and Financial Transactions* ch 1 (1984).

*Fee Simple in Remainder*

In modern English law, whether the traditional estates are classified as interests in land or in personalty may depend, not on their function, but on the management regime selected. For instance the tenant in fee simple absolute in remainder has, in that capacity, no relation to the thing as thing. But if at least some of the initial property be land, and if the system selected be that of the strict settlement, then the remainder is, for the purpose of dealing with it *inter vivos* or on death, deemed to be land even though at the time of the relevant disposition all the land has long been sold and the price invested entirely in securities.<sup>21</sup> If the initial management regime be that of the trust for sale, the fee is deemed to have been always personalty. In terms of the distinction drawn in this paper, however, and whether technically called realty or personalty, it is and always was an interest in things as wealth.

*Co-ownership*

It is a serious question whether, under current English law, the same can be said of all modern co-ownership entitlements. Certain recent English decisions of the House of Lords have—under the concept of ‘conversion’—taken the distinction more seriously, and applied it more rigorously than would the author of this paper. It would take too long to rehearse once more the details of this well-known litigation and legislation,<sup>22</sup> but the problem has arisen frequently where there are two creditors of a debtor who is registered proprietor (or paper owner) of a dwellinghouse.<sup>23</sup> The creditors are, firstly, the wife, lover, or some family member who has contributed to the acquisition of the house in such a way as to acquire a claim: as between this claimant and the registered proprietor, the claim is a real right—that of a co-owner—but, being unregistered, it is informal and is not, without more, effective *erga omnes*. The second creditor is a secured lender of the house, who has a claim backed by a (registered) real right. If the debtor’s general assets were sufficient to meet both creditors, no problem would arise. But as the only asset is the house, the two creditors’ real rights compete for priority.

The particular problem could be solved by a policy decision of the legislator. On the one hand, Parliament might agree that a lender’s interest is merely in the thing as wealth, whereas a family member’s interest is in the thing as a dwellinghouse, and so be led to lay down a clear if radical rule: that the real right of the creditor of a monetary obligation (the lender) is postponed to that of the creditor of an obligation in kind (the spouse etc). But a quite different policy

<sup>21</sup> Settled Land Act 1925 s 75(5), replacing SLA 1882 s 26(5).

<sup>22</sup> For a concise statement see (1989) Law Com No 188, ‘Transfer of Land: overreaching: beneficiaries in occupation’. References to more recent material may conveniently be found in Maudsley & Burn’s *Land Law: Cases and Materials* 271 ff (ed) E. H. Burn, Butterworths, 1992.

<sup>23</sup> The problem has also occurred where the title was not (and was not required to be) registered but, for the limited purposes of this paper, such cases may be ignored.



might also be adopted, which held that the burden of a black sheep should fall on its kin rather than on a stranger dealing for value and in good faith: and this would lead to an equally clear if quite contrary rule. The first would not solve a conflict between a family creditor and a good faith buyer (as opposed to lender) and, in any case, no sweeping solution has ever been adopted.

Consequently the courts are thrown back on the mechanics of the 1925 legislation and have felt compelled by the fundamentals of that system to hold that the answer may depend on the number of registered proprietors.<sup>24</sup> If the mortgage is effected by only one, the family creditor in occupation will win, her situation being described in terms of the thing itself: 'to describe the interests of spouses in a house jointly bought to be lived in as a matrimonial home as merely an interest in the proceeds of sale, or rents and profits until sale, is just a little unreal'.<sup>25</sup> But if the relevant disposition is made by two or more registered proprietors, the stranger wins, the interests of the family occupant being treated as wealth: 'The beneficiary's possession or occupation is no more than a method of enjoying in specie the rents and profits pending sale in which he is entitled to share . . .'.<sup>26</sup> The reasons cited are not, of course, the only ones which led their Lordships to their conclusions. But they do illustrate the somewhat extreme distinctions which, in the absence of modern legislative solution, the judges are forced to draw.<sup>27</sup>

### *Leases*

Like the fee, but in a rather different way, the lease is to be found on both sides of the division. If freehold owners treat their land as an investment they will often lease it. The tenant in turn may occupy the land and use it for its own sake, or may treat it as a source of wealth and sub-lease it. It is interesting to note in passing that, as a general principle, the numerous 20th-century statutes protecting farming, business, and residential tenants do so only for those who occupy.

### *Security Interests*

The final topic deserves a slightly more historical outline, for pledge seems to be the oldest of the institutions in which a person treats an object only and always in

<sup>24</sup> The Law of Property Act—speaking of course in terms of 'legal' and 'equitable' interests—provides that, in several common situations, a buyer of the former takes free of the latter whether he or she knows of them or not, provided the price is paid to the correct persons: s 2(1). Co-ownership is subjected to a trust for sale (ss 34,36) and the requisite number of sellers to receive this prophylactic payment is at least two (s 27).

<sup>25</sup> *Williams & Glynn's Bank Ltd v Boland* [1981] AC 487 per Lord Wilberforce at 507.

<sup>26</sup> *City of London BS v Flegg* [1988] AC 54 per Lord Oliver at 83. His Lordship also (at 82–3) cited with approval the words of Cross LJ that 'Even to hold that [tenants in common] have an interest in the land for a limited period . . . would be inconsistent with the trust for sale . . .' (*Irani Finance Ltd v Singh* [1971] Ch 59 at 80).

<sup>27</sup> There are a number of much deeper analyses of this problem. Outstanding examples are: Stuart Anderson, 'The Proper, Narrow Scope of Equitable Conversion in Land Law' (1984) 100 *LQR* 86; Charles Harpum, 'Overreaching, Trustees' Powers and the Reform of the 1925 Legislation' [1990] *CLJ* 277; J.W. Harris, 'Legal Doctrine and Interests in Land' in J. Eekelaar and J. Bell (eds), *Oxford Essays in Jurisprudence: third series* (1987) 167 esp. at 177–8.

terms of its value. The lender's interest is in repayment, and the thing pledged is entirely ancillary to that aim. Initially there is no right whatever to the thing as thing, for the Roman pledgee steals, who uses the thing itself.<sup>28</sup> If a power of sale be given to and exercised by the lender, the borrower is entitled to any excess over the loan, interest or costs. Thus the lender is confined to a relation with the thing as wealth: the pawnbroker who sells is still a money-lender, not a dealer in second-hand goods. Terms of the transaction (*lex commissoria*) whereby the pledgee might acquire ownership (and thereby treat the thing as thing) were forbidden by Constantine in AD 326. The only way the lender can acquire the thing to use at will is by a kind of foreclosure petition (*impetratio domini*) addressed to the Emperor.<sup>29</sup>

In its own way, and of course with its own vocabulary, English law has traversed much the same path. The pledge is both simple and safe for both parties. But, as possession is transferred, it suffers from the fact that the lender's interest is purely in the thing as wealth, yet the borrower is obliged to give up any claim to the thing as thing for the period during which he or she is enjoying the wealth—ie the loan—which it has procured. This necessary severing of the possessory link between owner and object may be psychologically effective in stimulating repayment and redemption, but may be economically inefficient in denying the borrower the use of the object.

In the mortgage transaction (*hypotheca*), the lender's interest remains monetary, and the powers are much the same as those of the pledgee described above. The borrower, however, is enabled both to charge the thing as security for an advance and thus to realize some of the capital embedded in it, and simultaneously to enjoy the thing as thing by retaining possession for himself or herself; the entitlement to possession may also be exploited (by user, lease, hire and the like) in order to earn income. Further refinements are common. The object of the charge may be a thing as thing or a thing as wealth. One can lend on the security of a charge on a fee simple absolute in possession (whether held by a single owner or by a trustee with the appropriate power to mortgage) and protect the right by entry in the Land Register. One may, just as prudently, lend on the security of a mortgage of a fee simple absolute in remainder, and protect the right by notice to the trustees, ie by a kind of entry in the fund register.

A final observation is to note that the oldest and most stable means of treating a thing as wealth is now the basis for one of the youngest and most mobile, by which first mortgages on English homes are transmuted into floating-rate bearer notes listed on the Luxembourg Stock Exchange: the magic of securitization.<sup>30</sup>

<sup>28</sup> J 4.1.6.

<sup>29</sup> C 8.34 & 35.

<sup>30</sup> For the modern UK system see David C. Bonsall (ed), *Securitisation* (Butterworths, 1990); Ellis Ferran, *Mortgage Securitisation* (Butterworths, 1992). The development almost justifies the exuberance of Kohler's conclusion that 'the creation of value rights alongside those in objects is one of the great achievements of humanity' (op cit above, n 2, 207).