The relationship between contract law and property law

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Abstract
It is commonly understood that contract law and property law are different areas of law which address different issues. This article departs from this conventional position in a rather radical way by arguing that the conclusion, amendment, and termination of contracts are in fact property law transactions and that the strict divide between contract law and property law is therefore not justifiable. It demonstrates theoretical and practical implications as contract law must be redefined and aligned with the general property law framework to avoid inconsistencies and thus the violation of the notion of formal rationality.

Keywords
property rights, personal rights, ownership of claims, claims as property, tort of conversion, formal rationality, OBG v Allan

Introduction
It is commonly understood that contract law and property law are different areas of law which address different issues.¹ This article departs from this conventional position in a rather radical way. It argues that the conclusion, amendment, and termination of contracts are in fact property law transactions and that the strict divide between contract law and property law is therefore not justifiable.² This has theoretical and practical implications as contract law must be

1. Eveline Ramaekers, ‘What is Property Law?’ (2017) 37 (3) Oxford Journal of Legal Studies 588, 591.
2. Cf John Tarrant, ‘Obligations as Property’ (2011) 34 (2) UNSW Law Journal 677, 695.

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redefined and aligned with the general property law framework to avoid the violation of the notion of formal rationality.

This article explores the relationship between contract law and property law from a purely doctrinal point of view. It does not aim to enter the rather broad jurisprudential discussion of the notions of contract and property and is not intended to develop new contract law or property law theories or discuss the related historical development. Furthermore, to allow for a focused discussion, the explanations concentrate on (tangible and intangible) personal property leaving aside issues of land law. Moreover, the review of the relationship between contract law and property law is conducted in the context of English law. Some comparative observations are, however, provided in the last section to put the analysis of English law into perspective.

The structure of this article is as follows: The part following this introductory section first establishes a terminological and doctrinal framework as a basis for the discussion in subsequent sections. The next part then explores the relationship between contract law and property law in general on the basis of the existing legal literature and case law. A special focus is on the question if and to what extent the scope of applicability of contract law also covers property law issues. The next section then considers practical implications of the findings. The final part concludes with a summary and general remarks among others on the likelihood of changes.

Terminology and doctrinal basics

General

Terminology in the areas of contract law and property law is very diverse and often used in an inconsistent manner. This section therefore briefly recaps related key terms and concepts of relevance for the theme of this article. In this regard, it is expressly not the goal to develop stipulative definitions, that is, to invent new terminology or to assess if certain terminology is preferable over others. This section rather aims to establish a terminological working basis for the purposes of (only) this article so as to allow for easy access to the line of arguments developed in subsequent sections. For the same reason and also to underpin the terminological discussion, this section also highlights some doctrinal core principles of relevance.

Contract law

Scope. Contract law is generally regarded as being broadly concerned with the circumstances in which agreements are legally binding. Thus it deals mainly with the two questions of agreement and legal effects or enforceability...but a number of other topics also call for discussion.

3. Cf e.g. Henry Smith, ‘Property as the Law of Things’, (2012) 125 Harvard Law Review 1691 arguing ‘at a metalevel, the bundle of rights [theory] is hardly a theory at property’ and developing a ‘modular theory of property’.
4. Cf George L. Gretton, ‘Ownership and its Objects’ (2007) 71 Rabels Zeitschrift für ausländisches und internationales Privatrecht (The Rabel Journal of Comparative and International Private Law) 803, 803–7.
5. Cf for a comprehensive comparative analysis of the concept of ownership, ibid, 807–31.
6. Cf Gretton 2007 (n 4), 833: ‘Lack of terms tends to lead to conceptual problems’.
7. Edwin Peel, Treitel – The Law of Contract (14th edn Thomson Reuters 2015) 6–7.
Three broad objectives which guide the intended, actual, and ideal functions of modern contract law are normally listed, namely to facilitate exchange, to protect the public interest and the parties themselves, and to provide a private dispute settlement mechanism.9 Contract law is generally regarded as part of the law of obligations,10 that is, the area of law which governs personal rights and corresponding duties between parties.11

**Contracts.** Contracts are seen as relationships consisting of promises which are enforceable by law.12 However, details are discussed controversially.13 Brownsword’s suggestion to treat a ‘contract’ as a cluster concept seems to capture most of the general viewpoints:

Cast in this form, we can say that a contract is an enforceable transaction; that contractual transactions are formally rooted in a promise (express, implied, imputed, or constructed); and that a promise will constitute a contract where it (i) is reciprocated by a requested act of performance; or (ii) is reciprocated by a promise; or (iii) is intended to, and does, induce reasonable reliance or expectation on the part of the promise; or (iv) is in a deed.14

**Contractual rights.** Contractual rights comprise those (main) rights which define the nature of a contract and are enforceable against the other contract party as well as other rights. For example, the right of the seller to demand the payment of the purchase price falls into the former, whereas the right to terminate the sales contract in particular situations as defined by law or by the parties falls into the latter category. To allow for a clear distinction, in this article, the former shall be called ‘contractual claims’, whereas the latter shall be called ‘secondary rights’.

Contractual claims are generally regarded as personal rights (rights *in personam*).15 It is the main feature of personal rights that—unlike property rights (rights *in rem*) – they can only be enforced against one particular other party (or parties) personally.16 In other words, the effect of contractual claims is not absolute, but only relative. The distinction between personal rights and property rights17 dates back to Roman law.

Roman law recognized two separate types of action—actions *in rem* and actions *in personam*. In the former action the claimant would assert ownership of a thing. In the latter action the claim would be directed primarily against the defendant personally. Whereas the Roman lawyer tended to think in terms of actions, his modern counterpart sees the law in terms of rights and duties. While modern law has retained the dichotomy of *in rem* and *in personam*, the distinction has been transposed to the concepts of rights and duties. The right *in rem* becomes a right in, to, or over, a thing which is available against persons generally and the right *in personam* one available against a specific person or persons.18

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9. Roger Brownsword, ‘General Considerations’ in Michael Furmston (ed), *The Law of Contract* (6th edn LexisNexis, London 2017) 23–25.
10. Richard Taylor and Damian Taylor, *Contract Law: Directions* (6th edn OUP, Oxford 2017) 5–6.
11. David Pearce, ‘Property and Contract: Where are we?’ in Alastair Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish Publishing, London 2004) 88.
12. British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd [1933] 2 KB 616.
13. Cf Brownsword (n 9), 11.
14. Ibid 10–11.
15. Mindy Chen-Wishart, *Contract Law* (5th edn OUP, Oxford 2015) 33.
16. Roy M. Goode, ‘Ownership and Obligation in Commercial Transactions’ (1987) 103 LQR 433.
17. See below, ‘Property Rights’.
18. Pearce (n 11), 88; cf Peter Birks, ‘The Roman Concept of Dominium and the Idea of Absolute Ownership’ (1985) 1 *ACTA JURIDICA* 1, 20.
Property law

Scope. Property law is commonly seen as being concerned with the legal relations (property rights) of (natural or legal) persons in relation to things.¹⁹ Property law can therefore be regarded as ‘a system consisting of a core of property rights surrounded by a framework of rules . . . that regulates the acquisition, registration, destruction and third party effects of those property rights’.²⁰ The law of England and Wales does of course not provide for a property law per se but distinguishes between land law and personal property law.²¹

Property. The term ‘property’ is used in many different and rather confusing ways.²² Sometimes it is meant to describe property rights,²³ normally ownership.²⁴ For others, the term ‘property’ is equivalent to ‘property law’.²⁵ Some authors write about ‘contracts’ as ‘property’.²⁶ Finally, ‘property’ is also used to describe the sum of assets of a person²⁷ or particular property items, that is, things ‘in which one can have property rights’.²⁸ This last understanding shall be adopted for the purposes of this article, that is, ‘property’ shall mean property items or a sum of property items.²⁹

Like most legal systems, English law distinguishes between real property (also called immovable property or realty)³⁰, that is, land, on the one hand, and personal property (also called personalty or movable property)³¹ on the other hand. English law also distinguishes between tangible (also called chattel or choses in possession) and intangible personal property (also called choses in action).³² It is now generally acknowledged that contractual claims are

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¹⁹. Fredrick H. Lawson and Bernard Rudden, *The Law of Property* (3rd rev edn OUP, Oxford 2002) 5.
²⁰. Ramaekers (n 1), 616.
²¹. Sue Farran and David Cabrelli, ‘Exploring the Interfaces between Contract Law and Property Law: A UK Comparative Approach’ (2006) 13 *Maastricht Journal of European and Comparative Law* 403, 422.
²². *Yanner v Eaton* (1999) 201 CLR 351, 388; Gretton 2007 (n 4), 835; George L. Gretton, ‘Owning Rights and Things’ (1997) 8 *Stellenbosch Law Review* 176, 178; for a similar lack of clarity in the US-American U.C.C. see Juliet M. Moringiello, False Categories in Commercial Law: The (Ir)Relevance of (In)Tangibility (2007) 35 *Florida State University Law Review* 119, 120.
²³. Cf Simon Douglas, ‘The Scope of Conversion: Property and Contract’ (2011) 74 *MLR* 329, 335; Sarah Worthington, ‘The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation’ (2007) *Texas International Law Journal* 917, 919; Gretton 2007 (n 4), 830
²⁴. Cf Douglas, ibid 337; Sukhninder Panesar, *General Principles of Property Law* (Longman, 2001) 7; Moringiello (n 22), 134; Smith (n 3), 1706, 1709.
²⁵. Ramaekers (n 1), 591; cf Tamar Frankel, ‘The Legal Infrastructure of Markets: The Role of Contract Law and Property Law’ (1993) 73 *Boston University Law Review*, 389, 392; also cf for examples of emerging ‘virtual property’ Joshua T. Fairfield, ‘Virtual Property’ (2005) 85 *Boston University Law Review* 1047, 1055-58; Joshua A. T. Fairfield, ‘Bitproperty’, (2015) 88 *Southern California Law Review* 805.
²⁶. Cf Pey-Woan Lee, ‘Inducing Breach of Contract, Conversion and Contract as Property’ (2009) 29(3) OJLS 511, 512.
²⁷. Andreas Rahmatian, ‘Intellectual Property and the Concept of Dematerialised Property’ in Susan Bright (ed), *Modern Studies in Property Law* (vol 6 Hart Publishing, Oxford; Portland 2001) 361, 363.
²⁸. Ramaekers (n 1), 591; cf Gretton 2007 (n 4), 832.
²⁹. For discussions of the similar terms ‘thing(s)’, ‘asset(s)’ and ‘patrimony’ see Henry Hansmann and Reiner Knaakman, ‘Property, Contract, and Verification: The *Numerus Clausus* Problem and the Divisibility of Rights’ (2002) 31 *Journal of Legal Studies* 378, 415–6; Smith (n 3), 1691; Gretton 2007 (n 4), 802, 832.
³⁰. *Armstrong DLW GmbH v Winnington Networks Ltd.* [2012] EWHC 10 (Ch) 171.
³¹. Roger J. Smith, *Property Law* (9th edn Pearson Longman, Harlow, Essex 2017) 8; Lawson and Rudden (n 19), 20; cf Gretton 2007 (n 4), 830.
³². Cf *Armstrong DLW GmbH v Winnington Networks Ltd.*, (n 25), 171.
one, but not the only type of intangible property. It is disputed, however, to what extent the protection of the law extends to contractual claims.

As mentioned above, contractual claims must be distinguished from secondary rights, such as the right to terminate a contract. Unlike contractual claims, secondary rights are normally not regarded as property. The rationale behind this point of view has, however, not received much attention in the past. In fact, one may consider if secondary rights should at least be treated, *mutatis mutandis*, like contractual claims from the property law point of view. Due to the limited scope of this article, this issue can, however, not be pursued further here. The following sections therefore focus on contractual claims only.

**Property rights.** Property rights (also called property interest(s) or proprietary rights) stand in the center of property law. Property rights as ‘rights *in rem*’ are generally regarded as potentially enforceable ‘against the whole world’. Property rights ‘include rights in the “thing” itself and in the fruits (profits) of the thing’. Details are again discussed widely and controversially on the basis of inconsistent terminology and without a clear delineation of different property rights.

Ownership (also called title or property or—for land—freehold) has been called ‘the ultimate property interest and the means by which we signify the person or persons with primary (but not necessarily exclusive) control of a thing’. However, the law also acknowledges other property rights, such as possession, servitudes and security rights as rights which can be exercised against everybody although with a reduced scope as compared with ownership.

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33. Stephen A. Smith, *Contract Theory* (OUP, Oxford 2004) 98.
34. *Lipkin Gorman v Karpnale Ltd.* [1991] 2 AC 548, 574 per Lord Goff; *Alloway v Phillips (Inspector of Taxes)* [1980] 1 WLR 888, 893; cf however, Moringiello (n 22), 134: ‘(W)e still lack an adequate vocabulary with which to describe intangible assets’; Gretton 1997 (n 22), 177; from the viewpoint of English language Gretton 2007 (n 4), 846.
35. See below, ‘Transferability as special feature of property rights?’, *Lumley v Gye* and *OBG Ltd. v Allan*.
36. See above, ‘Contractual Rights’.
37. Alison Clarke and Paul Kohler, *Property Law: Commentary and Materials* (CUP, Cambridge; New York 2005) 448–9.
38. Chen-Wishart (n 15), 26; for the equivalence of ‘property right’ and ‘estate’ see Moringiello (n 22), 136.
39. Chen-Wishart (n 15), 33.
40. Ben McFarlane, *The Structure of Property Law* (Hart Publishing, Oxford; Portland 2008) 132; for attempts to define property rights as differently cf Hansman and Kraakman (n 29), 374, 411–2.
41. Cf Lee (n 26), 515–6.
42. Chen-Wishart (n 15), 32.
43. Ramaekers (n 1), 591; Douglas (n 23), 336.
44. Douglas (n 23), 335.
45. See above, ‘Property’.
46. Clarke and Kohler (n 37), 180; also cf for the fact that ‘the civilian idea of ownership is alien to the common law tradition’, Gretton 2007 (n 4), 830.
47. Jonathan Hill, ‘The Proprietary Character of Possession’, in Elizabeth Cooke (ed) *Modern Studies in Property Law* (vol 11 Hart Publishing, Oxford; Portland 2001) 21, 24; Lawson and Rudden (n 19), 52.
48. Gretton 1997 (n 22), 177.
49. Cf McFarlane (n 40), 584; Lawson and Rudden (n 19), 127; Hansman and Kraakman (n 29), 403.
50. Different McFarlane (n 40), 140.
51. Leonard S. Sealy and Richard J.A Hooley, *Commercial Law – Text, Cases and Materials* (3rd edn OUP, London 2005) 67.
Finally, English law does not recognize that property rights themselves qualify as property. Property rights rather link property to particular persons, that is, the property right holders. In other words, property rights (only) carry an attributional function without being the object of such function. In contrast, if property rights were to qualify as property, the bizarre and illogical possibility of an indefinite stream of property rights related to property rights (e.g. ownership of ownership rights related to ownership rights) would have to be considered.

In particular: Property rights to contractual claims. The relationship of property rights on the one hand and intangible property on the other hand is not a theme which has attracted much attention or which has been an issue of judicial decisions. And yet, from a doctrinal point of view, it is of fundamental importance. If one accepts that property rights can only relate to tangible property, then any kind of intangible property would be excluded from being subject to property rights and arguably also from the scope of property law.

Some commentators have indeed concluded that property rights must be related to something which can be physically located. However, apart from references to the historical development, no other evidence or convincing arguments are presented to justify this position. Unlike in some other jurisdictions, supporting case law, statutory provisions, or at least a prevailing opinion in the English legal literature are not available.

In particular, in writings from civil law jurisdictions, one can often read that the category of ‘things’ only covers material objects. However, property rights relate in the first place to property and it should be irrelevant whether such property is material or immaterial in nature. Therefore, as long as rights qualify as property, there is no reason to exclude them from the scope of property rights and thus from the conventional property rights regime(s). On the contrary, it would be illogical to acknowledge that immaterial property, including contractual claims, qualifies as property on the one hand but can on the other hand not be subject to property rights.

One could of course consider if intangible property is subject to a separate property law regime. But, nobody has ever explained how such a different property law regime with a potentially different property rights concept should look like. Furthermore, why should such a separate property rights regime be needed and how would it be different from the existing one? Apart from the potential for systematic inconsistency, a separate property rights regime for intangible property would only make sense if the one that applies to tangible property was not suitable to cover also intangible property. Again, there is no evidence that this is the case.

52. Cf, however, taking expressly the opposite view from the civil law perspective Gretton 2007 (n 4), 834.
53. Cf Gretton 1997 (n 22), 177; Gretton 2007 (n 4), 827, 837.
54. Cf, however, the comprehensive comparative study by Gretton 2007 (n 4).
55. Gretton 1997 (n 22), 176, pointing out that most private law codes ‘are silent on the point’.
56. See the definition of property law, see above, ‘Scope’; cf for the US law perspective Morigiello (n 22), 136: ‘The contract of sale and deed for real property, however, convey not the things, the land and the building, but an estate in those things. The estate is itself an intangible right, the property right’.
57. Cf McFarlane (n 40), 132; Arianna Pretto-Sakman, Boundaries of Personal Property: Shares and Sub-Shares (Hart Publishing, Oxford; Portland 2005) 101; Douglas (n 23), 337.
58. From a comparative point cf Gretton 2007 (n 4), 807–31.
59. Cf the German Civil Code, Art. 90: ‘Only corporeal objects are things as defined by law’; Gretton 1997 (n 22), 178.
60. See above, ‘Property’.
61. Cf Lee (n 26), 514; Fairfield 2005 (n 25), 1089.
While it is obvious that intangible property such as contractual claims or intellectual property rights are governed by separate rules and regulations as compared, for example, with land law and personal property law, contractual claims should therefore fall within the general scope of applicability of property law as defined above.62

Gretton has brilliantly demonstrated that language is one of the main reasons for difficulties and inconsistencies in property law. ‘(T)he muddle is ingrained in our language’ as he put it.63 According to commonly used terminology, contractual claims are ‘held’ by the respective contract parties.64 Birks has (convincingly) called this kind of language ‘evasive’.65 ‘Holding’ in this regard describes the entitlement to and thus the legal attribution of a contractual claim to the respective contractual party. Without this legal attribution, contractual claims as abstract legal constructs would not even exist.66 More importantly, the legal attribution of a contractual claim to a contract party implies a right of such contract party in the respective contractual claim (as intangible property) which is prima facie valid against everybody. The thus existing legal relationships between contract parties and ‘their’ contractual claims should therefore qualify as property rights. In other words, ‘holding’ a contractual claim means having a property right in such contractual claim.

But, what is the nature of this property right? One may consider whether ‘holding’ a contractual claim means (actual) possession.67 Like other types of property rights, the notion of possession is not clearly defined by law resulting in inconsistent interpretations by legal literature and practice.68 What possession seems to imply is ‘that the person should have effective control of the thing, with the intention of excluding the rest of the world from it’.69

Contract parties do certainly have the required animus possidendi in relation to their contractual claims. However, it is difficult to imagine effective control over something that is (just) an abstract legal construct like a contractual claim or like other rights. Obviously, the notion of ‘effective control’ as well as the whole legal concept of possession as a ‘de facto relationship’70 was developed with tangible property types in mind. Possession does consequently not seem to describe appropriately the legal relationship of a contract party to her contractual claim.

The property right which grants absolute entitlement to property is ownership.71 In fact, one can often read that rights are ‘owned’ rather than just ‘held’. In particular, ‘ownership’ is normally used to describe the relationship of a person in regard to intellectual property rights.72 While this is much less the case in relation to contractual claims,73 there are neither terminological nor doctrinal reasons not to do so, that is, to treat tangible and intangible property

62. See above, ‘Scope’.
63. Gretton 1997 (n 22), 180; cf Gretton 2007 (n 4), 805, 835.
64. Cf Servaes Inc v Rafidin Bank [2012] UKSC 40, [2012] 1 All ER (Comm) 527, 539; also cf Gretton 1997 (n 22), 177.
65. Birks (n 18), 26; cf in contrast Gretton 1997 (n 22), 177
66. Douglas (n 23), 340.
67. Ibid 339.
68. Panesar (n 24), 127–8.
69. Clarke and Kohler (n 37), 261–2; Lee (n 26), 529.
70. Panesar (n 24), 111.
71. Clarke and Kohler, n 37 above, 180.
72. Cf e.g. AB v CD [2014] EWCA Civ 229, [2015] EWCA 771, 773; Shlosberg v Avonwick Holdings Ltd. [2017] Ch 210, 235.
73. Cf, however, PT Royal Bali Leisure v Hutchinson & Co [2004] EWHC 1014 (Ch) (para 100: ‘owned the contractual rights and benefits of the lessee’).
differently. Consequently, ‘holding’ a contractual claim (or any other intangible property) should mean ‘owning’ it. In his analysis of the Roman concept of ownership, Birks has pointed out that Gaius had already affirmed that the relationship between a man and his ius obligationis (ie a right in personam) was conceptually the same meum esse as between a man and his ius utendi fruendi or between a man and his horse: the difference lay in the asset owned, not in the relationship between the person and the asset.

As set out earlier in this section, it appears to be a rather natural conclusion that contractual claims as one type of property should also be subject to property rights. Nonetheless, the notion of ownership of contractual claims is not generally acknowledged. When considering the reasons for this obvious ignorance, it is first necessary to recall that a general consensus does not even exist in regard to the notion of property rights as such. It is not surprising that there is even less agreement and clarity in regard to property rights related to intangible property. Furthermore, the rather significant terminological confusion, which was also described above, complicates the acknowledgment that contractual claims can be owned like any other property types. The situation is exacerbated by the intangible nature of contractual claims which makes it difficult to envisage related property right features as this involves two (abstract and thus invisible) legal constructs, that is, the property right and the related intangible property. In other words, it is difficult to imagine the notion of invisible (property) rights in relation to (personal) rights which are invisible as well. Again, however, if one acknowledges that contractual rights qualify as property, then this is what needs to be done for the sake of doctrinal consistency.

There is of course a practical reason why property rights have hardly ever been discussed in relation to contractual claims. This reason becomes clear when comparing the situation of tangible and intangible property as far as the entitlement of (natural or legal) persons is concerned. The entitlement to tangible property is not automatic, that is, tangible property does not automatically belong to any particular person. Property law systems use the notion of property rights to fill the gap and to establish the missing link between property and persons. In other words, property rights attribute tangible property items as legal objects to persons as legal subjects. On the face of it, such a practical necessity does not exist in relation to contractual claims. Claims are artificial legal constructs in the form of creditor–debtor relationships. It lies in the nature of contractual claims (and other claims) that they always belong to a creditor. Without a creditor to whom a claim is attributed, there is not a claim. The entitlement of creditors to ‘their’ claims is a natural consequence of the nature of claims. Property rights are not needed in the first place to attribute claims to their owners. However, from the viewpoint

74. See, however, Lee (n 26), 524.
75. Cf (only) from the viewpoint of ordinary speech Gretton 2007 (n 4), 804.
76. Birks (n 18), 27; also cf ibid.: ‘Gaius’s scheme is elegant’.
77. Ibid 27; Gretton 2007 (n 4), 807.
78. See above, ‘Terminology and Doctrinal Basis’.
79. Cf Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd. [2011] UKSC 38, [2012] 1 AC 383, [2011] 3 WLR 521, [2012] 1 All ER 505; Gretton 2007 (n 4), 836–7.
80. Cf L.-C. Wolff, Zuwendungsrisiko und Restitutionsinteresse – Struktur und Rückabwicklung von Zuwendungen, dargestellt am Beispiel von Synallagma und Leistungskondiktion (Property Rights’ Transfer Risk and Restitutional
of doctrinal consistency, the picture is very different as explained in previous paragraphs. Property rights should therefore in the very same way be available in relation to contractual claims and other intangible property as in relation to tangible property. This approach is the only one that makes doctrinal sense and will therefore be adopted for the following discussion. As shown in subsequent sections, this approach also has significant practical implications and advantages.

Finally, it is important that even if one refuses to accept the notion of property rights in relation to contractual claims and other intangible property, it is necessary to acknowledge that contractual claims must still somehow be attributed to persons. This attribution, however it may be explained legally, is completely different from the creditor–debtor relationship arising out of a contractual claim. In other words, whether one accepts that the notion of property rights applies also in relation to contractual claims or whether one tries to explain why and how a claim belongs to a creditor for other reasons, either way the attribution of the claim to its holder is absolute, that is, it is valid ‘against the whole world’.

In particular: Gretton’s theses. One of the few academics who have addressed terminological and doctrinal issues discussed in this article comprehensively is George L. Gretton. Starting from the ‘Gaian scheme’, that is, the notion of corporeal and incorporeal things as set out in the Institutes of Justinian, and based on a comprehensive comparative analysis, his very inspiring article discusses ‘Ownership and its Objects’ with a focus on the questions if rights can be owned. Gretton’s discussion focuses on civil law rules, notions, and principles. However, three of his theses deserve special attention as they concern core features of this article. First, Gretton argues that ‘(w)ords such as “property”… should not be used to mean both things…and rights’. This of course differs from the terminology adopted in this article. More importantly, this would not be in line with English law which has now accepted that at least contractual claims qualify as property. Second, Gretton expressly suggests that ‘(r)ights cannot be owned’. To explain the relationship between a person and a right, he introduces the category ‘having’ as to be distinguished from ‘owning’. While this may correspond with commonly used language, the ‘having’ of rights is not an acknowledged legal category. Also, it remains unclear what the introduction of this new concept can add. As set out above, the concept of ownership can perfectly well explain the relationship between a person and a right, provided that the right qualifies as property such as contractual claims. Finally, Gretton concludes that

(t)here exists an area of law, property law, which deals with transfer of rights, with limited rights, and with the ranking of rights, which belongs to neither to the law of things nor to the law of obligations, but which applies to both.

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Interest—Structure and Revocation of the Transfer of Property Rights explained on the basis of the examples ‘Synallagma’ and ‘Leistungskondiktion’) (Duncker & Humblodt 1998) 41.

81. Inst. 2.2.
82. Gretton 2007 (n 4); also see Gretton 1997 (n 22).
83. Gretton 2007 (n 4), 831.
84. See above, ‘Property’.
85. Ibid.
86. Gretton 2007 (n 4), 831.
87. Gretton 2007 (n 4), 832, 847–8.
This assessment of the scope of property law, which allows him to consider a separate ‘law of things’, appears to be much narrower than the general understanding in English law.\(^88\) However, Gretton’s view also implies some kind of link between, not to say a convergence of, property law on the one hand and the law of obligations including contract law on the other hand. This is in line with conclusions reported in a later section of this article.\(^89\)

**Transfer of property rights.** Terminological and doctrinal uncertainties also exist in regard to the transfer of property rights.\(^90\) The law prescribes different preconditions to effectuate the transfer of property rights\(^91\) and the law may even disallow the transfer of property rights in certain circumstances or enable parties to do so contractually. Details are of no relevance for the theme of this article. It is sufficient to acknowledge that property rights are in principle transferable. Transfers of the ownership of contractual claims are normally called assignments.\(^92\)

**The relationship between contract law and property law**

**General**

On the basis of the terminological and doctrinal clarifications in previous sections, this section now seeks to explore the relationship between contract law and property law. It first conducts a review of the existing English legal literature as well as case law. Based on a critical analysis of the status quo, it then develops a new perspective on the interaction between contract law and property law. It shows that contract law does in fact function as a property law tool.

**Legal literature**

**Overview.** When assessing the academic discussion regarding the relationship between contract law and property law, it is first of all important to take note of the fact that this topic has not generated much discussion in the past. In particular, the relationship between contract law and property law is much less researched than, for example, the relationship between contract law and tort law.\(^93\) As far as statements on the interaction between contract law and property law are available at all, they may have to be regarded as by-products of work on other topics rather than focused assessments. It appears that it is often simply taken for granted that contract law and property law are different. As a result, the existing literature can only to a very limited extent serve as a solid basis to support convincing conclusions.

**Relative effect of contractual claims versus absolute effect of property rights.** Many textbooks fail to discuss the relationship between contract law and property law at all. Anson’s Law of Contract\(^94\) provides at least a short section on this issue. The authors argue—in line with the prevailing opinion\(^95\)—that the law of obligations, including contract law, must be distinguished

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\(^{88}\) See above, ‘Property law’.

\(^{89}\) See below, ‘“Property law features” of contract law’.

\(^{90}\) Lawson and Rudden (n 19), 57.

\(^{91}\) Clarke and Kohler (n 37), 448–9.

\(^{92}\) Douglas (n 23), 336.

\(^{93}\) Cf Henderson v Merrett Syndicates Ltd. [1994] 3 All ER 506.

\(^{94}\) Jack Beatson and Andrew Burrows and John Cartwright, Anson’s Law of Contract (30th edn OUP, Oxford 2016) 27.

\(^{95}\) Cf Frankel (n 25), 405.
from property law because property rights are generally valid against everybody while con-
tractual claims are personal and therefore valid only against a specific person or persons. 96
Others have argued along the same lines. 97

The difference between contractual claims on the one hand and property rights on the other
hand is indeed rather obvious and was already described above. 98 For example, as a result of the
conclusion of a sales contract regarding a car, the seller holds a claim for the purchase price
(only) against the buyer. Vice versa, the buyer can enforce her claim for delivery of the car
(only) against the seller. 99 In contrast, the seller’s (current) ownership of the car is indeed valid
‘against the whole world’.

It must be asked, however, if it is really helpful or even appropriate to compare contractual
claims with property rights. Contractual claims qualify as property and property rights as such
do not. As explained above, 100 property rights rather establish the link between property and
persons by attributing a certain interest in the former to the latter. Comparing property rights,
that is, rights in rem, with objects of property rights, that is, here rights in personam, is therefore
a comparison of apples with oranges. 101

To make this point clearer, consider, for example, the position of the seller in the above
example of a car sale. The seller is the owner of the car. However, upon conclusion of the sales
contract, the seller also owns the contractual claim for the payment of the purchase price
against the buyer. It is obvious that it does not make sense to compare the ownership of the car
with the contractual claim as it does not make sense to compare the ownership of the con-
tractual claim with the car. In contrast, what can and should be compared is the ownership of
the car with the ownership of the contractual claim on the one hand and the car with the
contractual claim as different types of property on the other hand. It is important that from a
doctrinal point of view there are prima facie no differences between the ownership of con-
tactual claims and ownership of other material and immaterial property types. 102 And, in this
regard, doctrinal differences can consequently not explain the need for any distinction between
contract law and property law. 103

The numerus clausus of property rights as special feature of property law?

The law of every jurisdiction defines a set of well-recognized forms that property rights can take
and burdens the creation of property rights that deviate from those conventional forms. In this
respect, property law differs from contract law, which generally leaves parties free to craft con-
tactual rights in any form they wish. 104

While the first part of this observation by Hansman and Kraakman is of course correct, the
conclusion in the second part seems unconvincing in the light of what has been discussed in

96. Ibid.
97. Amy Goymour, ‘Conversion of Contractual Rights’ (2011) Lloyd’s Maritime and Commercial Law Quarterly 67, 69.
98. See above, ‘Contractual Rights’ and ‘Property Rights’.
99. Cf Sale of Goods Act 1979, s 27.
100. See above, ‘Property Rights’.
101. Cf Birks (n 18), 27.
102. Cf Birks (n 18), 20.
103. Cf Worthington (n 23), 927; Birks (n 18), 20.
104. Hansman and Kraakman (n 29), 373.
previous sections. From the *numerus clausus* point of view, it is also not property rights and contractual rights which should be compared, but rather property rights related to contractual claims with property rights to other property types. In other words, the question is not if there is a *numerus clausus* of contractual rights, but if the *numerus clausus* of property rights also applies in relation to property rights in contractual claims. And, that is certainly the case.

**Transferability as special feature of property rights?** Some commentators have pointed out that property rights may be transferred by contract and in other ways. This does, however, also not explain any differences between property law and contract law.

Again, it would be inappropriate to compare the transferability of property rights with the transferability of contractual claims. What rather needs to be compared is the transferability of property rights regarding contractual claims with the transferability of property rights regarding other property types. The transfer modalities may indeed differ. For example, there may be form requirements or even transfer prohibitions depending on policy considerations. As a matter of principle, however, the ownership of contractual claims is transferable as a result of the fact that contractual claims qualify as property. And, from a doctrinal point of view, the transfer of property rights related to contractual claims is not unique, that is, regulatory considerations may or may not apply in the same way as in the case of property rights related to other types of property.

**Protection by tort law as special feature of property rights?** It has been pointed out that ‘property rights may be protected by the law of tort’. The point that property rights are protected by tort law does, however, not explain the distinction between property law and contract law. On the one hand, the *Lumley v Gye* tort treats contractual rights as a species of property which deserve special protection, not only by giving a right of action against the party who breaks his contract but by imposing secondary liability on a person who procures him to do so.

On the other hand, in *OBG Ltd. v Allan*, the majority of the Law Lords has rejected an extension of the tort of conversion also to contractual rights. At this point, it is sufficient to acknowledge that in *OBG Ltd. v Allan*, their Lordships were discussing contractual claims whereas, as concluded above, the focus of the discussion should rather be on property rights related to contractual claims or any other form of legal entitlement to the contractual claim. In other words, the question is if the scope of protection of tort law covers property rights related

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105. Worthington (n 23), 927.
106. See above, ‘Relative effect of contractual claims vs absolute effect of property rights’; cf Greton 2007 (n 4), 844.
107. Greton 2007 (n 4), 836.
108. Worthington (n 23), 927.
109. Lee (n 26), 528.
110. Ibid, 928; Birks (n 18), 20.
111. Eatson and Burrows (n 94), 27.
112. (1853) 2 El. and Bl. 216; 118 ER 749.
113. *OBG Ltd. v Allan* [2008] 1 AC 1 [27] per Lord Hoffmann; cf Worthington (n 23), 927; Hansman and Kraakman (n 29), 410.
114. Ibid.
to contractual claims as it covers property rights regarding other property types. Details are discussed below.\textsuperscript{115}

**Interaction and supplementary functions of contract law and property law.** In more recent times, some commentators have drawn attention to the interaction and supplementary functions of contract law and property law.\textsuperscript{116} Contract law is seen as a ‘generator or enabler of property law’.\textsuperscript{117} While it is of course correct that many property law transactions are based on contractual arrangements, it is important that authors who point to the functional proximity of contract law and property law do neither challenge the distinction between these two areas of law nor do they offer any reasons why they should be regarded as distinct.

**Case law**

**Overview.** Court decisions which expressly discuss the relationship between contract law and property law do not exist. This is not surprising in the light of the potentially rather abstract nature of this theme. However, two leading cases address the question if contractual claims are protected by tort law and may therefore allow for conclusions of relevance for the topic discussed in this article. These cases are analyzed in the following. Three points are important upfront:

First, due to their focus on tort law, it is prudent to take a cautious approach when drawing general conclusions regarding the relationship between contract law and property law from these cases. Second, specifics of tort law are outside the scope of this article and are in the following consequently only discussed to the extent relevant for the ultimate purposes of this article. Third, while both cases are highly disputed until today, they can be convincingly explained on the basis of the general notions outlined above. This demonstrates that a clear understanding of how contract law and property law relate to each other has immediate practical value in that it allows for a systematically coherent (re-)assessment of very specific legal questions.

**Lumley v Gye.** In *Lumley v Gye*,\textsuperscript{118} singer Johanna Wagner had entered into a contract with Benjamin Lumley to sing for 3 months at Her Majesty’s Theatre. Frederic Gye enticed her to breach the contract and rather to sing at the Covent Garden Theatre leased and operated by him for higher pay and afterwards also to ignore an injunction issued to bar her from singing there. Lumley sued Gye for damages. The court held that Lumley had a cause of action against Gye for maliciously\textsuperscript{119} interfering with the contract between Lumley and Wagner and Gye was required to pay damages. *Lumley v Gye* therefore ‘created accessory liability, dependent upon the primary wrongful act of the contracting party’.\textsuperscript{120}

\begin{itemize}
  \item \textsuperscript{115} See below, ‘*Lumley v Gye*’ and ‘*OBG Ltd. v Allan*’.
  \item \textsuperscript{116} Simon Whittaker, ‘Introductory’, in Hugh G. Beale (ed), *Chitty on Contracts, Vol. 1 General Principles* (32nd edn Thomson Reuters, London 2015) 3, 182; Fairfield 2005 (n 25), 1051 (‘traditionally balance each other’).
  \item \textsuperscript{117} Ibid.
  \item \textsuperscript{118} Gretton 2007 (n 4); also see Gretton 1997 (n 22); cf William Schofield, ‘The Principle of *Lumley v. Gye* and its Application’ (1888) 2 (1) Harvard Law Review 19.
  \item \textsuperscript{119} Cf Ibid 22–3.
  \item \textsuperscript{120} *OBG Ltd. v Allan* [2008] 1 AC 1, 20 per Lord Hoffmann.
\end{itemize}
The case has been broadly discussed and heavily criticized.\textsuperscript{121} \textit{Lumley v Gye} may be seen as reinforcing the understanding that intangible property is protected by tort law.\textsuperscript{122} It is noteworthy, however, that the judgment does not expressly explain what the tort of \textit{Lumley v Gye} is supposed to protect. Is it the contract, is it a contractual claim, that is, in this case Lumley’s claim, or is it anything else? While speculations about the court’s motives may not be all too helpful, it has to be noted that contracts as such do not qualify as property\textsuperscript{123} protected by tort law.\textsuperscript{124} Furthermore, Lumley’s contractual claim arising out of his contract with Wagner was a personal right. Personal rights only have relative effect.\textsuperscript{125} Lumley’s claim was therefore only enforceable against Wagner and not also against the third party Gye.\textsuperscript{126} As a result, if the \textit{Lumley v Gye} tort was to protect Lumley’s claim, then the notion of the relative effect of personal claims would be set aside thus leading to a systematic inconsistency with significant consequences.

In the late nineteenth century, Pollock had rejected the idea that in \textit{Lumley v Gye} ‘an element analogous to ownership or possession’ was violated resulting in liability under tort law.\textsuperscript{127} The same conclusion may have been drawn by Erle J:

\begin{quote}
It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right of property, whether real or personal, or to personal security: he who procures the wrong is the wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.\textsuperscript{128}
\end{quote}

Again, it appears pointless to speculate what this statement might exactly mean. However, it is important that Lumley owned the contractual claim against Wagner and Lumley’s ownership was absolute. Therefore, if the \textit{Lumley v Gye} tort was to protect Lumley’s ownership of the contractual claim against Gye, everything would fall in place. Lumley’s ownership was effective against ‘the whole world’ and any violation of Lumley’s ownership by Gye would be a wrong actionable under tort law. Furthermore, this conclusion would indeed reinforce the general understanding that contractual claims are property items.

\textbf{OBG Ltd. v Allan.} In \textit{OBG Ltd. v Allan},\textsuperscript{129} the defendants’ purported appointment as receivers of OBG under a floating charge was invalid. Unaware of the invalidity and therefore acting in good faith, the defendants took control of and sold OBG’s assets and undertaking. They also negotiated the settlement of various contractual claims against a reduction of the sums owed. OBG sued the receivers through its liquidator. The receivers accepted strict liability for trespass to the land and the market value of the chattels sold. The question eventually to be decided by

\begin{footnotesize}
\begin{enumerate}
\item[121.] See Stephen Waddams, \textit{Dimensions of Private Law – Categories and Concepts in Anglo-American Legal Reasoning} (CUP, Cambridge; New York 2003) 23-43, 23; Gerald H. L. Fridman, ‘Lumley v. Gye and the (Over?) Protection of Contracts’, in Jason W. Neyers and Richard Bronaugh and Stephen G. A. Pitel (eds), \textit{Exploring Contract Law} (Hart Publishing, Oxford; Portland 2009) 225; Lee (n 23), 520.
\item[122.] Cf Worthington (n 23), 927.
\item[123.] Cf, however, Lee (n 26), 512.
\item[124.] Cf Schofield (n 118), 21.
\item[125.] See above, ‘Contractual Rights’ and ‘Property Rights’.
\item[126.] This point was ‘vigorously argued’ by Gye’s counsel, see Waddams (n 122), 30.
\item[127.] Pollock quoted by Waddams (n 121), 31.
\item[128.] \textit{Lumley v Gye} (1853), 2 El. & Bl., 216, 232.
\item[129.] \textit{OBG Ltd. and another v Allan}, [2008] 1 AC 1. For the sake of reader-friendliness the short form \textit{OBG Ltd. v Allan} is used throughout this article.
\end{enumerate}
\end{footnotesize}
the House of Lords was whether the tort of conversion was to be applied in relation to OBG’s contractual claims of which the defendants had disposed.\(^{130}\) The House of Lords rejected this in a bare majority decision on the grounds set out by Lord Hoffmann:

Everyone agrees that conversion is historically a tort against a person’s interest in a chattel, being derived from the action of trover, which included a fictitious allegation that the plaintiff had lost the chattel and the defendant had found it.\(...\)(C)onversion is a tort of strict liability. Anyone who converts a chattel that is to say, does an act inconsistent with the rights of the owner, however innocent he may be, is liable for the loss caused which, if the chattel has not been recovered by the owner, will usually be the value of the goods.\(...\)(I)t would be an extraordinary step suddenly to extend the old tort of conversion to impose strict liability for pure economic loss on receivers who were appointed and acted in good faith.\(^{131}\)

Lord Walker and Lord Brown concurred.\(^{132}\) The dissenting minority views of Lord Nicholls of Birkenhead and Baroness Hale of Richmond have been and are still widely discussed. Lord Nicholls asked why the defendants should be strictly liable in relation to their unauthorized disposition of some types of property but not of others.\(^{133}\)

This distinction makes no sense. It lacks any rhyme or reason.\(...) With the expansion of commerce and the increase in dealings with intangible property this rule \(...) had to be relaxed.\(...) The reality is that English law does sometimes provide a remedy for the misappropriation, or conversion, of intangible rights. To that extent the tort of conversion has already jumped the gap between tangibles and intangibles.\(^{134}\)

Pursuant to Baroness Hale of Richmond

\(\text{(i)n a logical world, there would be} \ldots \text{a proprietary remedy for the ursurpation of all forms of property} \ldots \text{Once the law recognizes something as property, the law should extend a proprietary remedy to protect it‘).\)

Again it must be emphasized that it is not the purpose of this article to discuss tort law specifics of \emph{OBG Ltd. v Allan}.\(^{135}\) This case shall rather be assessed with a view to if and how contract law and property law relate to each other. As also already mentioned, the judgment does not provide a ready-to-use answer to this question. However, it allows two observations.

First, all the judges as well as commentators confirm the prevailing understanding that contractual claims qualify as property.\(^{136}\) Second, as in the \emph{Lumley v Gye} tort, it must be asked what exactly is protected by the tort of conversion. Is it the property of the claimant, is it the property right, that is, the entitlement of the claimant to his property, or is it

\(^{130}\) For the facts see ibid 18, 38 per Lord Hoffmann.
\(^{131}\) Ibid 42–3; cf, however, Fairfield 2005 (n 25), 1091: ‘(I)n the absence of statute, courts must decide disputes’.
\(^{132}\) Ibid 75, 92.
\(^{133}\) Ibid 67.
\(^{134}\) Ibid 68–9.
\(^{135}\) For the difficulty to define the tort of conversion see Dhirendra K. Srivastava, \emph{The Law of Tort in Hong Kong} (2nd edn, LexisNexis, Hong Kong 2005) 121.
\(^{136}\) Cf Lee (n 26), 512, 514.
something else? This question is important in particular from the viewpoint of doctrinal
consistency. If the tort of conversion was to protect property as such, then obviously a
distinction between material and immaterial property items can be made. Whether this
distinction mandates a different treatment in terms of the protection offered by tort law is
a different issue. In contrast, if the tort of conversion was to protect property rights, it
appears to be pointless to differentiate. Whether relating to material or immaterial prop-
erty, after all property rights are just property rights.

Neither the judgment in OBG Ltd. v Allan nor commentators seem to pay specific attention
to the scope of protection of the tort of conversion. Gregory Mitchell QC and Paul Greenwood
acting for the defendants had argued that

(c)onversion is a tort of strict liability designed to protect a person who owns, or is in, or is entitled
to, possession of tangible goods against all (other than purely in involuntary) acts, which in fact
exclude or usurp his proprietary or possessor rights in those goods.137

According to Lord Hoffmann ‘conversion is historically a tort against a person’s interest in a
chattel’.138 Lord Nichols’s speech implies that the tort of conversion is to protect ‘rights’139
while Lord Brown speaks about ‘physical possession’.140 Goymour has added that ‘… the tort
of conversion is the principal means whereby English law protects the ownership of chattels’.141

All these statements imply that the tort of conversion is not to protect particular property
items, but the right or—in the case of Lord Brown—a factual relationship related to those
items. It remains unclear whether there is any limitation to particular property rights, or if—to
use Lord Hoffmann’s words—every ‘interest’ in property is protected. Lee has pointedly
argued that there is no reason to limit the scope of applicability of the tort of conversion to
possession.142

Douglas has taken the contrarian view:

When we talk of the conversion of a chattel … it is not the right, but the thing to which the right
relates—the chattel—which the defendant deprives the claimant of. … the question whether the
claimant has been deprived of his chattel is a factual question, not a legal one.143

This is daring, but—with due respect—not convincing. If property as such would be pro-
tected by the tort of conversion, then everybody would be protected against conversion of any
property item. In contrast, it is only the entitlement, that is, the property right, which gives a
person a unique position in relation to such property item and which should therefore be
protected. In other words, if property rights embody the entitlement of a person to property,
then property rights require tort law protection. In perfect line with this understanding, the tort
of conversion has been regarded as performing ‘the property function of vindicatio’ thus

137. Ibid 12.
138. Ibid 42.
139. Ibid 69.
140. Ibid 92.
141. Goymour (n 97), 67; similar Tony Weir, An Introduction to Tort Law (2nd edn, OUP, Oxford; New York 2006)
165.
142. Lee (n 26), 529.
143. Douglas (n 23), 341; also see for US law Restatement (Second) of Torts §222A(1) (1965).
justifying that strict liability ‘which is really inevitable in property law, is carried over into . . . (the) tort remedy of conversion’.\footnote{144}

Furthermore, the dissenting Law Lords in \textit{OBG Ltd. v Allan} have correctly claimed that tort law should indeed provide equal protection to property rights relating to all property types unless convincing policy reasons justify any differential treatment.\footnote{145} Policy reasons of this kind have not been put forward and are in fact not available in \textit{OBG Ltd. v Allan}. The majority of their Lordships rather referred to the historical scope of protection of the tort of conversion which indeed only covered actual control of physical things.\footnote{146} But, historical considerations can only be a starting point. Legal innovation would be hindered forever if the status quo was written in stone.

The situation would be different if the tort of conversion had to be limited to the protection of property rights to material property because property rights to contractual claims cannot be converted. Douglas has indeed argued along these lines.\footnote{147} The case of \textit{OBG Ltd. v Allan} shows, however, that this assumption cannot be correct. Cases where property rights related to contractual rights are violated may be rare,\footnote{148} but they can and they do exist.

\textbf{Contract law as property law tool?}

\textit{Overview.} Previous sections have highlighted the prevailing understanding that contract law and property law are different areas of law governing different issues. As demonstrated, the arguments in support of this viewpoint do not hold water or—in the case of judicial decisions—do not really address the issue.\footnote{149} Furthermore, it is nowadays common understanding that contractual claims are items of property.\footnote{150} As argued above,\footnote{151} contractual claims are also subject to property rights. If contract law regulates the creation, amendment, and termination of contractual claims and if contractual claims qualify as property, one must ask if—contrary to the common perception—contract law serves property law functions. This is explored in the following.

\textit{‘Property law features’ of contract law.} To test the hypothesis that contract law carries property law functions, consider the following:

The ownership of contractual claims can be assigned to third parties subject to the applicable (personal) property law rules\footnote{152} and the rules of equity.\footnote{153} In fact, the sale and assignment of the ownership of claims arising out of contracts of sale in the form of factoring or—if the debt is expressed in a negotiable instrument and sold on a nonrecourse basis—in the form of forfeiting

\footnote{144. Weir (n 141), 166; from the perspective of Roman law cf Birks (n 18), 5: ‘The name of the action in which the plaintiff’s claim rested on ownership was the “vindicatio”’; cf different Gretton 2007, (n 4), 813: ‘... such protection of personal rights is not a necessary phenomenon: the system of personal rights can exist without it’.
145. Lee (n 26), 518, 527; cf AG v Blake (Jonathan Cape Ltd Third Party) [2001] 1 AC 268, 283.
146. Cf Lee (n 26), 525.
147. Douglas (n 23), 340.
148. Lee (n 26), 531; Worthington (n 23), 927.
149. See above, ‘Case Law’.
150. See above, ‘Property’.
151. See above, ‘In particular: property rights to contractual claims’.
152. Whittaker (n 116), 182.
153. See above, ‘Transfer of property rights’.
}
are common trade financing tools.\footnote{Cf MBNA Europe Bank Ltd. v Revenue and Customs Commissioner [2006] EWHC 2326 (Ch), [2006] STC 2089, 2100.} Upon the successful assignment, the assigned contractual claim is owned by and qualifies as property of the assignee for accounting purposes.\footnote{Cf Donald E. Kieso and Jerry J. Weygandt, Intermediate Accounting (4th edn, Wiley, New York 1983) 299; Lawson and Rudden (n 19), 37; Gretton 2007 (n 4), 804, 835; Gretton 1997 (n 22), 178.} If the assignment was made in fulfilment of some kind of undertaking, for example, arising out a factoring arrangement, then prior to the assignment the prospective assignee only had a (personal) right to demand the assignment.\footnote{Gretton 1997 (n 22), 178.} This does not mean, however, that the assignment then converts the personal right into a property right.\footnote{Cf ibid.} It is rather the (preexisting) ownership of the contractual claim which is transferred by the assignor to the assignee while the assignment implies at the same time fulfilment and thus extinction of the personal right to demand the assignment.

Interestingly, the conclusion of new contracts leads to identical results. Upon the conclusion of a contract, new contractual claims are held by and are in principle property of the respective contract parties, that is, they are owned by them.\footnote{Cf above, ‘In particular: property rights to contractual claims’.} In the example of a sales contract, the conclusion of such contract gives the buyer the claim for delivery of the sold subject matter and it gives the seller the claim for the payment of the purchase price.\footnote{Sale of Goods Act 1979, s 27.} The conclusion of the sales contract also establishes ownership of the buyer and the seller in relation to their respective contractual claims. These contractual claims qualify as property and can as a matter of principle be sold on and assigned to other parties.\footnote{See above, ‘Property Law’.} The contractual claims and the related property rights which attribute these contractual claims to the respective contract parties are on the one hand distinct. On the other hand, they are both created simultaneously through the conclusion of the contract. It is at this point that contract law and property law converge.

The only difference between the assignment of contractual claims and the creation of contractual claims by way of the conclusion of new contracts is that the former preexisted while the latter did not. In other words, once created under contract law for another party, the very same claim can be transferred to third parties, now, however, under property law rules or the rules of equity.

\textit{Mutatis mutandis}, if a contract is terminated, the contractual claims as well as the ownership rights to these contractual claims are terminated. If a contract is amended, property rights to the respective contractual claims may be amended as well. In other words, contract law governs the conclusion, amendment, and termination of property rights to a particular species of property, namely contractual claims. The conclusion, amendment, and termination of property rights, however, falls within the scope of and is thus regulated by property law.\footnote{Cf ibid.} The acknowledgment that contractual claims are subject to property rights therefore also implies that the conclusion, amendment, and termination of contracts are property law transactions as they directly affect property rights. It therefore has to be concluded that contract law has significant property law implications.

\begin{footnotesize}
\footnote{Cf MBNA Europe Bank Ltd. v Revenue and Customs Commissioner [2006] EWHC 2326 (Ch), [2006] STC 2089, 2100.}
\footnote{Cf Donald E. Kieso and Jerry J. Weygandt, Intermediate Accounting (4th edn, Wiley, New York 1983) 299; Lawson and Rudden (n 19), 37; Gretton 2007 (n 4), 804, 835; Gretton 1997 (n 22), 178.}
\footnote{Gretton 1997 (n 22), 178.}
\footnote{Cf ibid.}
\footnote{Cf above, ‘In particular: property rights to contractual claims’.}
\footnote{Sale of Goods Act 1979, s 27.}
\footnote{See above, ‘Property Law’.}
\footnote{See above, ‘Scope’.
}
Why does this conclusion seem somewhat surprising? First, as already discussed above, the immaterial nature of contractual claims conceals that contractual claims must be somehow legally attributed to respective contract parties. It was argued above that this attribution is in fact established like in the case of any other property type through property rights. Second, modern legal literature emphasizes the consensual nature of contracts. This again makes it difficult to envisage that parties are creating contractual claims and related property rights for each other when entering into contracts. In contrast, the property law features of contract law do become much clearer if one considers contracts as exchanges of promises as each contract party is giving something to the other.

Any independent function left for contract law? The acknowledgment that the establishment, termination, and amendment of contractual claims and related property rights through the conclusion of contracts are property law transactions provokes the question if contract law has additional regulatory functions and goals which distinguish its scope of applicability from property law regimes and which justify any separate existence of contract law. These special functions and goals do of course exist.

The scope of contract law is not limited to the property law features as described in the previous section. In contrast, contract law also regulates among other things the contents of contractual claims, including their relativity. Here contract law has to pursue special regulatory goals which do not overlap with those of property law.

Furthermore, contract law is generally regarded as part of the law of obligations and contracts are consequently seen as relationships of enforceable promises. But, there are also contractual arrangements governed by contract law which do not exactly meet this definition. Contracts contained in deeds which accomplish the transfer of an interest or right or confirm some act through which an interest or right has been transferred are examples in this regard. Here the contract is instrumental for or confirms the transfer of property rights but does not in itself create, amend, or terminate property rights. Contracts of this kind are (and have to be) regulated by contract law without qualifying themselves as property transactions. In this respect, the scope of contract law therefore exceeds the property law functions described in previous sections. Hence, contract law has important independent regulatory goals as compared with property law.

Practical consequences. As indicated above, the implications of the acknowledgment of the property law features of contract law could be rather significant. If contract law carries property law functions, then contract law rules including the underlying legal doctrines and policy decisions must be compared with other property rules, concepts, and doctrines. Any difference must be justifiable or otherwise constitutes a violation of the notion of

162. See above, ‘In particular: property rights to contractual claims’.
163. Ibid.
164. Cf Brownsword (n 9), 3–4.
165. Cf ibid.; Chen-Wishart (n 15), 19–20.
166. See above, ‘Contractual Rights’; cf Gretton 2007 (n 4), 844–5.
167. See above, ‘Contracts’.
168. Whittaker (n 116), 99; Knight Sugar Co v Alberta Railway & Irrigation Co [1938] 1 All ER 266, 269; Vansittart v Vansittart (1858) 2 De Gex & Jones 249, 255.
169. Whittaker (n 116), 99.
formal rationality, that is, of the requirement that legal doctrine should not be contra-
dictory. The above discussion of OBG Ltd. v Allan is a very good example in this regard: the focus on the distinction between tangible property and intangible property in the form of contractual claims as far as the scope of applicability of the tort of conversion is concerned is misleading. The focus should be on property rights. The distinction between property rights to tangible property on the one hand and intangible property on the other hand is only justifiable if supported by sound policy reasons. As shown, reasons of this kind are not available.

The consequences of the acknowledgment of the property law features of contract law are of course not limited to OBG Ltd. v Allan. In fact, if one buys into the notion of formal rationality, every aspect of contract law would have to be benchmarked against property law standards and vice versa.

**The comparative perspective: German and Austrian law**

*Overview.* As explained at the outset, this article focusses on English law. However, to put the findings into perspective, this section now highlights the relationship between contract law and property law in Germany and Austria. Reference is made to Germany not only because of the German legal system is one of the main representatives of the civil law legal tradition but also because other commentators have already drawn attention to some of the issues in question. English law is in the following also benchmarked against Austrian law because Austrian law is special in that it expressly acknowledges that contractual claims can be subject to property rights, that is, it addresses one of the core issues of this article.

**German law.** The basis of Germany’s private law is the German Civil Code of 1900 as subsequently revised many times, supplemented by other laws and regulations and interpreted by court decisions and academic writings. Contract law rules are set out in the First Book (General Part) and the Second Book (Law of Obligations) of the Civil Code. The Civil Code does not provide for one single section which comprehensively addresses all aspects of property law. In contrast, the Third Book (Law of Things) only covers movable and immovable tangible property. The First Book (General Part) adds some ‘basic legal concepts’. Rules regarding intangible property are scattered in different laws and regulations. The German Civil Code regulates assignments in its Second Book (Law of Obligations). This has been called an obvious systematic flaw, because assignments are acknowledged to be property

170. Brownsword (n 9), 224; also cf for different domains of contract law Roskill LJ in Cehave NV v Bremer Handelsgesellschaft GmbH, [1975] 3 All ER 739, 756, [1976] QB 44, 71.
171. See above, ‘OBG Ltd. v Allan’.
172. See above, ‘Introduction’.
173. Cf Marieke Oderkerk, ‘The Importance of Context: Selecting Legal Systems in Comparative Legal Research’ (2001) XLVIII Netherlands International Law Review 293.
174. Cf Ramaekers (n 1), 595.
175. Unofficial English translation <https://www.gesetze-im-internet.de/englisch_bgb/index.html>.
176. Cf Christian Hertel and Halmut Wicke, ‘Real Property in the European Union – National Report Germany’ 4-6/47. <https://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Germany.PDF>.
177. Ibid 4.
law transactions.\textsuperscript{178} Rules regarding other types of intangible property, such as security rights\textsuperscript{179} and intellectual property rights,\textsuperscript{180} are scattered in the \textit{Civil Code} and other laws and regulations. Similar to English law, German law therefore does not provide one systematic and comprehensive property law system but different regulatory subsystems addressing different property types which together form property law.\textsuperscript{181}

German law applies the ‘principle of separation’ and the ‘principle of abstraction’.\textsuperscript{182} The principle of separation implies that acts which establish rights and obligations, such as contracts of sale, must be strictly distinguished from acts performed in fulfilment of these acts, for example, the transfer of ownership and possession of a sold thing by the seller in fulfilment of a contract of sale.\textsuperscript{183} Article 433 of the German \textit{Civil Code}\textsuperscript{184} embodies this separation:

1. By the contract of sale, the seller of a thing is bound to deliver the thing and to transfer ownership of the thing to the buyer. The seller is bound to transfer the thing to the buyer free from material and legal defects.
2. The purchaser is bound to pay to the seller the purchase price agreed upon and to take delivery of the thing purchased.

Article 433 (1) of the German \textit{Civil Code} establishes the contractual right of the buyer to request the seller to deliver the sold thing and transfer ownership. Article 433 (2) establishes the right of the seller to request the buyer to pay the purchase price, that is, to request transfer of ownership and possession of the price money to the seller.

Article 929 of the German \textit{Civil Code}, located in the Third Book (Law of Things) of the \textit{Civil Code}, then explains what is required in fulfilment of these obligations of the seller and the buyer in relation to movable property: ‘In order to transfer ownership of a movable thing it is required that the owner delivers the thing to the transferee and both parties agree that ownership shall be transferred’.\textsuperscript{185}

The agreement required under Article 929 (the so-called real act\textsuperscript{186}) is separate from the underlying contract of sale addressed by Article 433. The contents of the former only relate to the transfer of ownership, while the latter addresses the establishment of the parties’ respective rights and obligations. This also means that for the completion of a sales transaction German law requires (at least) three contracts, that is, (i) the contract of sale creating rights and obligations of buyer and seller, (ii) the contract regarding the transfer of ownership of the sold thing, and (iii) the contract regarding the transfer of ownership of the purchase price as movable

\begin{thebibliography}{99}
\bibitem{1} L.-C. Wolff, ‘Assignment Agreements under English Law: Lost between Contract and Property Law?’ (2005) \textit{Journal of Business Law} 474, 484.
\bibitem{2} Cf Winfried M. Carli and Esther Jansen and Matthias Weissinger, ‘Lending and taking security in Germany’ (1 March 2015). <https://uk.practicallaw.thomsonreuters.com/8-501-2739?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1>.
\bibitem{3} Cf World Intellectual Property Organization. <http://www.wipo.int/wipolex/en/profile.jsp?code=DE>.
\bibitem{4} In German: \textit{Vermögensrecht}.
\bibitem{5} Wolff 2005 (n 178), 485–6.
\bibitem{6} Cf for the following L.-C. Wolff, \textit{The Law of Cross-border Business Transactions – Principles, Concepts, Skills} (2nd edn Alphen aan den Rijn 2017) 211–213.
\bibitem{7} Unofficial English translation. <http://www.gesetze-im-internet.de/englisch_bgb/>.
\bibitem{8} For the transfer of real property under German law see Art 873 para 1 sentence 1 with Art 925 para 1 sentence 1 of the German \textit{Civil Code}.
\bibitem{9} In German: \textit{Verfügungsgeschäft}.
\end{thebibliography}
property from the buyer to the seller.\textsuperscript{187} In practice, these contracts are of course often concluded impliedly without the parties even being aware of the legal implications of their actions. But, German legal doctrine insists that the different acts are to be distinguished.\textsuperscript{188}

The German ‘principle of separation’ is supplemented by the ‘principle of abstraction’ according to which the legal acts that create rights and obligations and the acts in fulfillment of the obligations are not only separate but also legally independent from each other.\textsuperscript{189} For example, the validity of a contract of sale does not depend on the validity of the contracts concluded to fulfill the obligations it has created. Vice versa, the validity of any legal act to fulfill a contractual obligation, such as an agreement regarding the transfer of ownership according to Article 929 of the German \textit{Civil Code}, does not depend on the validity of any underlying contract. In the case of, for example, an invalid or nonexistent underlying contract of sale, there would of course be neither a contractual obligation of the seller to transfer ownership of the sold thing nor a contractual obligation of the buyer to pay the purchase price, that is, in both cases any ownership transfer would be unjustified. German law therefore grants the transferor the right to request the retransfer under the law of unjust enrichment.\textsuperscript{190}

The German principles of separation and abstraction have often been criticized for being artificial and hard to understand for nonlawyers.\textsuperscript{191} Furthermore, it has been pointed out that the position of a transferor is at risk if a loss of ownership is possible without a valid underlying obligation to transfer. Similarly, commentators have argued that it is not justifiable that a seller can validly dispose of her property until the property transfer is effectuated even if an effective sales contract is already in place.\textsuperscript{192} Nevertheless, the principles of separation and abstraction dominate German private law until today.

Turning back to the main topic of this article, Ramaekers has observed that German law employs the so-called \textit{Trennungsprinzip} (principle of separation) to indicate a strict separation between the law of obligations and property law and is therefore one of the legal systems that most clearly and explicitly draws the line between these two areas of law.\textsuperscript{193}

On the face of it this statement seems to be convincing. However, a closer look reveals that this does not mean that the conclusions developed above in relation to English law do not in the very same way also apply to German law.\textsuperscript{194} The reasons are as follows:

As Ramaekers has correctly pointed out, like English law German law also distinguishes between contract law and property law. The German \textit{Civil Code} separates the sections dealing with contract issues as part of the law of obligations from the section addressing legal issues related to tangible property.\textsuperscript{195} As far as intangible property is concerned, the distinction is less visible due to the fact that rules and regulations are set out in very different laws and legislations as explained at the outset of this section.

\textsuperscript{187} Wolff 2017 (n 183), 211–3.
\textsuperscript{188} In German: \textit{Trennungsprinzip}.
\textsuperscript{189} In German: \textit{Abstraktionsprinzip}.
\textsuperscript{190} The German \textit{Civil Code}, Arts 812 and the subsequent articles.
\textsuperscript{191} Cf Wolff 2005 (n 178), 486.
\textsuperscript{192} Ibid.
\textsuperscript{193} Ramaekers (n 1), 595; Hertel and Wicke (n 176), 4/47.
\textsuperscript{194} For the following see Wolff 1998 (n 80), 38–41.
\textsuperscript{195} Ramaekers (n 1), 609.
As under English law also German law treats contractual claims as property. And, also German law fails to acknowledge that intangible property, including contractual claims, can be owned.\textsuperscript{196} The wording of Article 398 of the German \textit{Civil Code} shows this clearly when it addresses the assignment of claims rather than the transfer of the ownership of claims.:\textsuperscript{197} ‘A claim may be transferred by the creditor to another person by contract with that person (assignment). On conclusion of the contract the assignee takes the place of the assignor’.

Furthermore, like English law also German law fails to act upon the property law functions of contract law.\textsuperscript{198} This is all the more remarkable because contrary to the viewpoint of English commentators, the prevailing academic opinion in Germany does indeed acknowledge that the original creation of contractual claims by way of conclusion of contracts is an act of disposal of property.\textsuperscript{199}

It is one major difference between German law and English law that the core of German private law, including contract law and property law, is set out in the German \textit{Civil Code}. As outlined at the beginning of this section and disregarding the doctrinal inconsistencies mentioned above, as a matter of principle, the German \textit{Civil Code} provides different sections for the law of obligations and the law of things, respectively. This statutory divide may make it even more difficult to overcome the conventional understanding that contract law and property law are different areas which address different issues. In other words, under German law, the (statutory) form appears to dominate (doctrinal) substance.

\textit{Austrian law}. Interestingly, in contrast to English and German law, Austrian law expressly acknowledges possession and ownership of claims.\textsuperscript{200}

Austrian private law is based on the \textit{General Civil Code} which had originally entered into force in 1811.\textsuperscript{201} Article 285 of the Austrian \textit{General Civil Code} adopts a definition of ‘things’ which includes tangible and intangible property.\textsuperscript{202} Article 312 sentence 2 then addresses the acquisition of the possession of rights. Pursuant to Article 353 of the \textit{General Civil Code} as a matter of principle ownership is possible in relation to all types of (tangible and intangible)

\begin{footnotes}
\item[196] Cf in contrast the Prussian Civil Code of 1794, German version. \url{<http://www.koeablergerhard.de/Fontes/ALR1fuerdiepreussischenStaaten1794teil1.htm>}, I 11 §376 (‘Eigenthum seines Rechts’ – ownership of ones right’); Gretton 2007 (n 4), 821.
\item[197] Cf Wolff 2005 (n 178), 484.
\item[198] See, however, Ramaekers (n 1), 595.
\item[199] See e.g. Werner Flume, \textit{Allgemeiner Teil des Bürgerlichen Rechts II – Das Rechtsgeschäft} (General Part of Civil Law – The Legal Act) (4th edn Springer, Berlin Heidelberg 1992) 152; Volker Beuthien, \textit{Zweckerreichung und Zweckstörung im Schuldverhältnis} (Accomplishment of Objectives and Disturbance of Objectives in the Context of Contractual Obligations) (Mohr, 1969) 285.
\item[200] Cf for the following Cf for the following Wolff 1998 (n 80), 40; Gretton 2007 (n 4), 809.
\item[201] For an English version see Peter Eschig and Erika Pircher-Eschig, \textit{Das österreichische ABGB – The Austrian Civil Code: Deutsch-Englisch} (LexisNexis ARD ORAC, 2013).
\item[202] Cf Wilhelm Brauneder, ‘The “First” European Codification of Private Law: The ABGB’ (2012), \url{<https://hrcak.srce.hr/file/171860>}.
\item[203] Cf Helmut Koziol and Rudolf Welser, \textit{Grundriss des bürgerlichen Rechts, Band II, Sachenrecht, Familienrecht, Erbrecht} (Compendium of Civil Law, Vol. II, Law of Things, Family Law, Succession Law) (10th edn Manzsche Verlags- und Universitätsbuchhandlung, 1996) 6; Christoph Faistenberger, Heinz Barta and Bernhard Ecker, \textit{österreichisches Schuldrecht – Allgemeiner Teil} (Austrian Law of Obligations – General Part) (2nd edn Springer, 1985) 177.
\end{footnotes}
things, that is, also in relation to contractual claims: ‘All that belongs to somebody, all his
corporeal and incorporeal things, are called his ownership’.204

The General Civil Code provides for many exemptions from these general principles. In
particular, the acquisition and transfer of the ownership of claims does not follow the general
rules regarding ownership and ownership transfers.205 In contrast, the General Civil Code
provides for a special section on assignments in Articles 1392 to 1399. The basic rule of Article
1392 reads as follows:

If a claim is transferred from one to another person and is accepted by the latter, then the right is
changed with a new creditor. Such an act is called assignment (cession), and can be concluded with
or without consideration.

Article 1392 is obviously not in line with the principles set out in Articles 285 and 353
because Article 1392 does not relate to the assignment of the ownership of claims as envisaged
by Articles 353 and 285, but of the claim itself.206 This is the same doctrinally questionable
approach also taken by Article 398 of the German Civil Code.207

Three conclusions can be drawn from this brief look at Austrian private law. First, Austrian
law shows that the notion of property rights related to contractual claims (and other intangible
property) is not inconceivable. Second, the doctrinal ambiguities identified above in the context
of English208 and German law209 also feature prominently in Austrian law. Third, the difficulty
of conceptualizing property rights which are related to immaterial property thus hindering the
pursuit of doctrinal consistency does not seem to be a phenomenon of a particular legal system
or legal tradition.

Summary and final remarks

Following the introductory remarks, the second part of this article showed that inconsistent and
partly blurred terminology persists in English contract and property law. Differences in ter-
minalogy do of course not necessarily imply differences in terms of substance.210 More
importantly, normally there is no right or wrong in regard to the use of particular terminology.
However, a clear terminological framework is needed to ensure a focused discussion and to
facilitate the unambiguous analyses of any area of law.211 For the purpose of developing such a
framework for this article, underlying doctrinal principles had to be discussed as well. It was
one of the main conclusions in this regard that contractual claims should be subject to property
rights like any other type of property. As a result, contractual claims can be owned and the
ownership of contractual claims can be assigned to others.212

204. For similar statutory concepts in the Netherlands and Scotland cf Gretton 2007 (n 4), 808–9, 822–3, 826; also cf
for the USA ibid 829: ‘Not only is ownership a concept that is not much used: it is regarded as a primitive, pre-
legal concept’.; for the California Civil Code Gretton 1997 (n 22), 176.

205. Koziol and Welser (n 203), 7, 48.

206. Wolff 1998 (n 80), 40.

207. See above, ‘German Law’.

208. See above, ‘Terminology and Doctrinal Basis’.

209. See above, ‘German Law’.

210. Worthington (n 23), 924.

211. Cf ibid 919; Smith (n 3), 1712; Gretton 2007 (n 4), 833; Hansman and Kraakman (n 29), 379.

212. See above, ‘In particular: property rights to contractual claims’.
The third part of this article then turned to the main theme, that is, the relationship between contract law and property law. It demonstrated that the arguments usually put forward in support of the divide between contract law and property law are not convincing. In particular, the common reference to differences between contractual claims on the one hand and property rights on the other hand is misleading as it compares different types of rights which carry different functions and which are in fact not comparable.

It is nowadays commonly acknowledged that contractual claims are items of property. The regulation of the establishment, content, amendment, and termination of contractual claims by contract law consequently implies at the same time regulation of the establishment, content, amendment, and termination of property rights related to contractual claims. From this perspective, contract law carries property law functions.

The notion of formal rationality requires that contradictions between different property law rules and concepts must be avoided. As a result, those contract law rules which address property law issues have to be aligned with rules of other property law areas such as land law and personal property law unless there are reasons which justify any differences. It was demonstrated that this conclusion opens up groundbreaking new perspectives in relation to a variety of legal issues.

It must be acknowledged of course that formal rationality may not have played a very significant role in English law in the past. Furthermore, lawyers are normally deeply attached to the legal notions with which they have been brought up and to which they are accustomed. As a result, any suggestion for change may have to face skepticism if not outright rejection. Nothing else must be expected in relation to the rather drastic reconceptualization suggested in this article. However, it is the main goal of this article to prompt reflection. And, reflection is always the first step toward legal innovation.

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213. Farran and Cabrelli (n 21), 405, 423.
214. Roy Goode and Herbert Kronke and Ewan McKendrick, Transnational Commercial Law: Text, Cases, Materials (OUP, Oxford; New York 2007) 217.