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Unincorporated Associations and the Property Problem: The 'Contract-Holding' Theory as the Ace of Clubs?

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Summary: This article provides an examination of the contract-holding theory and reveals its flaws, proving it to be a misnomer. Sustained analysis also shows this method has much in common with other, supposedly distinct, property-holding methods, and that a contract is neither a necessary nor sufficient condition for an unincorporated association.

Keywords: *Unincorporated associations; property-holding; contract-holding theory; dissolution; bare trusts*

1. Introduction

With like-minded individuals coming together for a particular purpose or cause (and such being not to profit), unincorporated associations play a vital role within civil society. Yet, unlike most other civil society groups, unincorporated associations do not have separate legal personality. This causes the well-known problem of trying to explain, satisfactorily, how such associations 'hold' property.

It is now generally thought the solution has been found—that of the 'contract-holding' theory. So prevalent is this theory that, unless the association's constitution or the donor's intentions are explicitly clear and specify upon what basis the property is to be held, the contract-holding theory will very likely be the approach taken.[1] That is, where there is ambiguity regarding how the property is to be held, the courts will use the contract-holding theory as an ace up their sleeve. Surprisingly, however, there has not been sufficient scrutiny of the theory since its formulation several decades ago. This paper will examine the contract-holding theory and reveal it to be nothing more than judicial sleight of hand—a misnomer we avoid examining lest we ruin the 'magic'.

The paper is structured in two parts: first, it examines the theory's fundamental flaws—some which have not been considered in sufficient depth previously, and some of which strike at the very heart of the theory itself. Sustained analysis in this part will also reveal—contrary to conventional wisdom—that a contract is neither a necessary nor sufficient condition for the existence of an unincorporated association. Second, as a corollary, the paper goes on to provide a better explanation of the legal underpinnings of that which we call the 'contract-holding' theory, making a useful distinction between formal and informal clubs and societies. This better understanding also reveals that this method has in fact much in common with other, supposedly distinct, property-holding methods.

2. The Contract-Holding Theory: Could it be Magic?

In essence, the contract-holding theory means that property is held on bare trust by an officer of the association (typically the treasurer) for the benefit of the members at the time of transfer—but subject to members' contractual rights and liabilities *inter se*.[2] These obligations are said to derive from the rules/constitution of the association.[3] This theory proves convenient

[1] *Hanchett-Stamford v Attorney General* [2009] Ch 173 at [29]-[30] (Lewison J)
[2] *Re Horley Town Football Club* [2006] EWHC 2386 (Ch); [2006] WTLR 1817 at [118] (Lawrence Collins J).
[3] *Neville Estates Ltd v Madden* [1962] Ch 832 at [849] (Cross J).

as it is believed it assists the association in carrying out its purposes, prevents members severing their 'share' of the property, and allows the property to be available to members who may join the association in the future. It also explains how gifts to the association from non-members can be held alongside members' subscriptions and contributions. Yet, despite these key advantages offered by this method of property-holding, there are deficiencies—some of which are substantial enough such that we should no longer continue to rely on the theory (or at least as it is typically understood). The examination which follows begins, however, by first considering one of the more familiar, peripheral problems with the theory.

2.1. Formalities for the transferring of existing equitable interests

It is typical for unincorporated associations to have a fluctuating membership, with individuals able to join and leave the association from time to time. As a member is a beneficiary under a (bare) trust, should they leave the club, their interest/share in the property is said to pass to the remaining members; where a member joins the association, they are given an existing equitable interest. This causes problems in light of statutory formalities, viz. the transferring of existing equitable interests. Statute requires signed writing for a transfer of equitable interest to be effective[4] but it is perhaps unlikely that (in most situations) current members will sign (or have already signed) documents to transfer interests to new members. And it will be extremely unlikely any such document will be affected upon a member's departure from the club. Although the courts have failed to address this particular problem some solutions can be found in the academy.

One answer is provided by Virgo. He suggests that when a member leaves the club, their interest is not transferred but rather extinguished, with the destruction of such an interest (not being a transfer) therefore not requiring signed writing.[5] This destruction is perhaps brought about as a result of the member/beneficiary being treated as having disclaimed their interest.[6] But this explanation is ultimately lacking for it does not resolve the formalities issue regarding new members joining the association.

An alternative view, which addresses the issue for both members joining as well as leaving, is offered by Penner. He provides an incisive interpretation of the statutory subsection, arguing that the bare trust under which the officer/trustee holds the property contains an implied power, enabling the trustee to add or remove from the class of beneficiaries.[7] Therefore, should a member leave the association, the trustee can remove them as a beneficiary; should a member join, they can be added to the class. As a result, the Law of Property Act 1925, s.53(1)(c) is not infringed because no disposition of an existing equitable interest technically occurs, merely the exercise of a power. Though such a power needs to be implied, this is useful for not only does it address both members' departure and new members joining, but also the solution is based upon the officer's exercise of powers—ie. the trustee's actions—rather than the action (or inaction) of a (former) member. Though Penner's solution seems to provide an answer to the fluctuating membership/equitable interest problem, we are nevertheless faced with further problems with the contract-holding theory.

2.2. Co-ownership of property and severance

In *Re Recher's Will Trusts*[8] Brightman J stated that, absent words purporting to create a trust, property given to an association takes effect:

> "in favour of the existing members of the association as an accretion to the funds which are the subject matter of the contract... and falls to be dealt with in precisely

[4] Law of Property Act 1925, s.53(1)(c).

[5] G. Virgo, *The Principles of Equity Trusts*, 4th edn (Oxford: Oxford University Press, 2020) p.215. See e.g. *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291.

[6] A disclaimer operating "by way of avoidance and not by way of disposition" (*Re Paradise Motor Co Ltd* [1968] 1 WLR 1125 at [1143] (Danckwerts LJ)).

[7] J.E. Penner, *The Law of Trusts*, 12th edn (Oxford: Oxford University Press, 2022) pp.285-286.

[8] *Re Recher's Will Trusts* [1972] Ch 526.

> the same way as the funds which the members themselves have subscribed. So, in the case of a legacy. In the absence of words which purport to impose a trust, the legacy is a gift to the members beneficially, *not as joint tenants or as tenants in common* so as to entitle each member to an immediate distributive share, but as an accretion to the funds which are the subject matter of the contract."[9]

In other words, this analysis states that property is transferred to the members beneficially, as co-owners, but that the property is received and treated as if it is property of the group (ie. an accretion to the club's funds) and governed by the contract *inter se*. Yet, to state that this form of co-ownership is neither a joint tenancy nor a tenancy in common is problematic, for it effectively recognises a third, unorthodox type of (beneficial) co-ownership. Lewison J (as he was then), however, gave short shrift to the notion of a new, third type of co-ownership being created; in *Hanchett-Stamford*[10] he sought to draw such an analysis within orthodox parameters, stating:

> "It is true that this is not a joint tenancy according to the classical model; but since any collective ownership of property must be a species of joint tenancy or tenancy in common, this kind of collective ownership must, in my judgment, be *a subspecies of joint tenancy, albeit taking effect subject to any contractual restrictions* applicable as between members."[11]

This is far from convincing. Extending this well-known legal term to include a situation which does not in fact possess a fundamental feature (ie. the ability to sever) renders the term itself almost nugatory. If a beneficiary cannot sever their share, and this is not consequent of property law or equitable principles, it is not a joint tenancy. Were it otherwise, it would leave the right of survivorship as the distinguishing feature between this 'subspecies' and tenancy in common; this would be akin to treating unincorporated associations as tontine societies—which they are not[12]—and could undermine the intentions of the members whose sole aim is to carry out a particular purpose, one which is *not* to profit.[13] This author therefore shares the view of the Harpum[14] that this subspecies analysis is contrary to orthodoxy (and common sense) and creates a new, third type of co-ownership.

What is more, precisely how this theory is understood to preclude severance is an issue. The understanding is that it is the contract which prevents members severing their 'share'—but this is a fundamental misconception. The problem with this thinking is that when stating members are prevented from severing their share as a result of the contract *inter se*, it is tantamount to saying that specific performance (of the contract) prevents them doing so. Yet, specific performance is an equitable remedy awarded following a breach; to say that the contract prevents members from severing their share is to treat the contract as being specifically enforced but *before* any breach has actually occurred. Moreover, even if this were effectively a *sui generis* type of specific performance, it would surely also depend upon the type of property in issue. If we are concerned with, for example, a small, nascent club with little more than the money it has collected from its members (and perhaps a few chattels), it would be wholly inappropriate to claim specific performance. After all, specific performance will not be ordered unless damages are inadequate; why would such not be adequate here? Damages would also be the more appropriate remedy following breach, as the fallout from a member deliberately breaching their obligations could result in them losing their membership status; courts will not generally enforce a contract where the parties' relationship has irretrievably broken down, where trust has been lost.[15]

[9] *Re Recher* [1972] Ch 526 at [539] (emphasis added).
[10] *Hanchett-Stamford v Attorney General* [2008] EWHC 330 (Ch); [2009] Ch 173.
[11] *Hanchett-Stamford* [2008] EWHC 330 (Ch); [2009] Ch 173 at [47] (emphasis added).
[12] *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2)* [1979] 1 WLR 936 at [943] (Walton J).
[13] *Conservative and Unionist Central Office v Burrell* [1982] 1 WLR 522 at [525] (Lawton LJ).
[14] C. Harpum, *Megarry and Wade: The Law of Real Property*, 6th edn (London: Sweet Maxwell, 2000) para.9-095.
[15] *Vertex Data Services Ltd v Powergen Retail Ltd* [2006] EWHC 1340 (Comm); [2006] 2 Lloyd's Rep 591 at [46] (Tomlinson J).

Furthermore, even if we were to overlook the above points, the understanding that there is any form of joint tenancy in this context—be it 'subspecies' or a conventional one—is untenable. Unless the association is a closed group, not allowing new members to join, then consequently the core requirements of a joint tenancy (the 'four unities') cannot be satisfied—most evidently unity of time. And even if an association were a closed group not permitting new members, it does not necessarily mean a joint tenancy will exist; it is not a certainty that where the four unities are present, a joint tenancy will be recognised.[16] More will be said of the joint tenancy in the following section.

2.3. Dissolution of the club

When dissolution occurs, any contract which was in existence when the club was in operation, becomes redundant.[17] Therefore, to say that, upon dissolution, the property is to be distributed in accordance with terms of the contract seems odd; it appears to be the courts giving effect to contractual terms which are no longer effective, dissolution rendering such null and void. This can be seen in *Re Sick and Funeral Society*[18] where, though there were different classes of membership, there was no provision for departing from per capita distribution following the society's dissolution. Despite that, the court decided to distribute the property on the grounds of level of membership, rather than on the default 'equality is equity' basis. And it is worth noting that *Re Sick and Funeral Society* is by no means the only case where this approach has been taken.[19]

It may be said that in such cases it is not the courts acting Houdini-like—performing some form of equitable escapology to evade the legal nullity of the contract—but that they are merely seeking to enforce the rules of the association, not any contractual terms. But this misses the point. The concept of the contract *inter se* has its foundation in the rules of the association.[20] Put simply, the rules of the association play such an essential role in the concept because the rules *are* the terms of the contract *inter se*. They are one and the same; the contract *inter se* would not exist without them. If the court is enforcing the association's rules concerning distribution upon dissolution, it is enforcing the terms of the contract.

Nevertheless, one could perhaps argue these cases are not instances where courts *enforce* what are no longer effective contractual terms, but merely seek to honour the former contractual agreement between the parties. Though this view may have something to it, there remains the core question of 'why would the courts do so?' After all, the members have already enjoyed any contractual benefits and entitlements during the association's existence. And why should the courts do so when any contract which had previously existed has been frustrated consequent of the dissolution? That is, unless it was triggered by membership falling to just one, then the dissolution would have very likely been as a result of a decision by its members to end the association. If the members have decided to dissolve the club, they have chosen to no longer be bound by their contractual obligations.

Perhaps it can be explained on the grounds of the court exercising its inherent jurisdiction.[21] Yet, the court will generally not exercise such where the rules of the association provide for a dissolution, nor even where such provision is absent—unless the majority of the members wish to dissolve, or special circumstances mean it is no longer possible or practicable to continue.[22] It is seems this impossibility or impracticability may be the main reason for why the

[16] As Roger Smith points out, "both Common Law and Chancery recognised a tenancy in common in numerous cases, regardless of the four unities": R.J. Smith, *Plural Ownership* (Oxford: Oxford University Press, 2005) p.27.

[17] *Hanchett-Stamford v Attorney General* [2008] EWHC 330 (Ch); [2009] Ch 173 at [47] (Lewison J).

[18] *Re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch 51.

[19] See e.g. *Hardy v Hoade* [2017] EWHC 2476 (Ch); *Re Harper* [2009] EWHC 1369 (Ch); *Hammond v Noble (No 2)* [2001] 7 WLUK 703.

[20] *Neville Estates Ltd v Madden* [1962] Ch 832 at [849] (Cross J).

[21] See e.g. *Keys v Boulter (No. 2)* [1972] 1 WLR 642; *Re William Denby Sons Ltd Sick and Benevolent Fund* [1971] 1 WLR 973 at [978-9] (Brightman J). For an in-depth examination of this jurisdiction, see R.C. Nolan, "'The execution of a trust shall be under the control of the court': A Maxim in Modern Times" (2016) 2(2) C.J.C.C.L. 469.

[22] *Blake v Smither* (1906) 22 TLR 698; *Halsbury's Laws of England*, 5th edn, vol.13 (London: LexisNexis Butterworths, 2017) para.291.

court would exercise its inherent jurisdiction, as typically the courts are reluctant to otherwise dissolve an association.[23] This impossibility/impracticability may serve to explain the outcome in *Re Sick Funeral Society*[24] as the purpose of the society, the provision of sick and death benefits for its members, "no longer fulfilled any need in the parish" in light of social legislation.[25] Consequently, it may not be a case of enforcing any contractual terms, but simply the court, through its inherent jurisdiction, honouring the terms and distributing the assets in accordance with how members would have otherwise been contractually entitled.

When it comes to involuntary dissolution (ie. membership falling to below two), the superfluousness of any contract is self-evident: one cannot contract with oneself. But interestingly, Lewison J recently stated that the type of co-ownership underlying unincorporated associations is, as aforementioned, a form of joint tenancy albeit one subject to the contract *inter se*.[26] He then went on to say that he could not see why

> "the legal principle should be any different if the reason for the dissolution is the permanent cessation of the association's activities or the fall in its membership to below two. The same principle ought also to hold if the contractual restrictions are abrogated or varied by agreement of the members."[27]

In other words, no matter the cause of dissolution, the contract falls away leaving the remaining members, as joint tenants, entitled to the surplus assets being "free from any such contractual restrictions."[28] This raises doubts about those decisions where, despite the lack of any provision in the rules of the association, other-than-equal distribution is made and for which it cannot be justified on the basis of the court exercising its inherent jurisdiction. At the very least, it would suggest that whilst the relationship may have initially begun as a joint tenancy then, as a consequence of dissolution, it becomes a tenancy in common. This may not be too difficult to argue because, where members voluntarily dissolve the association, this could be understood as severance by mutual agreement. But this could not be the case for involuntarily dissolution, as there is no mutual agreement; dissolution occurs automatically. Moreover, even where voluntary dissolution, we face to the same problem viz. the courts looking back to the prior contractual arrangement. This is because, upon severance of a joint tenancy, the shares will be equal to the number of (former) joint tenants; the court will then look to the intentions of the parties to justify departure from equal distribution.[29] But absent any such provision, they will need to impute such an intention—and when we are concerned with altering proprietary rights after the fact, this is a very slippery slope indeed.

It would appear, therefore, that *Hanchett-Stamford* is a significant case, at least concerning distribution of surplus assets upon a club's dissolution. Yet, the case itself is not free from difficulty. As previously mentioned, we cannot have a joint tenancy absent the four unities, but the club in *Hanchett-Stamford* was not a closed association. Lewison J therefore erred in asserting there was a joint tenancy underlying the group. And even if it were recognised as a tenancy in common—and that any interest Mr Hanchett-Stamford had as the penultimate member could have passed on his death to his wife as sole surviving member—this outcome would have been because of the unusual circumstances surrounding the case rather than based on any clear rule or principle.

2.4. A contract?

As outlined above, key problems for the contract-holding theory stem from the belief that there is a contract *inter se*. However, though it may seem to be a given for unincorporated associations, this is in fact a legal fiction. As will be discussed, a contract is neither a necessary

[23] See e.g. *Re GKN Bolts Nuts Ltd v Birmingham Works Sports and Social Club* [1982] 1 WLR 774.
[24] *Re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch 51.
[25] *Re Sick and Funeral Society* [1973] Ch 51 at [56] (Megarry J).
[26] *Hanchett-Stamford v Attorney General* [2008] EWHC 330 (Ch); [2009] Ch 173 at [47].
[27] *Hanchett-Stamford* [2008] EWHC 330 (Ch); [2009] Ch 173 at [47].
[28] *Hanchett-Stamford* [2008] EWHC 330 (Ch); [2009] Ch 173 at [47].
[29] R.J. Smith, *Plural Ownership* (Oxford: Oxford University Press, 2005) p.36.

nor sufficient condition for the existence of an unincorporated association.[30] But first, it will be considered how this legal fiction came to be and how it is has evaded scrutiny.

When looking to explain or identify an unincorporated association, we of course look to simple, oft-cited definitions. Perhaps the most well-known definition is that provided by Lawton LJ in *Conservative and Unionist Central Office v Burrell*, where an unincorporated association is said to concern:

> "two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and on what terms and which can be joined or left at will. The bond of the union between the members of an unincorporated association has to be contractual."[31]

The contractual aspect, therefore, appears a central characteristic; without a contract there cannot be an unincorporated association. And having been decided in 1982, *Burrell* is a comparatively recent case within this area of law, such that it would not be unreasonable to assume that this definition paints an accurate picture of the law. But this is not so. The understanding that the mutual duties and obligations binding the members are legal ones deriving from the association's rules or constitution is troublesome. To say that a member who joins an association and agrees to abide by the rules of the club is thereby entering some contractual arrangement with each and every member of the club—including any who join in future—is strained to say the least. It is also likely far from the minds of some that, when they join together with like-minded individuals to pursue a particular purpose, and not to profit, they will be considered to owe (and themselves be owed) legal duties and obligations. This seems a bit much for, say, members of the local book club. In their minds, it is perhaps nothing more than a matter of goodwill, with membership simply being a case of agreeing to 'play by the rules'. And it is worth stressing that the existence of any rules—even coupled with members agreeing to abide by such rules—is not enough. Why should merely agreeing to adhere to the rules of the association give rise to contractual obligations? Associations can have purely 'outward-looking' purposes, such that no member can be said to be receiving something in exchange for following the association's rules (except something very vague or abstract).

Significantly, further examination reveals the fact that the contract is not a necessary condition of an unincorporated association. This has been made clear in the decision of *Leahy v Attorney-General for NSW*[32] concerning a gift of land to an order of nuns, a group which the Privy Council deemed an unincorporated association. Rather tellingly, not once do the terms 'contract' or 'contractual' appear within the Board's judgment. But of course, this is hardly surprising. To state that a contract existed between the nuns would be astonishing; not only is there a problem establishing what exactly such a member could be said to be 'offering'—and whether or not such an offer is *legally* capable of being accepted—it is a complete fiction to suggest that each member had ever intended to create legal relations.[33] If ever there was a group of people less likely to do so, it would surely be a group of devout religious individuals such as those.[34] Evidently, a contractual bond or contract *inter se* was certainly not considered a pre-requisite for an unincorporated association—and given that this is a decision of the Privy Council, it should not be easily dismissed as a mere outlier. Neither is the contract a *sufficient* condition because a contract *inter se*, without more, is not enough to imply the existence of an unincorporated association; there are additional elements which must be satisfied before the collective can be called an unincorporated association.[35] While one might argue that all the

[30] Cf. e.g. Green who states a contract is foundational to an unincorporated association: B. Green, "The Dissolution of Unincorporated Non-Profit Associations" (1980) 43(6) M.L.R. 626, 627.

[31] *Conservative and Unionist Central Office v Burrell* [1982] 1 WLR 522 at [525].

[32] *Leahy v Attorney-General for New South Wales* [1959] AC 457.

[33] Cf. Green who provides an explanation for the offer and acceptance requirements but omits any discussion of consideration and the intention to create legal relations: B. Green, "The Dissolution of Unincorporated Non-Profit Associations" (1980) 43(6) M.L.R. 626, 629.

[34] Cf. Gardner who assumes the existence of a contract between the members of such a religious order: S. Gardner, "A Detail in the Construction of Gifts to Unincorporated Associations" (1998) Conv. 8, 10.

[35] e.g. to be not-for-profit.

necessary characteristics/requirements could be stipulated within a contract between the individuals, this would be far removed from reality, given there is typically "a considerable degree of informality in the conduct of the affairs of such clubs".[36]

Consequent of a contract *inter se* not being a necessary condition, we are led to some very important conclusions about the nature and workings of unincorporated associations. Firstly, the fiction seems to elide an important distinction concerning the roles/capacities of the individuals involved in these groups. Typically, there will be officers and/or treasurers in charge of the management of the association; these individuals are usually members themselves, but there is no reason why—particularly if a large association—such management could not be appointed externally. Of course, were such an appointment to be made, it would likely involve, *inter alia*, some sort of contract, the very thing being disproved. However, this only goes to make the point even clearer: whether or not an officer/treasurer is a member of the association, the obligations to which they are subject are not as a result of membership but derive from their assuming a particular role/office. That is, any obligations a treasurer may owe *qua* treasurer will be distinct from any they may owe *qua* member. Any obligations the treasurer/officers of an unincorporated association owe do not derive from the contract *inter se*. Likewise, any powers and rights which they may enjoy. Moreover, if a contract is not a necessary condition, any obligations members owe to other members (*qua* members) cannot be understood to arise from contract. True though it is that a contract may exist to *modify* obligations, it does not make it the *source* of such obligations.[37] Therefore, in order determine their provenance (and any powers and rights given to officers of the association) we must look elsewhere; this will be considered below.

At this point, the reader may be wondering "if the contract is just a legal fiction, what is the harm? Particularly if it serves a useful purpose". This is of course an important question, for the theory undoubtedly has its benefits. One such benefit may be described as concerning the expressive function of the law.[38] By stating there is a 'contract' underpinning the association, it serves as a useful tool to remind members of the duties and expectations that arise from being a member (these duties are not necessarily legal ones). This in turn helps ensure that the purpose—the very reason for the group's existence—can be carried out.

On a similar vein, the idea of a contract being a legal concept comprehensible and familiar to laypeople provides a much wider, more substantial benefit. That is, a theory whose foundation is built around an intelligible concept goes some way to providing clarity to a complicated area of the law; that the law is clear is of course a core characteristic for the rule of law.[39] So this raises the question: if the idea of a 'contract' existing helps the furtherance of the association's purpose and makes the law clearer and more accessible, why not accept it?

This view, however, is short-sighted. If anything, the existence of a 'contract' arguably *undermines* the rule of law; not only does it render the law less clear—ie. it is a 'contract' but not the everyday, commonplace type—it also proves contradictory, suggesting that such a legal relationship can easily be recognised without the need to clearly establish the foundational requirements of a contract.[40] Equally important, is that to accept the notion of a 'contract' existing will naturally call into question many decades' worth of precedent, where unincorporated associations were held to exist but no contract was considered to be present, or perhaps even possible, on the facts.

The preceding tells us that we should be critical of any 'contract *inter se*', with the notion analogous to a magician's assistant: appearing to provide assistance but in reality serving as a distraction, to take our attention away from what is really going on. But more than that, a closer examination shows the contract-holding theory to be, in essence, self-justificatory. When the courts look to play this card, they will declare a group to be an unincorporated association and

[36] *Re GKN Bolts Nuts Ltd v Birmingham Works Sports and Social Club* [1982] 1 WLR 774 at [776] (Megarry VC).

[37] L. Smith, "Contract, Consent, and Fiduciary Relationships" in P.B. Miller and A.S. Gold (eds), *Contract, Status, and Fiduciary Law* (Oxford: Oxford University Press, 2016) p.117, p.127.

[38] See generally e.g. C. Sunstein, "Law's Expressive Function" (1999) 9(2) The Good Society, 55.

[39] Being part of Fuller's well-known desiderata: L.L. Fuller, *The Morality of Law* (Yale: Yale University Press, 1964) 63.

[40] viz. offer, acceptance, consideration, and an intention to create legal relations.

thus state the presence of a contract *inter se* between the members (no matter how unrealistic). Having first declared such, it is then only a short step to applying the contract-holding theory; given the contract *inter se* fiction is doing all the heavy-lifting in this theory, it is allowing the judge to draw from a stacked deck. Burrows has argued that, in the search for rational transparency, all such fictions in judicial reasoning should be eradicated—adding that fictions "have very often been used in judicial reasoning to underplay the power exercised by the judges."[41] This seems apposite. We should no longer entertain the contract fiction, not only because it serves to disguise judicial power affecting proprietary rights, but also because—perhaps more worryingly—courts are not applying the law to the facts but manipulating the facts to fit the law. This causes great damage to the rule of law.

3. The Bare Necessities: A Better Understanding

As has been argued above, a contract is neither a necessary nor sufficient condition for the existence of an unincorporated association. Nor should we simply accept the contract-holding theory on the grounds of *communis error facit ius*. Rather, it is best that we strive to better understand what is really going on when this particular method is employed.

It is generally accepted that there is somebody within an unincorporated association who is in charge of/manages the property: an officer/treasurer. Again, it seems relatively uncontroversial that, with the officer/treasurer in charge of the property, they would have legal title to the property; this gives rise to a bare trust. Indeed, where there is land involved, such could only be held on trust for the members.[42] However, it is important to understand that depending on nature of the association, the type of bare trust which may arise will likely vary; be it along the lines of a small, informal, local book club or that of a larger, well-established society, such as the Oxford Union. For the rest of this paper, I will refer to such types of associations as 'informal' and 'formal' clubs respectively.

3.1. 'Informal' and 'formal' clubs and societies

It is unlikely that those who take on the role of treasurer in informal groups are aware that their doing so triggers a bare trust—let alone that they are deemed a trustee. Nevertheless, as explained by AL Smith LJ in *Mara v Browne*[43]

> "If one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters *or to do acts characteristic of the office of trustee* he may thereby make himself what is called in law a trustee of his own wrong, ie. a trustee *de son tort*, or as it is also termed, a constructive trustee."[44]

It is worth stating that this concerns trusteeship *stricto sensu*, and not that of 'constructive trusteeship' which has, rather confusingly, been used to refer to personal liability of third-parties for knowing receipt or dishonest assistance.[45] Moreover, it should be emphasised that for trusteeship *de son tort* intention is not relevant; the individual can be considered a trustee *de son tort* even if they acted honestly and with good intentions. As put succinctly (and colourfully) by Lord Millett in *Dubai Aluminium*[46]

> "Substituting dog Latin for bastard French, we would do better today to describe such persons as de facto trustees. In their relations with the beneficiaries, they are treated

[41] A. Burrows, "Form and Substance: Fictions and Judicial Power" in A. Robertson and J. Goudkamp (eds), *Form and Substance in the Law of Obligations* (Oxford: Hart Publishing, 2019) p.17, p.33.
[42] Law of Property Act 1925, ss.34 and 36.
[43] *Mara v Browne* [1896] 1 Ch 199. See also e.g. *Selangor United Rubber Estates v Cradock (No 3)* [1968] 1 WLR 1555 at [1579] (Ungoed-Thomas J).
[44] *Mara v Browne* [1896] 1 Ch 199 at [209] (emphasis added). The principle equally applies to fiduciaries who are not trustees (*Lyell v Kennedy* (1889) 14 App Cas 437).
[45] A recent example of the latter: *Manolete Partners Plc v Nag Anor* [2022] EWHC 153 (Ch) at [96].
[46] *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366.

> in every respect as if they had been duly appointed. They are true trustees and are fully subject to fiduciary obligations. Their liability is strict; it does not depend on dishonesty."[47]

The effect of such trusteeship means the treasurer holds the property on bare trust for the association's members, and that this bare trust is a *constructive* trust.[48] However, just because a treasurer may be deemed a de facto trustee and "treated in every respect as if they have been duly appointed"[49] it does not mean they are subject to the same duties and obligations as an express trustee. This is an important point, as there will be many occasions where it would be wholly inappropriate to make the de facto trustee subject to further/the same obligations and duties as a typical express trustee.

Yet, a key point must be made. Though they may not be subject to the duties and obligations of an express trustee, they will still be subject to additional duties *as a fiduciary*. Notably, Lord Millett made clear in *Dubai Aluminium* that trustees *de son tort* are "fully subject to fiduciary obligations"[50] and it is this treasurer-member fiduciary relationship which ensures the treasurer's fidelity to the club's members, enabling their collective interest (the furtherance of the club's purposes) to be pursued, rather than the treasurer's own.[51]

Where express and constructive trustees crucially differ, however, is the powers they possess. Though trustees *de son tort* are also subject to fiduciary obligations, they do not have the same powers as an express trustee. But this is eminently sensible, as it would be "contrary to principle to allow such a person to arrogate powers to himself" by virtue of their involvement—even if honest and well-intentioned.[52] So with the duties of a fiduciary typically understood as being proscriptive, and the treasurer not enjoying the same powers as a typical express trustee, this casts the role of the treasurer as being quite limited and passive—simply holding the property for the members and nothing more. This is perhaps unlikely to reflect the reality of what a treasurer does within a club or society. True, they may look after the finances and other property of the association, but they also make decisions, purchase property and so on, on the club's behalf. How they are able to do so will be discussed later.

By the term 'formal', this author refers to those clubs or societies who may have, for example, committees/bodies for the management of the association and who go to the trouble of formalising rules and agreements in writing. Crucially, however, for a group to be deemed 'formal' it must involve members signing a contract which states that the treasurer holds the property for them and permits the use of that property for the purposes of the association. Though it is very tempting to fall back on the contract-holding theory in such situations, it would be to ignore the significant problems raised above. It would also misunderstand the role of the contract here; any contract which exists is merely a set of additional legal obligations which governs the *use* of the property. It is not a contract which affects the ownership of the property or how it is held.

Indeed, the only way in which such a contract may have any affect regarding how the property is held concerns simply the type of bare trust present, for it is perhaps not unreasonable to infer the existence of an express trust in these situations. Though there may be occasions where members may not necessarily be aware that there is a (bare) trust, or that the treasurer is a trustee, the written contract would likely show that what they intended was, in effect, a trust. And whilst this may appear to diverge from the structure which underpins informal clubs and societies (such groups lacking a contract), it is really a difference in degree, rather than kind. For whether a trust is implied or whether it is inferred in light of a written contract, both are still bare trusts.

The above does mean, however, there is a difference regarding the permission to use the property for the purposes of the association. It could be said that the existence of a signed contract in the formal clubs and societies context gives rise to a contractual mandate determining

[47] *Dubai Aluminium* [2003] 2 AC 366 at [138] (Lord Millett).
[48] See e.g. *Blythe v Fladgate* [1891] 1 Ch 337.
[49] *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at [138] (Lord Millett).
[50] *Dubai Aluminium* [2003] 2 AC 366 at [138] (Lord Millett).
[51] But of course if the treasurer is a member, it would be in their interest *qua* member.
[52] *Jasmine Trustees Ltd v Wells Hind* [2007] EWHC 38 (Ch) at [42] (Mann J).

the use of the property.[53] Again, it is worth stressing this merely affects the *use* of the property—not the ownership of it. Yet this bare trust with mandate approach—more commonly known as a 'nomineeship'—proves too much.

Firstly, it would not be able to apply *mutatis mutandis* to the informal club context, as there is no written contract (by definition) from which we are able to say the mandate derives. We therefore would require a separate explanation for informal clubs. Secondly, and perhaps most significantly, we face a conceptual problem. The term 'nomineeship' disguises the fact that inherent in such an approach is that of an agency relationship. Agency is of course a creature of commercial law, but unincorporated associations, by their very nature, are groups which exist to carry purposes which are *not* business purposes[54]—they are clubs and societies which are not-for-profit. So, to invoke this commercial vehicle into this voluntary, non-commercial context is quite a stretch.

Therefore, with the mandate theory proving unsatisfactory, we still need to explain how the treasurer is capable of dealing with 'club' property. It would seem that any acts of the treasurer-trustee which appear to exceed the terms of the bare trust ie. anything other than preserving the trust property—such as the selling of any of it—would be a breach of trust. However, this not necessarily the case. As Matthews states, bare trustees can possess significant powers in relation to dealing with trust property[55]—and the Trusts of Land and Appointment of Trustees Act 1996, s.6 makes clear, bare trustees of land have all the powers of a beneficial owner of land.[56] But what of other types of property? Given the treasurer-trustee is able to readily deal with real property—property of a unique nature and which is potentially very valuable—it would not be irrational to infer the necessary powers to deal with other types of property.[57] Yet, even if to do so were too much, members (beneficiaries) are likely to consent to the trustee's dealings with other property such that it would not result in a breach of trust. Furthermore, the trustee, being subject to fiduciary duties, will be constrained in their dealings with the property, and with themselves typically a member, they are unlikely to use the property in a way which will be detrimental to the purposes of the association.

3.2. Formalities and the beneficiary principle

A fluctuating membership is potentially troublesome when considering the need to comply with statutory requirements ie. satisfying the necessary formalities for transferring existing equitable interests. In the informal club context, where the treasurer is regarded a trustee *de son tort*, this issue may be particularly problematic. Though Penner's suggestion speaks of an implied power to appoint/remove beneficiaries, it may nevertheless prove a difficult argument to sustain here—principally because it would be wrong to call such a power. Penner's solution means that we are saying a power to add or remove beneficiaries is exercised every time a member joins or leaves the association. In fact, it would be to say that the power *must* be exercised every time a member joins/leaves—otherwise new members would not become entitled under the trust, and former members would also retain an interest (contrary to the contract-holding theory). But such compulsion removes the core, discretionary nature of a dispositive power, such that it would be wrong for us to call it a power; it would be more accurate to refer to it as a duty.[58] And if the action of adding and removing beneficiaries is not by means of a power, it will very likely be caught by the Law of Property Act, s.53(1)(c) and thus be void for lack of signed writing.

[53] The contractual mandate notion has been suggested by Penner: J.E. Penner, *The Law of Trusts*, 12th edn (Oxford: Oxford University Press, 2022) pp.284-285. Penner, however, does not distinguish between formal and informal groups and, more importantly, presumes the existence of a contract *inter se*. Cf. Smart who also offers a mandate approach but one which only applies to *inter vivos* gifts to unincorporated associations: P. Smart, "Holding property for non-charitable purposes: mandates, conditions and estoppels" (1987) Conv., 415.

[54] *Conservative and Unionist Central Office v Burrell* [1982] 1 WLR 522 at [525].

[55] P. Matthews, "All about Bare Trusts: Part 1" [2005] 5 P.C.B. 266; "All about Bare Trusts: Part 2" [2005] 6 P.C.B. 336, 343.

[56] TOLATA, and s.1(2)(a) of the same Act stating the Act applies to bare trustees of whatever type.

[57] These not being dispositive powers.

[58] And even then, the Court of Appeal has stated that where property is held for those absolutely entitled, the trustee has no duty whatever to perform: *Re Lashmar* [1891] 1 Ch 258 at [267]. This of course means no *further* duties besides the trustees' core, custodial duty.

One explanation is that, as a constructive bare trust, it would be treated as statutorily exempt—not needing to satisfy the Law of Property Act 1925, s.53(1)(c) requirements at all.[59] But this explanation would not be able to account for the more formal types of clubs and societies ie. express bare trusts, and it would perhaps also be difficult to justify having differing explanations depending on the type of bare trust recognised, given that how they each arise—via implication or inference—may prove, in some cases, a very difficult line to draw.[60]

One might argue that there is no magic legal power or rule at work here but simply a matter of fact; that the treasurer-trustee holds property on behalf of the club's members—or more specifically, for 'those who are members of [the particular unincorporated association]'. Though this is a bare trust, this characterisation is not a special term (such terms being generally contrary to the nature of bare trusts). Rather, it is simply a means of describing the class of objects (beneficiaries), with the effect that those who fall within that class description are beneficiaries of the bare trust and collectively entitled in equity to the property. And while those who form the class of beneficiaries may change from time to time this is not an issue; just like a trust for the benefit of a company's 'employees', those who fall within that class description will fluctuate as people join or leave the company.[61] Therefore, it could be said that discussion of s.53(1)(c) formalities is misconceived, as it is not a legal issue regarding the transferring of equitable interests, but simply one of fact: if X is considered to meet the class description 'member of [the club]' they thus qualify and have a vested interest. Should a person leave the club, they would no longer be a beneficiary of the trust having fallen outside the class description.

Attractive in its simplicity, this argument is nevertheless unsound. The effect of this 'matter of fact' argument is to say that a member loses their beneficial interest when they cease to be a member of the club; in other words, their interests are terminable. But this does not track with the understanding that there exists a bare trust at the centre of the arrangement. Beneficiaries of the bare trust have *absolute*—not terminable—interests and so this 'matter of fact' explanation falls short.

It would seem, therefore, that we are left with two possible options. One is that *all* unincorporated associations are treated as giving rise to a constructive bare trust—with the Law of Property Act, s.53(2) making explicit that the s.53(1)(c) formalities are not affected by the creation or operation of constructive trusts. Yet, this would be to ignore the important distinction made above between formal and informal clubs, with formal ones necessarily involving an *express* intention to create a trust. It would therefore be unwise to gloss over this distinction, painting all unincorporated associations with the same constructive trust brush.

Alternatively, it may well be that the courts treat unincorporated associations as exempt from the requirements of s.53(1)(c). It is evident that any distinction between associations with 'inward-looking' purposes from those with 'outward-looking' ones is not a helpful one.[62] This is not only because those purposes may change over time, but also because the law does not discriminate between them; unincorporated associations can have purely charitable purposes or purely private purposes. That is, the law permits unincorporated associations of whatever stripe because all unincorporated associations are deemed worthwhile. This is why the courts went to great lengths to formulate the contract-holding theory, in an effort to help unincorporated associations thrive—whatever their purpose.[63] Moreover, it is notable that (to this author's knowledge) the s.53(1)(c) formalities issue does not appear to have been discussed in any of the relevant judgments concerning the contract-holding theory. And this is so even when other sections of the same statute may have been discussed within the judgment.[64] This is very telling and only goes to further support the argument that the courts are willing to treat unincorporated

[59] Law of Property Act 1925, s.53(2).

[60] e.g. occasions where any evidence of the contract is lost or destroyed.

[61] Such as in *Re William Denby Sick and Benevolent Fund* [1971] 1 WLR 973.

[62] *Re Recher's Will Trusts* [1972] Ch 526 at [542] (Brightman J); echoed in *Re Grant's Will Trusts* [1980] 1 WLR 360 at [367] (Vinelott J).

[63] Though it should be noted that, for the theory to apply, members must be able to change the purpose(s) of the association as well as have the ability to dissolve the association and divide the assets between themselves. See e.g. *Re Grant's Will Trusts* [1980] 1 WLR 360.

[64] See e.g. *Hanchett-Stamford v Attorney General* [2008] EWHC 330 (Ch); [2009] Ch 173.

associations as exempt from the formalities requirement. Perhaps we simply need to learn to accept that, for this particular issue, the ends may justify the means.

3.3. Co-ownership and severance

As aforementioned, unless the unincorporated association is a closed group not permitting new members, it is unrealistic to state that there exists a joint tenancy; permitting members to join in future will mean that the four unities cannot be present, so it must be a tenancy in common. Consequently, the right of survivorship, a core feature of joint tenancy, is not relevant. Similarly, there is no need to talk about severing shares—they are already tenants in common. It is more accurate to discuss how a member/beneficiary is prevented from *realising* their share. Having already explained unincorporated associations do not require a contract, we are required to look elsewhere for an answer. There are a few possible explanations.

Firstly, the law has shown that where a beneficiary[65] seeks to claim their share, they may be prevented from doing so if it is deemed likely to have an adverse impact on the other, remaining beneficiaries. Indeed, trustees have a duty to act fairly/impartially between the beneficiaries and such a duty can override an individual member's wish to realise his or her share in the trust.[66]

Similarly, though more practically speaking, it is certainly possible that an association's property will consist of more than just money, including other types of property too, such as a clubhouse. A member who seeks to realise their interest could require the trustee to liquidate all/part of the club's property in order to be able to transfer that share. Doing so may be refused if considered to be detrimental to the interests of the other beneficiaries/members[67]—and this will surely be the case where that which is sold plays a vital role in carrying out the purposes of the association and the other members wish for the association to continue.

Third, the preceding presupposes the treasurer-trustee would in fact seek to honour the member's request and transfer the share, and that it is wider circumstances preventing the realisation. Yet, we must not forget that the very reason for the association's existence—why these individuals joined together in the first place—is to further a particular purpose. It is not far-fetched to consider the possibility of an individual member's request to realise their share being refused by the trustee, because it undermines the association and its purposes. And should the beneficiary look to the courts for an order that the trustee transfer the share, the court may refuse to do so (given the reasons discussed above), likely relieving the trustee of any liability in view of it being a judicious breach of trust.

More broadly speaking, we would be wise to observe that the reason why courts strive to provide explanations for how unincorporated associations 'hold' property (even to the extent they employ flawed fictions) is that, in being able to do so, they can help clubs and societies thrive. That is, the courts recognise the social significance and utility of these groups in society and are willing to bend the rules—or in this case the law—to support them.

3.4. Dissolution

It will be recalled that *Re Sick Funeral Society*[68] is a key authority for distribution of assets upon dissolution within the contract-holding theory context. Yet, we have reason to be wary of it as an authoritative example of such in that context, as the judgment involved more than just a finding of other-than-equal division of the assets upon dissolution. In addition to the members' decision to dissolve the group, they decided that the society's assets were to be divided amongst the members *and the personal representatives of any member who had died since 12 December 1966.* Megarry J upheld these decisions. This is important for two reasons.

[65] Following the discussion in the previous section, the terms 'beneficiary' and 'member' will be used interchangeably.

[66] *Lloyds Bank v Duker* [1987] 3 All ER 193.

[67] *Stephenson v Barclays Bank Trust Co Ltd* [1975] 1 WLR 882.

[68] *Re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch 51.

First, that the judge found the shares *were* able to pass to the personal representatives, suggests that members, post-dissolution, are not *contractually* entitled to any remaining assets but entitled because of their *proprietary* interests ie. being entitled as beneficiaries of the trust. Importantly, those entitled under the deceased member's estate were not owed, nor did themselves owe, any contractual duties or obligations—and nor were they contractually entitled to any of the property held by the association.[69]

Second, we must question whether this case should even be considered as dissolution relating to the contract-holding theory. The decision runs counter to the orthodox view of the theory, namely that members co-own the property in the form of a joint tenancy, and that upon a member's death or resignation, their share passes to the remaining members according to *ius accrescendi*.[70] Any shares belonging to the members who died within the period of 12th December 1966 to 23rd October 1968, should therefore have passed to the remaining members—not the deceased's personal representatives.

Equally important, is that where members change the rules of the association such that, upon their death, any of the members' shares pass to whomsoever is entitled (be it eg. via a will or consequent of the intestacy rules)—and those recipients are not the remaining members—it means that the contract-holding theory cannot apply. Foundational to this theory is that the association's members are beneficiaries under a bare trust and thus absolutely entitled to the property in equity; if members amend the rules to enable them to leave their interests to those who are not members of the society, and those rules are triggered (as here with the death of some of the members), it means those members cease to have an absolute interest. Having given non-members an interest in the property, it will therefore prevent the remaining members being able to divide the property amongst themselves, as they will no longer be absolutely entitled to the property in equity.[71] Consequently, we should not view this case as being an instance of distribution of assets upon dissolution under the contract-holding theory.

Of course, the above discussion does not, in truth, undermine the 'contractual entitlement' notion under the theory per se, but simply show that *Re Sick Funeral Society*[72] is not good authority for the point. So although we should of course be cautious of subsequent decisions which relied on that case to justify departure from the equal distribution of assets upon dissolution, within the contract-holding theory context,[73] the 'contractual entitlement' view has not been undercut.

Further consideration, though, shows that even on the orthodox understanding of the theory—that there is a contract *inter se* binding the members—it would be misleading to say distribution is based on contractual entitlement. This concerns the enforceability of the rules (ie. the contract) following dissolution. *Hanchett-Stamford*[74] makes clear that dissolution causes any contract to fall away; the rules of the association, which form the basis of the members' contractual duties and obligations, can therefore no longer have any legal effect upon dissolution. So, where there is distribution upon an other-than-equal basis, ie. according to their contractual entitlement, it is difficult to explain—should there be any problems concerning distribution of those assets to the members—on what grounds they are entitled to an other-than-equal share. And this is also the situation even where the court, using its inherent jurisdiction, distributes assets according to members' contractual entitlement.

To illustrate the problem, consider the following situation: upon dissolution of the association, the trustee wrongly distributes property to someone who is not entitled to the assets. Unless that party is 'equity's darling', members would be able to bring an action against that third-party to make a claim in relation to the property. They are able to do so because of their *proprietary* interest under the trust, not because of any 'contractual entitlement'. And similarly, if that third-party exchanged those assets for other property, the members will be entitled to

[69] The case being decided well before the Contract (Rights of Third Parties) Act 1999.
[70] *Hanchett-Stamford v Attorney General* [2008] EWHC 330 (Ch); [2009] Ch 173 at [47].
[71] This being one of the issues which led the judge to conclude the contract-holding theory could not apply in *Re Grant's Will Trusts* [1980] 1 WLR 360.
[72] *Re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch 51.
[73] e.g. *Hardy v Hoade* [2017] EWHC 2476 (Ch).
[74] *Hanchett-Stamford v Attorney General* [2008] EWHC 330 (Ch); [2009] Ch 173.

trace the property (assuming it had not lost its identity) and potentially claim the substitute asset consequent of their proprietary interests.

Moreover, this point is shown more explicitly when considering the role of the trustee. As mentioned above, though it is perhaps common, there is no requirement that those with legal title to the property are themselves a member of the association. This means a treasurer-trustee who is not a member will not therefore be bound by the contract *inter se*. So should the trustee, upon dissolution, fail to distribute to the entitled members, those members will be able to bring a claim.[75] Again, this claim will be rooted in their entitlement to the surplus assets, such deriving from their proprietary interests as beneficiaries. And even if the treasurer were a member, the appropriate claim to bring would concern the treasurer *in the capacity of trustee*, not *qua* member—and this would again help protect the members' interests should third-parties become involved. So, to explain a member's right to a share of the property upon dissolution as being the result of 'contractual entitlement' is misleading; rather, they are entitled to a share of the assets because they are simply beneficiaries of a trust.

Following the above, it is best to understand members as beneficiaries co-owing the property as tenants in common. This helps to explain why courts may depart from equal division of surplus property following an association's dissolution. Yet, the tenancy in common view appears at odds with the recent decision of *Hanchett-Stamford*[76] where a sole, surviving member of an association was said to be no longer bound by any contract *inter se* (not being able to contract with oneself), and able to take the surplus property absolutely—consequent of a (supposed) joint tenancy and the *ius accrescendi* principle. But, with respect to Lewison J, and as aforementioned, this is wrong. Putting aside the existence of any 'contract' affecting the ownership of the property, the particular association in *Hanchett-Stamford* could not have given rise to a joint tenancy. However, despite these facts, the outcome in *Hanchett-Stamford* can still be justified. Following the penultimate member's death, the remaining member will be treated as holding both (bare) legal title and equitable title to the property for themselves. Just as one cannot contract with oneself, one cannot be both sole trustee and sole beneficiary; the bare trust would no longer exist, and they would become absolute owner of the property.[77]

The members of the association, being entitled as beneficiaries under a bare trust, also helps explain why they are able to, if desired, dissolve the association altogether. Their ability to do so comes from the members' capacity *qua* beneficiaries: the members, being fully entitled under the bare trust, can demand the trustee transfer the property to them immediately, thus terminating the trust.[78]) So should the members decide to dissolve the association, it is best to view such an act as involving two things concomitantly: (i) the members *qua* members collectively deciding to bring the association to an end; and (ii) the members *qua* beneficiaries terminating the trust.

3.5. Gifts and purposes

Though the cases citing and applying the contract-holding theory lack coherence and persuasiveness in light of the criticisms discussed in the previous part of this paper, it is worth revisiting *Re Recher's WT*.[79] Within the judgment, Brightman J stated that:

> "In the case of a donation *which is not accompanied by any words which purport to impose a trust*, it seems to me that the gift takes effect in favour of the existing members of the association *as an accretion to the funds* which are the subject-matter of the contract which such members have made *inter se*, and falls to be dealt with in precisely the same way as the funds which the members themselves have subscribed. So, in the case of a legacy."[80]

[75] A claim can be brought in the Chancery Division if, following dissolution, the assets are not being properly administered (*Re St James's Club* (1852) 2 De GM G 383).
[76] *Hanchett-Stamford v Attorney General* [2008] EWHC 330 (Ch).
[77] *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291.
[78] Commonly referred to as the 'rule in *Saunders v Vautier*' (*Saunders v Vautier* (1841) 4 Beav 115.
[79] *Re Recher's Will Trusts* [1972] Ch 526.
[80] *Re Recher* [1972] Ch 526 at 539 (emphasis added).

Putting aside the erroneous contract *inter se* notion, this is correct. Any gifts given to the association—*inter vivos* or testamentary—would fall be treated as an "accretion to the funds". Such gifts are received by the treasurer and simply added to the property already held on trust by them, and this is so whether it concerns an express or constructive bare trust.

It is worth re-emphasising that this is a trust for the members, not purposes, otherwise it would be construed as a purpose trust—be it a charitable one or possibly on the grounds of *Re Denley* (or else it would be void).[81] Crucially therefore, with the members already fully entitled in equity, there appears—at most—to be only a *moral* obligation they use the property for the purposes of the association. Though such an obligation may be considered strengthened by the law—by the law's approach regarding severance and the possible existence of a signed, written contract permitting use of the property—there is no overriding legal obligation that the members use the property for the club's purposes. With the law not recognising such groups as legal entities, the law does not (and cannot), force the members to use the property in a particular way—it can only stop them from using property if contrary to public policy, such as for illegal purposes. And this is of course understandable, because were the law to recognise members' de facto ownership of the property, but require them to use it in specific ways, it would be to give with one hand and take away with the other; it would render a foundational tenet of private law—property ownership[82]—self-defeating.

The reader may think this all seems possibly contrary to the wishes of the donor/testator whose intention is for the property to be used for the association's purposes. But this is merely the upshot of the association lacking separate legal personality and the unfortunate ignorance of the donor or testator/testatrix. Brightman J put it thus:

> "Of course, [they] did not intend the members of the society to divide her bounty between themselves, and doubtless she was ignorant of that remote but theoretical possibility. *Her knowledge or absence of knowledge of the true legal analysis of the gift is irrelevant.*"[83]

This shows us that the law takes a rather pragmatic approach. If a gift to an unincorporated association is evidently not for a charitable purpose or is incapable of being squeezed into the confines of a *Re Denley* trust, the default approach will be that of a trust for the members coupled with a seemingly *moral* obligation that they use the property for the stated purposes. Writing only a few decades after the *Leahy* decision, Hackney elegantly summarised the state of the law which is still true today:

> "The exercise has thus changed its juridical nature since *Leahy*; it is no longer a construction, in the sense of construing [intention]; it has become a construction in the sense of constructing. We are not looking at what the donor intends but trying to fit his intentions into a legal framework that works, whether or not it approximates to the category he has in mind."[84]

Unless or until there are substantial changes in the law, gifts made to unincorporated associations can never, at least legally speaking, both belong to the members as beneficiaries and be for a purpose. While theories have been conceived in an effort to do so, including the contract-holding theory, these are left wanting.[85]

[81] That there is an express or constructive trust—and there being no express or implied power regarding the purpose—means the *Quistclose* trust analogy is unhelpful. Moreover, *Quistclose* trusts are commercial trusts yet key to unincorporated associations is that they are not for business purposes.

[82] It would, for example, undermine the power of alienation—such falling within the broader 'right to the capital' incident of ownership: A.M. Honoré, "Ownership" in A.G. Guest (ed), *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1968) p.107, p.118. See generally eg *Re Machu* (1882) 21 Ch D 838; *Re Brown* [1954] Ch 39.

[83] *Re Recher's Will Trusts* [1972] Ch 526 at [539] (Brightman J) (emphasis added).

[84] J. Hackney, *Understanding Equity Trusts* (London: Fontana Press, 1987) p.81.

[85] See e.g. Smart who explains testamentary gifts to unincorporated associations on the basis of conditions subsequent and estoppel: P. Smart, "Holding property for non-charitable purposes: mandates, conditions and estoppels" (1987) Conv., 415. Though clever, the theory does not ensure the property is used for the purposes of the club; it merely prevents misuse of such.

3.6. Method in the madness?

An in-depth analysis of the contract-holding theory reveals something of even greater importance—something which changes how we should see/interpret each of the different methods of property-holding for unincorporated associations. If we take a wider view of the property-holding problem, it is possible to see that some of the methods have a great deal in common.

Where property is construed as being on trust for present members, this is merely a bare trust for the members of the club—with the club having a closed membership, hence why members are joint tenants.[86] Where property is held on trust for present and future members, this again is a bare trust but is, of course, of relevance for those clubs and societies with an open/fluctuating membership, where members are able to join and leave. With a bare trust at their heart, this begs the question of how the contract-holding theory is any different (if in fact it is).[87] A crucial difference, however, with the 'contract-holding' theory (properly understood), is that only in the latter does the law intervene in such a way as to make what is ultimately a moral obligation, that the members use the property in accordance with the association's purposes, appear to be a legal one. While this may be commendable in light of seeking to fulfil a testator's wishes regarding a gift to his club, it undermines the rule of law and only gives rise to further problems.

4. Conclusion

A close examination has shown that the contract-holding theory is not the solution we consider it to be. It is a theory which is deeply flawed, both at a specific, legal level, and on a broader, conceptual one. The analysis above shows us that the 'contract *inter se*' is merely a distraction, to hide the fact that the law dresses what is simply a moral obligation—that members use trust property for the purposes of the association—in legal clothing. What is more, it would seem that if there is any magic here at all, it is not that of any 'contract' existing between the members, but rather the illusion that the methods by which property may be held for an unincorporated association are fundamentally distinct; the contract-holding theory—as with some of the other methods of property-holding—amounts to little more than a bare trust for the members of the association.

[86] *Neville Estates Ltd v Madden* [1962] Ch 832 at [849] (Cross J).

[87] There is also an argument that the non-charitable purpose trust method—via the *Re Denley* trust—is better understood as a bare trust (A.J. Morris, "Private Purpose Trusts and the *Re Denley* Trust 50 Years On" (2020) 34(3) T.L.I 165); this would also explain why the only decisions to have positively cited *Re Denley* within the context of unincorporated associations also invoked the contract-holding theory (*Re Lipinski's Will Trusts* [1976] Ch 235; *Gibbons v Smith* [2020] EWHC 1727 (Ch)).