

**SEPARATION AND ABSTRACTION IN  
PROPERTY TRANSFERS: A COMPARATIVE  
STUDY OF ENGLISH AND CHINESE LAW**



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## ABSTRACT

This thesis is a non-traditional comparative study of a traditional topic, to see to what extent the non-unified rules in English law and vague rules in Chinese law can be fitted into the conceptual framework of separation and abstraction which originates in German law. It therefore comprises two main questions: first, how title/ownership is conveyed *inter vivos* consensually and second, whether the validity of conveyance is infected by a nullified or rescinded underlying basis. As for the existence of separation (between the underlying obligation and conveyance), answers for both jurisdictions are generally in the affirmative. It is further argued that though the underlying contract and the conveyance may factually coincide, a separate intent to convey can nevertheless be found as a method of conveyance conceptually independent from the contract. As for the existence of abstraction, answers for both jurisdictions are also generally in the affirmative, though in English law it appears to be but is in reality not subject to an exception in the context of sale of goods involving fraudulent misrepresentation, while in Chinese law such proposition can only be inferred from clues in other legislative provisions rather than direct authorities. A special feature of English law which must not be neglected is that though the transfer system may be notionally abstract at common law, the consequence of a valid conveyance involving a flawed underlying basis might be a right beyond *in personam* under a constructive trust. This makes the English system effectively causal in equity, though a coherent rationale is not easy to find regardless of the trust being an immediate response or one triggered by rescission. Although trusts are recognised in China, the role of constructive trust as a device for reversing unjust enrichment is alien to Chinese law, with substantial barriers from a systematic perspective for Chinese law to take lessons from English law. When it comes to debates over justifications between abstraction and causality, pro-causality justifications such as swollen assets, involuntary assumption of risk, causality plus bona fide acquisition, and property of sentimental value cannot stand up to scrutiny. It is suggested that the theory of detecting opportunity could serve as a positive argument for abstraction.

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## TABLE OF ABBREVIATIONS

AC	Appeal Cases (3 <sup>rd</sup> series)
All ER	All England Law Reports
Am Bankr LJ	American Bankruptcy Law Journal
Am J Comp L	American Journal of Comparative Law
Anon	anonymous
Anst	Anstruther's Exchequer Reports
App Cas	Appeal Cases (2 <sup>nd</sup> series)
art	article
B & Ad	Barnewall & Adolphus' King's Bench Reports
B & Ald	Barnewall & Alderson's King's Bench Reports
B & C	Barnewall & Cresswell's King's Bench Reports
BCC	Brown's Chancery Cases
BCLC	Butterworths Company Law Cases
Beav	Beavan's Rolls Court Reports
Bing	Bingham's Common Pleas Reports
BPIR	Bankruptcy and Personal Insolvency Reports
Bro CC	Brown's Chancery Cases
Burr	Burrow's King's Bench Reports tempore Mansfield
Camp	Campbell's Nisi Prius Cases
Can Bar Rev	Canadian Bar Review
Can JCCL	Canadian Journal of Comparative and Contemporary
CB	Common Bench Reports
CB NS	Common Bench Reports, New Series
CCR	Law Reports, Crown Cases Reserved
Ch	Law Reports, Chancery Division (3 <sup>rd</sup> series)
Ch App	Law Reports, Chancery Appeal Cases
Ch D	Law Reports, Chancery Division (2 <sup>nd</sup> series)
ChD	Chancery Division
Ch Rep	Chancery Reports
CLJ	Cambridge Law Journal
CLR	Common Law & Equity Reports
CLP	Current Legal Problems
Cmnd	Command Paper
Co	Company
Co Rep	Coke's King's Bench Reports

Colum L Rev	Columbia Law Review
Conv	Conveyancer
Cornell LQ	Cornell Law Quarterly
Corp	Corporation
Cox Eq Cas	Cox's Equity Cases
CUP	Cambridge University Press
CUPL	Chinese University of Political Science and Law
Doug KB	Douglas' King's Bench Reports
DP	Discussion Paper
E & B	Ellis & Blackburn's Queen's Bench Reports
ECPL	Journal of East China University of Political Science and Law
ed/eds	editor/editors
Edin L Rev	Edinburgh Law Review
edn	edition
eg	for example
EGLR	Estates Gazette Law Reports
ER	English Reports
Esp	Espinasse's Nisi Prius Reports
Eur Rev Priv L	European Review of Private Law
EWCA Civ	Court of Appeal (Civil Division)
EWHC	England & Wales High Court
Ex	Exchequer Reports
Ex D	Law Reports, Exchequer Division
F & F	Foster & Finlayson's Nisi Prius Reports
FLR	Family Law Reports
fn	footnote (abbreviation used when referring to a cited piece of work)
H & C	Hurlstone & Coltman's Exchequer Reports
Harv LR	Harvard Law Review
HCA	High Court of Australia
Hil	Hilary term
HKLJ	Hong Kong Law Journal
HLC	Clark & Finnelly's House of Lords Reports New Series
HM	Her Majesty's
ICLQ	International & Comparative Law Quarterly
ILTR	Irish Law Times Reports
ie	that is
In re/Re	In the matter of
IR	Irish Reports
J Eq	Journal of Equity
J Leg Hist	Journal of Legal History
JP	Justice of the Peace Reports
KB	Law Reports, King's Bench (3 <sup>rd</sup> series)

KBD	King's Bench Division
LBC	Lawbook Co
LLC	Limited Liability Company
Lloyd's Rep	Lloyd's (List) Law Reports
Lloyd's Rep Bank	Lloyd's Law Reports Banking
LLP	Limited Liability Partnership
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LQR	Law Quarterly Review
LR	Law Reports (1 <sup>st</sup> series)
LR App Cas	Law Reports, Appeal Cases (Second Series)
LR CCR	Law Reports, Crown Cases Reserved
LR Eq	Law Reports, Equity Cases
LR Ex	Law Reports, Exchequer Cases
LR HL	Law Reports, English and Irish Appeals
LR QB	Law Reports, Queen's Bench (3rd Series)
LR PC	Law Reports, Privy Council Appeal Cases
LS	Legal Studies
LT	Law Times Reports
Ltd	Limited
M & K	Mylne & Keen's Chancery Reports
Cr M & R	Crompton, Meeson & Roscoe's Exchequer Reports
M & W	Meeson & Welsby's Exchequer Reports
Mich	Michaelmas term
MLR	Modern Law Review
Moo PC	Moore's Privy Council Cases
NI	Northern Ireland Law Reports
n/nn	footnote (abbreviation used when referring to the current piece of work)
No	Number
NSWLR	Law Reports, New South Wales
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
P & CR	Property & Compensation Reports
pl	plea number
Plc	Public Limited Company
PNLR	Professional Negligence and Liability Reports
Pr Ch	Precedents in Chancery
pt/pts	part/parts
Pty Ltd	Proprietary Limited Company
P Wms	Peere-Williams' Chancery & King's Bench Cases
QB	Law Reports, Queen's Bench (3 <sup>rd</sup> series)
QBD	Queen's Bench Division

Renmin UP  
RLR  
sch/schs  
Scot Law Com  
s/ss  
SS  
Stan L Rev  
Swan  
T & T  
Taunt  
TLI  
tr  
TR  
  
Trin  
Tul L Rev  
U Illinois L Rev  
U St Thomas LJ  
UKHL  
UKNCCL  
  
UKSC  
UWALR  
  
v  
Vanderbilt L Rev  
Ves  
viz  
vol/vols  
WLR  
WN  
YB

Renmin University Press  
Restitution Law Review  
schedule/schedules  
Scottish Law Commission  
section/sections  
Publications of the Selden Society  
Stanford Law Review  
Swanston's Chancery Reports  
Trusts & Trustees  
Taunton's Common Pleas Reports  
Trust Law International  
translator  
Durnford & East's Term Reports, King's  
Bench  
Trinity term  
Tulane Law Review  
University of Illinois Law Review  
University of St Thomas Law Journal  
UK House of Lords  
UK National Committee of Comparative  
Law  
UK Supreme Court  
University of Western Australia Law  
Review  
against (*versus*)  
Vanderbilt Law Review  
Vesey Junior's Chancery Reports  
namely  
volume/volumes  
Weekly Law Reports  
Weekly Notes of Cases  
Yearbook

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# INTRODUCTION

## A. Aim of Project

The abstract system, with which many civilian jurisdictions are familiar, is a fundamental but controversial system originating in German law<sup>1</sup> and arguably rooted in Roman law<sup>2</sup> governing transfers of rights, especially property rights.<sup>3</sup> It consists of two separate principles: (i) the principle of separation (*Trennungsprinzip*), by which the underlying consensual obligations to transfer are separate from the actual conveyance of the subject-matter of the transfer,<sup>4</sup> and (ii) the principle of abstraction, by which a defect in the

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<sup>1</sup> Germany has been widely recognised as the homeland and the first jurisdiction accepting the ideas of separation and abstraction thanks to 19th century Pandectist jurists such as Gustav Hugo and Friedrich Carl von Savigny who identified a separate ‘real agreement’ in conveyances and its ‘abstraction’ from the underlying obligational basis: see Birke Häcker, *Consequences of Impaired Consent Transfers: A Structural Comparison of English and German Law* (Mohr Siebeck 2009) 49. For a historical account that the modern understanding of separation and abstraction in German law has deviated from what von Savigny originally meant, see Changfeng Tu, *Abstrakte Verfügungen und kausale Verpflichtungen?* (Nomos 2007) pt 2. For an orthodox description in comparison, see eg, Stephan Buchholz, *Abstraktionsprinzip und Immobilienrecht* (Vittorio Klostermann 1978) ch 1.

<sup>2</sup> Eg, Professor Barry Nicholas argued that the earliest example of a legal system shifting from causality to abstraction can be traced back to Roman law. As elucidated by him, while the classical law was that ownership cannot pass if the parties had no consensus as to the cause for doing so, the law of Justinian reversed the position, by which the validity of conveyance was no longer dependent on any cause external to itself, but on its own rules regarding physical and mental requirements. Thus, conveyances by methods of *traditio*, *mancipatio* and *in iure cessio* were no longer causal but abstract: Barry Nicholas, *An Introduction to Roman Law* (Clarendon Press 1962) 118.

<sup>3</sup> Although the abstraction between dispositive transaction and obligatory transaction can *ex hypothesi* be applicable to all species of transfer of rights (including choses in possession and choses in action), the scope of enquiry of this thesis is limited to the transfer of rights with respect to physical things.

<sup>4</sup> There is another definition of separation held by some Chinese academics saying that, where a conveyance can rest on the parties’ contractual consent plus an additional merely physical act of delivery (without a separate intent to convey), such unitary intent plus system could be labelled as ‘separation’ too. However, it should be clarified that such alternative definition never represents

underlying obligation to transfer does not infect the validity of conveyance.

Before setting out the relationship and possible combinations among fundamental concepts relevant to separation and abstraction in chapter 1 below, the aim of the present thesis should be explained as to why it is a worthwhile project for both Chinese and English legal research. On the path towards a new civil code,<sup>5</sup> China has had since the 1980s a debate over whether it should fully adopt the abstract system. While the legislature did not explicitly recognise the abstract system, neither did it negate it. A new General Provisions of Civil Law 2017, which will be the first book of the upcoming Chinese Civil Code, was promulgated in mid-March 2017, with a number of substantial changes having been made compared to the 1986 Law it will replace. It is expected that drafts of books on Property and Obligations will be completed in the next couple of years, meaning that the choice of fundamental transfer system between abstraction and causality might be very close to a formal decision in Chinese law.

The core concern of the abstract system, which is not confined to the Chinese context, is, by common law terminology, that there will be no proprietary restitution provided as a response to a transferee's unjust enrichment, and by civilian terminology, that leaving aside remedies *in personam* such as unjustified enrichment, the transfer of

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the term 'separation' used in the present thesis from time to time. Here, 'separation' requires a juridical act of conveyance or at least a separate intent to convey.

<sup>5</sup> Until now, three academic groups have published their draft of Chinese Civil Code since the beginning of this century, led by LIANG Huixing, WANG Liming and XU Guodong respectively. Only one has been translated into English: Liang Huixing and others, *The Draft Civil Code of the People's Republic of China* (Martinus Nijhoff Publishers 2010). For a complete collection of official drafts for the Civil Code in Chinese, see HE Qinhuo and others (eds), *新中国民法典草案总览 [A Collection of Drafts for a New Chinese Civil Code]* (rev edn, Peking University Press 2017).

property is still be valid even if it has no valid underlying basis or *iusta causa*. Anti-abstractionists argue this can lead to ‘unfairness’ to the transferor in certain situations,<sup>6</sup> which can be solved by adopting the causal system, meaning (i) that property transfers normally need an underlying basis, and (ii) that property rights will be seen as never having been passed to the transferee if the underlying contract is rescinded or nullified.

A defect of the current debate in China is that there is virtually no in-depth research conducted by Chinese scholars on the common law position on the above issue. This is in stark contrast to the amount of research on civilian jurisdictions, which makes the debate incomplete from a global perspective. Worse still, most members of the Chinese property law academia, regardless of whether they are proponents or opponents of the abstract system, fail to correctly understand English law in this respect. As a result, it is a prevalent notion among Chinese lawyers that the abstract system is a creature of German law only, which stands against the tide of the general development trends of the modern European private law harmonization and thus should not be adopted by Chinese law.

Though the old civilian abstract/causal debate has been alien to English lawyers until the late twentieth century, this does not mean that English rules regarding property transfers cannot possibly be fitted into such civilian framework. Notably, it was sometimes argued by comparative lawyers that English law does not have a uniform

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<sup>6</sup> Eg, in the events where the transferee is insolvent, where the property is collateralized as security, and where the property is transferred on to a third party.

system, whether in terms of the consensual/*traditio* contrast,<sup>7</sup> or the abstract/causal contrast. The present thesis will argue that the abstract system nevertheless does exist in England, subject to certain qualifications. These include: (i) a seemingly non-uniform separation principle,<sup>8</sup> (ii) a seemingly non-uniform abstraction principle,<sup>9</sup> and (iii) the possible role of trusts to reverse unjust enrichment.<sup>10</sup> On the one hand, from an effective perspective, these regimes may allay concerns regarding the drawbacks of the abstract system in different ways, making English law a good point of reference for the ongoing Chinese debate. On the other hand, the underpinnings of each of these qualifications, especially the second, should be examined in both positivist and normative ways.

## *B. Methodology*

Now a few words on methodological explanation. The nature of my research is generally doctrinal and comparative. As for *doctrinal* research, as opposed to theoretical research and socio-legal research, the thesis is to concentrate on black-letter law from cases and legislation, and academic literature on these rules. As for *comparative*

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<sup>7</sup> Traditio literally means delivery in English. However, in this thesis, the ‘traditio system’ is used in a wide sense, referring to systems where the conveyance of property rights is not complete without some further act (whether by delivery or deed for goods, by registration or deed for land). Therefore, the traditio/consensual contrast, or to put it in another way, the ‘intent alone/intent plus contrast’ is employed to describe transfer systems with respect to both movables and immovables.

<sup>8</sup> Specifically, rules on transfer of title in English law is not entirely ‘separatist intent plus’ but could be ‘separatist intent alone’ where the underlying obligational basis is for instance, contract of sale of goods.

<sup>9</sup> Specifically, rules on transfer of title in English law is not entirely abstract but could be causal where the invalidating factor is for instance, fraudulently induced mistake. However, with the help of Professor Häcker’s ‘power model II’ plus a separatist approach for ‘intent alone’ transfers, English law could be interpreted as entirely abstract.

<sup>10</sup> Specifically, there is a series of constructive trusts in favour of the transferor under certain circumstances involving impaired consent despite a valid conveyance, though it is a controversial issue with no unanimity.

research, chapters 1 to 6 will carry out conceptual comparisons of rules in English and Chinese law regarding methods of property transfers and the validity of conveyance upon a flawed underlying basis. Methodology will be changed from descriptive comparison to normative comparison in chapters 7 and 8 for reform and justification issues respectively.

The great English legal historian Maitland once said that ‘it is dangerous to play with foreign terms unless we know very well what we are about.’<sup>11</sup> This indeed is a sound warning for comparative lawyers to step into a field of law where many of the terms in the target jurisdiction have a different meaning from those in their homeland. However, it is equally dangerous not to play with foreign terms just because we are not quite sure that we know them well enough. On the one hand, there are admittedly fundamental differences between English law and Chinese law regarding many core terms which are inevitably to be used for comparative research on separation and abstraction. On the other hand, the differences between eg, ownership and title, gift, contract and gratuitous promise, property torts and vindication, should not bar us from further exploration. For those who are familiar with the civilian absolute idea of *ownership*,<sup>12</sup> the English notion of relativity of *title*<sup>13</sup> might seem inconceivable. Yet

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<sup>11</sup> F W Maitland, *Equity Also the Forms of Action at Common Law* (CUP 1913) 372.

<sup>12</sup> Peter Birks, ‘The Roman Law Concept of Dominium and the Idea of Absolute Ownership’ (1985) *Acta Juridica* 1; Joshua Getzler, ‘Roman Ideas of Land Ownership’ in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998); George L Gretton, ‘Ownership and Its Objects’ (2007) 71 *Rabel Journal of International and Comparative Law* 802. In English law ownership is used in a different sense. It is used to describe the holding of a right, no matter what kind of right it is. Thus, one can ‘own’ a freehold, a lease hold or even a personal right. However, the word ‘own’ in English law cannot be used to describe a particular type of right, ie ‘ownership’ (*dominium*) in a civilian sense.

<sup>13</sup> Ben McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 154–6; Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Hart Publishing 2011); 26–30; William Swadling, ‘Property: General Principles’ in Andrew Burrows (ed), *English Private Law* (3rd edn, OUP 2013) 4.422. Cf Luke Rostill, ‘Relative Title and Deemed Ownership in English Personal Property Law’ (2015) 35 *OJLS* 31. Roughly speaking, by taking possession of A’s goods, B could

given that this is a thesis largely on derivative acquisition, as long as we do not (and we indeed do not need to) discuss the situation of title independently acquired by taking possession, so that title usually means ‘the highest title’ rather than any possible inferior title,<sup>14</sup> *ownership* can be treated as synonymous with *title* for the purpose of this thesis. Similarly, while it makes no sense to say ‘gift contract’<sup>15</sup> in English law because a gratuitous promise does not create a contract,<sup>16</sup> it by no means indicates that we must avoid using *gift* cases (and similar cases involving eg, mistaken payment) in English law to test causality or abstraction. There are at least two reasons for this. First, for those gratuitous promises made by deed or with the promisee’s detrimental reliance, it does trigger a binding obligation<sup>17</sup> or at least enforceability<sup>18</sup>, albeit one not labelled ‘contractual’;<sup>19</sup> an underlying obligational basis is provided here for causality or abstraction. Second, for cases involving gratuitous promises not in the form above, there is indeed no obligation under English law, but if we cut loose their jurisdictional conceptual context and feed these cases (the facts of which are normally not country-

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acquire title to the goods in question originally (independently), being the right to exclusive possession forever against everyone minus A. Although B’s title is inferior to A’s, their contents are the same, being the right to exclusive possession forever against everyone. Thus, B’s title can be transferred to C, though according to *nemo dat*, C’s dependently (derivatively) acquired title cannot bind A as well.

<sup>14</sup> This is just for the purpose of simplicity, which by no means indicates that the rules discussed in this thesis with regard to English law do not apply to all titles, best or not.

<sup>15</sup> Contract Law 1999 (China), art 185.

<sup>16</sup> *Pinnel’s Case* (1601) 5 Co Rep 117; *Currie v Misa* (1874-75) LR 10 Ex 153; *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87.

<sup>17</sup> Law of Property (Miscellaneous Provisions) Act 1989, s 1.

<sup>18</sup> *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, though unlike deed, estoppel does not create an ‘obligation’ or cause of action but just estop the donor from denial, hence it still has certain enforceability in the sense of binding effect: *Combe v Combe* [1951] 2 KB 215.

<sup>19</sup> Because ‘contract’ is merely one of the sub-species of ‘enforceability’; enforceability on a promise can be created by contract; it can be created by other reasons such as deed and promissory estoppel.

specific at all) into the functional civilian ‘black box’ and see what consequences emerge, we can find that they are still good cases to test causality or abstraction. No one would deny that facts similar to eg, *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*,<sup>20</sup> *Chase Manhattan Bank v Israel-British Bank (London) Ltd*<sup>21</sup> or *Westdeutsche Landesbank Girozentrale v Islington LBC*<sup>22</sup> may also happen in China. For the same reason, the difference between *property torts* in English law and *vindication* in Chinese law does not bar either. For instance, although detinue (in pre-1977 law)<sup>23</sup> and conversion (and its old form trover) are different from vindication<sup>24</sup> in terms of the scope of protection (eg, subsequent loss)<sup>25</sup> and forms of remedies (eg, monetary restitution instead),<sup>26</sup> the possibility of bringing detinue or conversion can be seen as a test for causality or abstraction.

Unlike traditional comparative works where writers would portray a ‘mainstream’ view of rules in one jurisdiction to an audience trained in another jurisdiction, it is very difficult for the present thesis to keep such ‘faithful’ tradition. The most distinctive reason lies in targeted jurisdictions. Unlike comparing many European continental legal systems such as German law, French law and Dutch law where rules regarding property transfers and consequences to conveyance under a flawed obligational basis are well-

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<sup>20</sup> [1980] QB 677.

<sup>21</sup> [1981] Ch 105.

<sup>22</sup> [1996] AC 669.

<sup>23</sup> Detinue at one time was an independent claim but was consolidated into the tort of conversion by Torts (Interference with Goods) Act 1977, s 2.

<sup>24</sup> Property Law 2007 (China), arts 34–35.

<sup>25</sup> Common Law Procedure Act 1854, s 78.

<sup>26</sup> Torts (Interference with Goods) Act 1977, s 3(2).

settled, both the English and the Chinese counterparts are not the case. It is therefore inevitable to incur critiques from time to time throughout the present thesis on whether a particular rule in English law or in Chinese law should be interpreted in a separatist or unitary, abstract or causal way.

Honestly speaking therefore, it is inevitable to see that for readers who have encountered relevant discussions from other writers, or who have thought about English law in this respect, they might possibly feel that this thesis does not paint a ‘representative’ picture of English law. For instance, among the existing various interpretations regarding causality versus abstraction, some argue that English law is entirely causal across all contracts so far as personal property is concerned.<sup>27</sup> Another view is that English law is causal for sale of goods, otherwise abstract.<sup>28</sup> A third view is that English law is abstract with respect to transfers of title to money.<sup>29</sup> A fourth view is that English law is entirely abstract.<sup>30</sup> Admittedly, the major proposition is to regard English law as largely causal whereas the abstractionist interpretation is the minor one. Nevertheless, as will be shown in chapters 2 to 6, a closer look at the scattered authorities in English law would reveal that the abstractionist interpretation should be the more

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<sup>27</sup> Lars van Vliet, ‘The Transfer of Moveables in Scotland and England’ (2008) 12 *Edin L Rev* 173; *Transfer of Movables in German, French, English and Dutch Law* (Ars Aequi Libri 2000) ch 4; Michael Bridge and others, *The Law of Personal Property* (2nd edn, Sweet & Maxwell 2017) para 18-030.

<sup>28</sup> Birke Häcker, ‘Rescission of Contract and Revesting of Title: A Reply to Mr Swadling’ [2006] *RLR* 106; ‘Causality and Abstraction in the Common Law’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (CUP 2010).

<sup>29</sup> David Fox, ‘The Transfer of Legal Title to Money’ [1996] *RLR* 60; *Property Rights in Money* (OUP 2008) paras 3.48–3.72.

<sup>30</sup> William Swadling, ‘Rescission, Property, and the Common Law’ (2005) 121 *LQR* 123, which significantly inspired the present thesis, though the present thesis intends to go a step further to build the abstraction in English law on the premise of separation in English law.

rational one, with causality existing only in an effective sense in limited scenarios. It is therefore necessary for this thesis to deviate from the standard functionalist approach but to conduct a conceptual study, in the sense of providing one particular interpretation of English law with a significant amount of persuasion. For the same reason, readers should note that they are not being presented with the mainstream interpretation but one particular interpretation of Chinese law too.

### *C. Structure*

The main body of the thesis is divided into eight chapters. Chapter 1 sets the scene for the detailed analysis and comparison in the chapters which follow, with two concrete objectives. First, as neither England nor China but instead Germany is the homeland of the principles of separation and abstraction, a preliminary introduction is provided to elucidate the differences between separation and abstraction, thereby making the separate treatment of these two concepts in the following four chapters meaningful. Second, since the contrast of ‘intent plus versus intent alone’ and the contrast of ‘separatist versus unitary’ overlap, it is necessary to have a preliminary illustration with respect to the relation between these two contrasts, as well as their relations to the contrast of ‘abstraction versus causality’.

Chapter 2 deals with separation in ‘intent plus’ transfers, ie, transfers completed by the parties’ intent plus additional methods of conveyance such as registration, delivery or deed. As for registration, transfers of registered title by registration and unregistered title by deed in English law encompass the notion of separation between contract and

conveyance in land law. Similarly, transfers of ownership to immovables in Chinese law generally follows the separationist idea. As for delivery, separation can be seen in English and Chinese law from two aspects. First, actual delivery or constructive delivery (namely, *traditio brevi manu*, *traditio longa manu*, and *constitutum possessorium*) are recognised as methods of conveyance of property rights to movables in both jurisdictions. As for transfer by deed, such method of conveyance in English law has no counterpart in Chinese law, though it is conceivable from an outsider's view that the execution of a deed is distinct from the underlying contract.

Chapter 3 deals with separation in 'intent alone' transfers, which refers to transfers completed by parties' intent alone. A typical example in English law lies in the sale of goods. It is argued that the statutory provision of section 17 of the Sale of Goods Act 1979 means title can pass by parties' intent to convey, rather than that title can pass by contract. In addition, the widely-accepted assertion that property may pass by the contract itself has a long history in common law, is erroneous. The intent to convey and the contract sometimes coincide as a matter of fact, but the former is conceptually separate from the latter. Although 'transfer of title by intent alone' has no counterpart in Chinese sale of goods law, a separate intent to convey can nevertheless be found in Chinese law by analysing juridical acts in various contexts.

Chapter 4 deals with the question whether the principle of abstraction exists in English and Chinese law with regard to transfers involving impaired consent, ie, where the underlying obligation is avoided due to impaired consent, especially spontaneous mistake and fraudulent misrepresentation. As for English law, it is argued that as long as

there is a valid conveyance based on a valid intent to convey title on the part of the transferor, title passes, and there will be no general automatic reversion of title by the transferor's exercise of the power of contractual rescission. However, such proposition, backed by a series of old authorities, was challenged by another series of authorities with the leading cases being *Load v Green* and *Car & Universal Finance v Caldwell*, which is limited to the context of sale of goods involving fraudulent misrepresentation. However, *Caldwell* can be understood in an abstractionist way, which leads to a further implication, ie, the possibility of abstraction in intent alone transfers. As for Chinese law, it is argued that although the wording of article 58 of the Contract Law 1999 is vague, evidence of the existence of the principle of abstraction can be found from clues in the law of limitation.

Chapter 5 deals with the question whether the principle of abstraction exists in English and Chinese law with regard to transfers involving other invalidating factors, such as where the underlying obligation is void due to illegality (assuming it is an unjust factor when it comes to English law), incapacity, and non-compliance with formalities in the making of the contract. As regards English law, it is submitted that the underlying basis being void due to such kinds of invalidating factors does not *ipso facto* render the conveyance void. As regards Chinese law, it is argued that abstraction can be inferred both from rules on invalidating factors and clues in unjustified enrichment. Finally, the land registration system being constitutive and conclusive of title and the rules on rectification do not present a challenge to abstractionism in either jurisdiction.

Chapter 6 explores a special feature in English law that though the property

transfer system is notionally abstract, the consequence of a valid conveyance involving a flawed underlying basis is not always simply a personal right triggered by unjust enrichment. Rather, where the unjust factor is mistake or undue influence, the consequence might sometimes be a right beyond *in personam* under a constructive trust. This makes the English system 'effectively causal' in the sense of proprietary attributes of trusts based on tracing, following, and immunity from execution and insolvency being available, though the notion that a constructive trust has the same effect of insolvency priority as a consensual trust should not be taken for granted. Some of these incidents recognise an immediate trust while others grant a trust arising out of rescission, among which a coherent doctrine is difficult to find.

Chapter 7 concentrates on the possible role of Chinese trust law in reversing unjustified enrichment based on lessons from English law. The starting point is that though China has trust legislation, none of the aforementioned incidents in English law of trusts is explicitly recognised in China. However, given that there are Chinese academic views endorsing the importation of the constructive trust, a closer look at considerations for the Chinese legislature to promulgate a trust law, as well as the interaction between the so-called traditional civil law and trust law, indicates that the arguments for importing the English idea of constructive trust as a device to reverse unjust enrichment should not be accepted.

Chapter 8 draws a comparison not on the positive rules but on the normative justifications for the choice between abstraction and causality. It first considers policy-based justifications of proprietary restitution in English law, eg, the assumption of risk

theory, swollen assets theory, and the animus theory. It also analyses the worry of unfairness regarding abstraction among Chinese academics, as well as the pervasive, principle-based justification on ‘causality plus bona fide purchase’. After rejecting criticisms of the abstract system, it suggests that a modified assumption of risk theory based on comparing the opportunity of detecting flawed underlying basis could serve as a positive argument for abstraction.

## CHAPTER 1 SETTING THE SCENE

Conducting comparative legal research without first laying down a basic understanding of the framework, principles, and terminology of the systems involved would be a path riddled with the risk of misunderstanding and confusion. This chapter therefore sets the scene for the detailed analysis and comparison in the chapters which follow, with two concrete objectives. First, since neither England nor China but Germany is the homeland of the principles of separation and abstraction, and since neither the meaning of these two principles nor their conceptual relation is clear-cut, a preliminary introduction is provided to elucidate the conceptual differences between separation and abstraction, thereby making the separate treatment of these two principles in the following chapters meaningful. Second, since the contrast of ‘intent plus’ versus ‘intent alone’ and the contrast of ‘separatist versus unitary’ overlap, it is therefore necessary to spare a bit of ink with respect to the relation between these two contrasts, as well as their relations to the contrast of ‘abstraction versus causality’.

### 1.1 The Principle of Separation

In the eyes of some comparative property lawyers, transfer systems consist of two dividing lines. The first is the consensual system versus the delivery (*traditio*) system, the second being the abstract system versus the causal system.<sup>31</sup> Considering that the use

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<sup>31</sup> Sjef van Erp and Bram Akkermans (eds), *Cases, Materials and Text on National, Supranational and International Property Law* (Hart Publishing 2012) ch 8; Vincent Sagaert, ‘Consensual Versus Delivery Systems in European Private Law: Consensus About Tradition?’ in Wolfgang Faber and Brigitta Lurger (eds), *Rules for the Transfer of Movable* (Sellier 2008); Vincent Sagaert and Julie Del Corral, ‘Acquisition of Ownership of Goods in the DCFR: A Belgian

of the term ‘delivery’ is limited to the context of movables rather than all tangibles,<sup>32</sup> it is more reasonable to employ the word ‘intent plus’ instead, referring to a system where the conveyance is completed by an additional, separate stage with various methods prescribed by law no matter what the ‘plus’ precisely denotes; it could be delivery, deed or registration. The opposite of the ‘intent plus’ system is the ‘intent alone’ system, referring to a system where property rights generally pass automatically on the conclusion of the contract, save for agreements to the contrary (or strictly speaking, when the parties so intend in English law). As a result, normally no additional stage other than the parties’ intent in contract is needed to complete the transfer.<sup>33</sup>

The principle of separation (*Trennungsprinzip*) derives from this intent plus notion in German civil law. At its core is ‘the separation of the obligation from the performance of the obligation’.<sup>34</sup> Although the two may factually coincide with each other, they are always viewed as two separate conceptual stages of a transaction. This

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Perspective’ in Vincent Sagaert and others (eds), *The Draft Common Frame of Reference: National and Comparative Perspectives* (Intersentia 2012).

<sup>32</sup> Delivery used to be a way of transferring fee simple to land in English legal history before 1925, where there was a symbolic ceremony called ‘livery of seisin’ taking place on the very land where the transferor placed a clod of earth into the hands of the transferee. This was abolished as a way of conveyance by the Law of Property Act 1925, s 51(1), which means that ‘delivery’ is no longer suitable to represent land conveyance. To complicate matters further, even for cases of chattel conveyance, delivery is not the only effective method as there still the option of doing so by deed.

<sup>33</sup> Though it was argued by some scholars that in French and Belgian law, a separate stage of conveyance could be found, being different from the obligatory agreement: Vincent Sagaert and Julie Del Corral, ‘Acquisition of Ownership of Goods in the DCFR: a Belgian Perspective’ in Vincent Sagaert and others (eds), *The Draft Common Frame of Reference: National and Comparative Perspectives* (Intersentia 2012).

<sup>34</sup> Jens Thomas Füller, ‘The German Property Law and Its Principles’ in Wolfgang Faber and Brigitta Lurger (eds), *Rules for the Transfer of Movables* (Sellier 2008) 200. Some would say that this is a part of the principle of abstraction (which is used in a loose sense): Norbert Horn and others, *German Private and Commercial Law: An Introduction* (Tony Weir tr, Clarendon Press 1982) 70.

was not only adopted in German law,<sup>35</sup> but also by a number of other continental European jurisdictions such as the Netherlands, Switzerland, Austria, and Greece, where property does not pass unless there is an effective delivery (in cases of movables) or registration (in cases of immovables).<sup>36</sup> However, the Germans went further in the 1800s, led by Pandectist jurists drawing a conceptual distinction between ‘obligatory’ juridical acts (*Verpflichtungsgeschäft*) and ‘dispositional’ juridical acts (*Verfügungsgeschäft*),<sup>37</sup> the latter of which can also be called ‘real contract’ or ‘real agreement’ if the subject-matter is ‘real rights’.<sup>38</sup> This means that the ‘real contract’ does not merely denote the factual performance of the contract, but is a juridical act with the transferor’s intent to convey besides his factual act of convey. This makes German law different from many other ‘intent plus’ jurisdictions in that the former interprets property transfers in a separatist way, while the latter interpret property transfers in a unitary way. Specifically, following the separatist approach, the intent to convey is conceptually different from the intent to create an underlying obligation to convey, whereas following the unitary approach, there

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<sup>35</sup> German Civil Code (Germany), ss 873, 925, 929. Similar provisions can also be found in Greek Civil Code (Greece), arts 1033, 1034.

<sup>36</sup> Dutch Civil Code (the Netherlands), arts 3:4, 3:84; Austrian General Civil Code (Austria), ss 425, 431; Swiss Civil Code (Switzerland), arts 656, 714; Spanish Civil Code (Spain), art 1473. Note that there are similar words translated as ‘entry’ (Netherlands and Switzerland), ‘intabulation’ (Austria) and ‘transcription’ (Italy) in civilian codes in lieu of the word ‘registration’ regarding transfer of immovables.

<sup>37</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, North-Holland Publishing 1977) 180. For a detailed introduction in English on von Savigny’s contribution to the German principles of separation and abstraction, see L P W van Vliet, ‘Iusta Causa Traditionis and Its History in European Private Law’ (2003) 11 *Eur Rev Priv L* 342.

<sup>38</sup> The phrase ‘real property’ or ‘real right’ in civil law has a broader meaning compared to its counterpart in common law. They include all tangible property rights, not only confined to ‘real’ property (immovables) but also person property (movables). Note that real agreement is merely a sub-species of dispositional juridical acts in German law, for the principle of separation in German law not only applies in dispositions of property rights, but also in claims (assignment of debts): B S Markesinis and others, *The German Law of Obligations*, vol I (Clarendon Press 1997) 20.

is no such thing as an independent intent to convey, such intent must be in the underlying contractual basis, so that there is only one intent throughout the whole transaction.

Unlike the intent plus systems in civilian jurisdictions which can be interpreted in both separatist and unitary ways, the intent alone systems in civilian jurisdictions, by contrast, are all interpreted in a unitary way, though hypothetically it can be interpreted in a separatist way, as will be shown English law of sale of goods in chapter 3 below. The unitary intent alone approach was adopted by France, Belgium, Italy and non-European civilian jurisdictions such as Japan.<sup>39</sup> It means, the contract is effective to transfer property rights at the time the parties stipulate, which normally equals to, leaving formality requirements aside,<sup>40</sup> the reaching of consensus by which the parties agree to bring about the contract. Therefore, it is also called the principle of *solo consensu*. As a result, a separate act of conveyance is not necessary to pass property rights; the obligation to deliver is accomplished by the mere consent of the parties. Failure to deliver or register does not affect the validity of transfer of property, but merely its binding effect against third parties.<sup>41</sup> Of course the party can, by party autonomy agree not to complete the obligation to transfer merely at the moment of incurring the contract

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<sup>39</sup> French Civil Code (France), arts 938, 1196, 1583; Belgian Civil Code (Belgium), arts 938, 1136, 1138, 1583; Italian Civil Code (Italy), arts 1376, 2643, 2644, 2684; Japanese Civil Code (Japan), arts 176–78.

<sup>40</sup> For example, some types of contracts should be in writing otherwise they cannot be effective even if the parties have reached an agreement. This issue will be discussed in detail in the following chapters.

<sup>41</sup> French Civil Code (France), art 1198; The décret of 4 January 1955 (France). For a brief introduction to this, see eg, Geneviève Helleringer, ‘The Proprietary Effects of Contracts’ in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms* (Hart Publishing 2017). Japanese Civil Code (Japan), arts 177–78 are clearer provisions. For instance, if A enters into a contract of sale with B on Day 1, but delivers the goods in question to C on Day 2, then B cannot bring a vindication claim against C even though according to the principle of *solo consensu* B has acquired ownership from A on Day 1.

which gives rise to the obligation,<sup>42</sup> but this does not diminish the unitary intent alone system.

## 1.2 The Principle of Abstraction

Suppose a transfer is valid according to the rules of property law, will the conveyance be infected by a flawed underlying obligation? For instance, if a transferee acquire property right by the transferor's act of delivery (with an intent to convey), but the underlying contract later on turned out to be a voidable one, will the transferor's property be seen as never having been passed to the transferee when the transferor elects to rescind the contract? This is a question which cannot be answered by the principle of separation. Indeed, among civilian jurisdictions adopting the intent plus system, their answers to this question vary. Unlike the majority, German law holds the position that the property transfer is purely 'abstract';<sup>43</sup> thus no matter whether the underlying obligations is void or voidable due to fundamental defects in contract regarding incapacity, impaired consent, illegality, or informality as to validity, it does not infect the validity of the transfer, which is determined by its own rules. This is called the principle of abstraction (*Abstraktionsprinzip*). As a result, generally speaking, even if the transferor elects to rescind the contract, the transferor nevertheless cannot have the property right automatically re-vested. The remedy the law could provide for the transferor is a claim based on unjustified enrichment due to absence of basis, so that the transferor can either

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<sup>42</sup> This is often seen in cases of conditional sale of goods (retention of title) and sale of unspecified goods.

claim for specific restitution and thereby have the property right re-conveyed, or alternatively,<sup>44</sup> claim to have equivalent monetary restitution in lieu of re-conveyance.

If we use a metaphor to describe the effect of the principle of abstraction as a ‘filter’,<sup>45</sup> then we can use another metaphor to say that there is a ‘mirror effect’ between the validity of the contract and the validity of conveyance in other continental European jurisdictions adopting the unitary intent plus system as well as the unitary intent alone system standing on the opposite position.<sup>46</sup> Since the unitary approach means there is only one intent in the contract throughout the whole transaction, the validity of transfer is surely dependent on a valid intent in the contract. Thus, a transfer can be seen as retrospectively invalid simply because its underlying obligation (as the *iusta causa traditionis* of the transfer) is void *ab initio* or subsequently rescinded. This is called the principle of causality, implying the general idea that ‘all conveyances shall be based

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<sup>43</sup> This position is taken by Germany, Greece, Estonia, and also some other jurisdictions outside Europe such as South Africa, Scotland and Taiwan: see E J Cohn, *Manual of German Law*, vol I (2nd edn, Oceana Publications 1968) paras 134, 305, 360; Steven Bartels, ‘An Abstract or a Causal System’ in Wolfgang Faber and Brigitta Lurger (eds), *Rules for the Transfer of Movables* (Sellier 2008); Kai Kullerkupp, ‘Transfer of Ownership in Recent Reform Projects: Estonia’ in Wolfgang Faber and Brigitta Lurger (eds), *Rules for the Transfer of Movables* (Sellier 2008); P J W Schutte, ‘The Characteristics of an Abstract System for the Transfer of Property in South African Law as Distinguished from a Causal System’ (2012) 15 Potchefstroom Electronic LJ 120; WANG Tze-Chien, *民法物权 [Civil Law: Property]* (Peking University Press 2009) 59–69.

<sup>44</sup> Or ‘subsidiarily’, meaning the ‘second-best’ claim from a civilian perspective.

<sup>45</sup> Basil Markesinis and others, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart Publishing 2006) 30.

<sup>46</sup> Indeed, this position is taken not only by ‘intent alone’ jurisdictions such as Italy, Belgium and France (eg, French Civil Code (France), art 711), but also some ‘intent plus’ jurisdictions such as Austria (Austrian General Civil Code (Austria), s 380), Netherlands (Sjef van Erp and Bram Akkermans (eds), *Cases, Materials and Text on National, Supranational and International Property Law* (Hart Publishing 2012) 830–7), and Switzerland (So far as transfer of movable property is concerned, cf K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, North-Holland Publishing 1977) 185–7).

upon a cause.<sup>47</sup> Under the operation of causality, where the contract is null and void or, voidable and rescinded, the property right automatically reverts in the transferor, who does not have to resort to the unjust enrichment but only need to claim to have the possession of the property back if he intends so.

Similar to other legal principles, the principle of abstraction also tolerates a limited number of exceptions,<sup>48</sup> as a result of which it was asserted by some comparative lawyers that the principle of abstraction should be defined as that ‘the validity of the actual transfer of property is only *exceptionally* affected by the invalidity of the contract.’<sup>49</sup> Some of these are genuine exceptions, while others are not. Take German law as an example. The first exception, which is a genuine one, due to considerations of party autonomy, is that the transferor may add a resolutive condition, or a condition precedent to the transfer that the conveyance is valid so long as the underlying contract remains valid.<sup>50</sup> However, such resolutive conditions are invalid for transfers of immovables.<sup>51</sup> The second exception is identity of defect, which means that a certain defect in the contract coincidentally happens to be the same defect in the conveyance. For instance, if

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<sup>47</sup> F H Lawson, *A Common Lawyer Looks at the Civil Law* (University of Michigan Law School 1993) 158.

<sup>48</sup> Note that the term ‘exception’ is used here in a loose sense, for in the eyes of some scholars in jurisprudence this should not be called ‘exception’ but merely ‘counter-instance’ which we could not hope to enumerate to refine the statement of the principle: Ronald Dworkin, *Taking Rights Seriously* (new impression, with a reply to critics, Duckworth 1978) 25.

<sup>49</sup> P D V Marsh, *Comparative Contract Law: England, France, Germany* (Gower 1994) 100 (emphasis added).

<sup>50</sup> German Civil Code (Germany), s 158. Note that unlike resolutive condition, adding a suspensive condition to the contract stating that the conveyance is complete only if the contractual obligation becomes valid is not a genuine exception to the principle of abstraction. Take retention of title as an example. In the case where in fact there is no conveyance at all, there is no talk of whether the conveyance is valid or void before the contractual obligation is discharged.

<sup>51</sup> German Civil Code (Germany), s 925(2).

the fraud or mistake<sup>52</sup> involved in the contract is one that relates to the identity of the transferee, or the very subject-matter of the property, and such contract is rescinded, then such defect will also invalidate the conveyance due to lack of a valid intent to convey. This could similarly happen in illegality or immorality cases, where both contract and conveyance are void due to statutory prohibition or public policy.<sup>53</sup> However, this exception is a false one,<sup>54</sup> in the sense that the invalidity of conveyance is not due to the ‘mirror effect’ of the invalidity of the underlying contract, but due to its own determinant rules in property law. A third but contentious exception is something called *Geschäftseinheit*, referring to the idea based on a general principle of civil law that if a part of a legal transaction is void, then the entire legal transaction is void, unless it is to be assumed that it would have been entered into even without the void part.<sup>55</sup> This logically means it is possible to interpret the obligatory transaction (contract) and the dispositive transaction (conveyance) as two parts of a single juridical act. Then the invalidity of the former part would cause the invalidity of the latter part. However, there is a broad consensus among German lawyers that this kind of interpretation based on § 139 BGB cannot be generally applied to this context so as not to undermine the principle of abstraction.<sup>56</sup>

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<sup>52</sup> German Civil Code (Germany), ss 119, 123.

<sup>53</sup> German Civil Code (Germany), ss 134, 138.

<sup>54</sup> Or it could be called ‘apparent’ exceptions: Birke Häcker, *Consequences of Impaired Consent Transfers: A Structural Comparison of English and German Law* (Mohr Siebeck 2009) 62.

<sup>55</sup> German Civil Code (Germany), s 139.

<sup>56</sup> Dieter Medicus, *Allgemeiner Teil des BGB* (SHAO Jiandong tr, Law Press 2000) 184, 503. Baur Stürner, *Lehrbuch des Sachenrechts* (ZHANG Shuanggen tr, 17th edn, Law Press 2004) 101; Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts* vol II: Das Rechtsgeschäft (CHI Ying tr, Law Press 2012) 210–11.

The practical difference between the principle of abstraction and the principle of causality is not that significant in two party cases where the subject-matter of the property right is still possible to be returned *in specie*. The difference will be significant, however, in three party cases where the property is transferred on by the transferee to a third party,<sup>57</sup> or where the transferee goes into insolvency with unsecured creditors and insufficient distributable assets. Briefly speaking, in the former situation, the transferee will not have the very property returned from the third-party acquirer even if it is irreplaceable in the market or if it is of great sentimental value to him. In the latter situation, similarly, the transferee will not have the very property returned, and worse still, he cannot even receive the full amount of monetary restitution from the insolvent transferee.<sup>58</sup>

### **1.3 The Relation between Separation and Abstraction**

Take the following examples: A (the transferor) and B (the transferee) enter into a contract of sale of a house and a car, and convey title to the car by delivery and title to the land by registration. However, the contract is flawed due to either (i) B's minority, (ii) failure to comply with the requisite formality, (iii) A's spontaneous or induced mistake, or (iv) their illegal purpose in circumventing regulation. After having conveyed the title, A elects to rescind the voidable contract or simply declare the contract to be void, both thereby rendering the underlying obligational basis void retrospectively. A later discovers that, prior to rescission, B had sold the car on to a third-party purchaser C,

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<sup>57</sup> Whether the third-party transferee is *bona fide* or *mala fide*, and whether the regime of *bona fide* acquisition could take a role in this issue will be explained in detail in chapter 8 below.

<sup>58</sup> A detailed comparison on the justification of all these matters will be delivered in chapter 8 too.

who knew what happened between A and B. Worse still, B had already gone into insolvency, thus making the house possibly available for distribution among B's general creditors. The central question is whether A can maintain property tort/vindication claim against C and B's office-holder.<sup>59</sup> Answers in different jurisdictions vary, because there are two or even three conceptual 'forks in the road' which lead to the affirmative or negative 'destination' via different routes.

Assuming the *nemo dat quod non habet* rule (no one gives what he does not have) is universally applicable and rules of bona fide purchase do not apply here (meaning that C cannot have a better title than B's), the question is as follows: so far as the transfer of title between A and B is concerned, is the validity of conveyance dependent on the validity of the underlying contractual basis? Here lies the first 'fork': *abstraction versus causality*. If, according to the principle of *abstraction*, the answer is in the negative, then A's proprietary claim would normally fail, because both C's acquisition of title to the car from B and B's acquisition of title to the house from A are valid, except where the conveyance is also void or voidable on itself due to the identical defect. If, according to the principle of *causality*, the answer is in the affirmative, then the result would be reversed; A could successfully bring property tort/vindication claims against C and B's general creditors. In Germany, for instance, A has a mere personal right triggered by B's unjustified enrichment, which cannot help A fully recover the loss given B's impecuniosity. However, further discrepancies lie in jurisdictions with different reasons why A would win. This is the second 'fork': *separatist versus unitary*, asking the

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<sup>59</sup> Eg, B's insolvency liquidator or administrator who has a competing proprietary claim on behalf of B's general creditors.

question whether contract and conveyance are conceptually (despite factual overlap) seen as different juridical acts represented by the existence of an intent to convey title separate from the intent in the underlying contract promise to convey. For jurisdictions following *separation*, such as Austria and Spain,<sup>60</sup> the reason why A would win is that, on the one hand, conveyance is a separate juridical act in the sense that, taking the method of delivery as an example, delivery means change of physical possession *and* the intent of passing title. On the other, however, such separate juridical acts of conveyance still require a just cause, which, in principle, means a valid contractual basis. Because in the present case the contract of sale between A and B is avoided or void, the validity of the conveyance is retrospectively avoided or void.<sup>61</sup> By contrast, for jurisdictions following *unitary* approach such as France and Japan, the reason why A would win is that since property passes by a validly concluded contract, and since in the present case the contract of sale between A and B is avoided, property cannot pass at all.

Logically speaking, abstraction presupposes separation, but not vice versa. This is because if a jurisdiction follows the *unitary* approach, due to the fact that there is only one juridical act with one intent regarding passing of property, it is logically impossible to say the contract is void but the conveyance is valid; the intent cannot be both void and valid. Causality can be the only choice. By contrast, if a jurisdiction follows the *separatist* approach, then the irreducible core of separation, ie, a separate intent to

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<sup>60</sup> For recent works in English see Gabriele Koziol and Helmut Koziol, *Austrian Private Law* (Jan Sramek Verlag 2017) 69 (Austria); Luz M Martínez Velencoso and others (eds), *Transfer of Immovables in European Private Law* (CUP 2017) 6 (Spain).

<sup>61</sup> No matter how counter-intuitive it looks that the already-registered title to land magically and retrospectively jumps back to A despite the fact that B is still the registered proprietor on the registry.

convey does provide the logical premise for a conveyance being valid (as a juridical act) and possibly remain uninfected by any kind of invalidity in the contract (as another juridical act). Nonetheless, separation is a necessary but not a sufficient condition for abstraction; a jurisdiction may freely choose whether or not to ‘break the chain of infection’ between contract and conveyance, as happens in Germany (choosing to break) and Austria (choosing not to break).

More importantly, such an analysis leads to a third ‘fork’: *intent alone versus intent plus*, asking whether the passing of property requires intent alone (*solo consensu*)<sup>62</sup> or something in addition, (‘plus’) such as delivery, deed, or registration; and, if the answer is that it does, what the role of these ‘pluses’ is, ie, whether it is *separatist* or *unitary*. Take delivery as an example. Its interpretation may take a *separatist* approach, as seen above in Austria and Spain, in the sense that delivery is a separate juridical act with physical and mental elements. Equally, its interpretation may take a unitary approach, as suggested by many Chinese anti-abstractionists, ie, that delivery is not a juridical but a mere factual act (事实行为), meaning that there is no separate intent to convey embodied in delivery; delivery is nothing more than a mere physical change of possession with a feature of publicity. Under the latter approach, therefore, delivery is conceivable without separation; passing of property consists of (i) a contractual intent to convey and (ii) a physical ‘plus’ in the form of ‘handing over’. Based on exactly the same logic as in the preceding paragraph, it follows that such *unitary* interpretation of *intent plus* can only lead to *causality* not *abstraction*, while the former *separatist*

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<sup>62</sup> As will be elucidated in chapters 3 and 5, intent alone does not necessarily denote the intent in contract, but could also denote a separate intent to convey conceptually independent from the underlying contract.

interpretation of *intent plus* reserves the possibility of *abstraction*. In addition, as will be shown in chapter 3 as exemplified by the English law on the sale of goods, a distinction between separationist and unitary, however counter-intuitive it seems, may well lie in *intent alone* conveyance in the sense that ‘intent alone suffices to pass property’ does not necessarily lead to the conclusion that it must be unitary; rather, it could be either unitary or separationist. Overall, this means the *intent alone versus intent plus* contrast (the third ‘fork’) is not strictly speaking a synonym for the *unitary versus separatist contrast* (the second ‘fork’); they completely overlap to form a matrix by sub-division: (i) unitary intent alone (债权意思主义), (ii) unitary intent plus (债权形式主义), (iii) separatist intent alone (物权意思主义), and (iv) separatist intent plus (物权形式主义).

## CHAPTER 2 SEPARATION IN ‘INTENT PLUS’ TRANSFERS

It was said by Professor van Vliet that compared to civilian counterparts, ‘English law forms the exception in that it does not have a uniform transfer system’.<sup>63</sup> Indeed, as will be explored in chapters 2 and 3, English law has a non-uniform system for transfers of title because it depends on the particular types of underlying contract, a unique feature that does not exist in Chinese law. English law is generally intent plus, but could be intent alone if the underlying contract is a contract of sale of goods. Consequently, this chapter considers general scenarios, and the next chapter deals with the special scenario, ie, sale of goods. So far as this chapter is concerned, while briefly comparing rules regarding transfer of title/ownership in English and Chinese law, it mainly aims at answering two questions. First, whether both English and Chinese law generally follows an ‘intent plus’ approach as opposed to an ‘intent alone’ approach, in the sense that registration, delivery (in both English and Chinese law) and deed (in English law) are constitutive methods of conveyance. The answer will be explored to be in the affirmative. Second, if the answer to the first question is yes, then whether the ‘intent plus’ transfer system in both English and Chinese law can be interpreted in a separatist way as opposed to a unitary way. By finding the intent to convey conceptually separate from the intent to create an underlying (obligational) basis to convey, the answer will be explored to be also in the affirmative.

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<sup>63</sup> Sjef van Erp and Bram Akkermans (eds), *Cases, Materials and Text on National, Supranational and International Property Law* (Hart Publishing 2012) 783.

## 2.1 Registered Acquisition<sup>64</sup>

### 2.1.1 English Law

Registration is clearly a method of conveyance with respect to transfers of title to land in English law. As regards transfers of registered title to land, the Land Registration Act 2002 provides ‘if a disposition of a registered estate or registered charge is required to be completed by registration, it does not operate at law until the relevant registration requirements are met.’<sup>65</sup> Transfer of registered title to land is seen as a kind of dispositions which are required to be completed by registration.<sup>66</sup> As regards transfers of unregistered title to land, the Law of Property Act 1925 provides that ‘all conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.’<sup>67</sup> A contract (whether of sale or of barter) itself is not sufficient to convey title to land, but merely creates an obligation to convey; to complete the conveyance, an additional stage of conveyancing cannot be circumvented. Thus, generally speaking ‘in England and Wales the sale of registered title to land is essentially a two-step process: first contract of sale, then transfer of title’<sup>68</sup>

So far as the second stage is concerned, it is not a mere act of publicity, but an act

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<sup>64</sup> For more discussions on registration, especially the relation between conclusiveness of registration and abstraction, see chapter 5 below.

<sup>65</sup> Land Registration Act 2002, s 27(1).

<sup>66</sup> Land Registration Act 2002, s 27(2)(a).

<sup>67</sup> Law of Property Act 1925, s 52(1). It also repealed old methods of conveying of an estate to land ‘by livery or livery and seisin, or by feoffment, or by bargain and sale.’ Law of Property Act 1925, s 51(1). The deed issue will be dealt with in section 2.3 below.

<sup>68</sup> Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) 1034.

with the transferor's intention to convey. This could be inferred from technicalities in the form of transfer used in the Land Registry.<sup>69</sup> Box 12 of such form provides a space for the transferor to execute the transfer as a deed, so that the transferor's intent to convey is not represented by the underlying obligation to convey in the contract, but by a separate manifestation of intent when filling the deed in box 12.<sup>70</sup> In fact, such separatist 'intent plus' approach is not only confined to the case of sale, but nearly all cases of acquisition of title to land under English law, which 'insists on formality above all at two crucial points in the acquisition of real rights, contract and conveyance.'<sup>71</sup>

### 2.1.2 Chinese law

Similar to English law, transfers of ownership to immovables in Chinese law also follows the 'intent plus' approach, in that the underlying contract alone does not suffice to convey ownership to immovables. It is provided by the Property Law 2007 that the transfer of ownership to immovables shall become effective at the moment when it is registered in the immovable register.<sup>72</sup> The next question is: whether such intent plus approach can be interpreted by a unitary way or a separatist way? Unlike English law, there is no such thing as 'execution of deed' either as a method of conveyance or as a

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<sup>69</sup> For a specimen of such form, see Charles Harpum and others, *Megarry & Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 7-149.

<sup>70</sup> Forms of execution are given in Land Registration Rules 2003, sch 9.

<sup>71</sup> Peter Birks, 'Before We Begin: Five Keys to Land Law' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998) 482. It should be noted that both the contract carrying the intention to pass title to land and the conveyance passing the title to land have their own *formality* requirements which should not be confused with each other. The satisfaction of the former (ie, by taking the form of writing in making such a contract) does not necessarily lead to the satisfaction of the latter (ie, the acquisition of title to land under such contract): Law of Property (Miscellaneous Provisions) Act 1989, s 2.

<sup>72</sup> Property Law 2007 (China), arts 9(1), 14.

stage in the registration process in Chinese law, hence a similar analogy cannot be drawn from what we have seen in the previous paragraph. Nevertheless, the same conclusion could be reached after a closer look at the detailed rules of examination by the registrar.

To complete immovable registration, the parties to the transaction<sup>73</sup> shall provide materials including ‘proof of ownership’<sup>74</sup> and ‘other required materials’<sup>75</sup> for examination by the registrar. Specifically, these ‘required materials’ include<sup>76</sup> (i) a written application for registration, (ii) identity certification materials, (iii) ownership to subject-matter certification materials, and the so-called (iv) ‘documents on the registration reason’, which is the underlying contract. The registrar shall check if there is no error between what is written on the contract and what is shown on the conveyancing application documents.<sup>77</sup> Consequently, the written application carries the transferor’s intent to convey. The registry does not scrutinise the contract in detail to explore why the transferor has the intent to create an obligation to convey in the contract. What is to be examined, is whether the intent to convey is a genuine one in the sense that there is no error as to the identity or the subject-matter of conveyance. From here it can be inferred that registration serves as a constitutive, separatist ‘intent plus’ role in Chinese law of immovables in the sense that registration, as a juridical act with an intent to convey,

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<sup>73</sup> In real estate practice, where the transaction is between a developer and a purchaser, usually the developer alone goes to the registry, and where the transaction is between an individual vendor and a purchaser, usually both parties go to the registry together because they normally have to except for a certain number of scenarios: Interim Regulation on Real Estate Registration 2014 (China), art 14.

<sup>74</sup> Property Law 2007 (China), art 11.

<sup>75</sup> Property Law 2007 (China), art 12(1).

<sup>76</sup> Interim Regulation on Real Estate Registration 2014 (China), art 16.

<sup>77</sup> Detailed Rules for the Implementation of the Interim Regulation on Real Estate Registration 2016 (China), art 15.

transfers ownership to immovables.

## 2.2 Unregistered Acquisition: Delivery

### 2.2.1 English Law

In English law, the leading authority on delivery as a method of conveyance is a nineteenth century gift case: *Cochrane v Moore*.<sup>78</sup> The donor, one Benzou was the owner of a stable and a number of racehorses including the subject-matter of this case, a racehorse named Kilworth. Benzou by his words purported to gratuitously granted an undivided fourth share of the title to Kilworth to the donee, one Moore. Since the racehorse was not in the possession of Benzou then but was possessed by Benzou's trainer in or near Paris, no delivery occurred between the donor and the donee.<sup>79</sup> Benzou later on mortgaged his stable and all racehorses therein by a bill of sale to secure a series of loans advanced by one Cochrane. When Benzou defaulted on the loans, Cochrane exercised his power of sale through an auction during which Moore intervened to claim his one-fourth of the proceeds of the sale of the racehorse, Kilworth. The central question in this case is whether that quarter share of the racehorse was effectively conveyed to Moore by Benzou. In response to Moore's argument that delivery merely served as the evidence of the intent to make a gift rather than an indispensable step to complete a gift, Lord Esher said that the actual delivery 'is not a piece of evidence to prove the existence of the proposition; it is a necessary part of the proposition, and, as such, is one of the

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<sup>78</sup> (1890) 25 QBD 57.

<sup>79</sup> Whether it is factually possible to deliver 'a quarter share' of the horse is another question.

facts to be proved by evidence.’<sup>80</sup> A more generalised proposition not confined to the law of gift is given by Fry LJ, who said that:

‘according to the old law no gift or grant of a chattel was effectual to pass it ... unless accompanied by delivery: that on that law two exceptions have been grafted, one in the case of deeds, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery.’<sup>81</sup>

The judgement in *Cochrane v Moore*<sup>82</sup> by and large clarifies the general position in English law regarding passing of property rights to chattels that property does not pass in an ‘intent alone’ way by contract or verbal gift without a further act of delivery or execution of deed, except for the case of sale, which will be dealt with in the next chapter. Such an act of delivery for the purpose of transfer<sup>83</sup> is not a mere possessory fact of physical change of custody from one to another;<sup>84</sup> rather, it must be an act with (and not only evidencing) the transferor’s intent to pass property rights, which can be either title, ie the right to exclusive possession forever, or possessory lesser property rights. In other words, delivery itself does not necessarily pass property rights so long as the act of delivery does not entail the transferor’s intent to convey, which should be manifest<sup>85</sup> and

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<sup>80</sup> *Cochrane v Moore* (1890) 25 QBD 57, 75.

<sup>81</sup> *Cochrane v Moore* (1890) 25 QBD 57, 72–3.

<sup>82</sup> (1890) 25 QBD 57.

<sup>83</sup> Obviously, delivery can be done for the purpose of bailment, for instance, without the bailor’s intent to convey title to the bailee.

<sup>84</sup> *Cartwright v Green* (1803) 8 Ves 405, 32 ER 412; *Merry v Green* (1841) 7 M & W 623, 151 ER 916. Although these are criminal cases, so no reasoning was given by the judges as to why title to the hidden money in the drawer did not pass to the recipient. But as McFarlane points out, at least it could be inferred that the recipient did not acquire the title, for otherwise no crime would be committed: Ben McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 166.

<sup>85</sup> *Glaister-Carlisle v Glaister-Carlisle* (CA, 22 February 1968).

immediate<sup>86</sup> regardless of the fact whether there is already a contractual or gratuitous promise between the parties to pass property rights. The notion of separation lies here. A gift promise might be enforceable and thus effective to trigger a personal right in certain cases in English law such as promises in the form of deed or promises bound by promissory estoppel. Admittedly in these situations it is not easy to identify the nature of the transferor's intent to convey: whether it is a part of the gift promise or a separate one independent from the gift promise. However, since normally it makes no sense to say 'gift contract' in the sense that a gift promise does not create a binding obligation in English law, if there is a transfer of title under such promise, it is not difficult to identify the nature of the transferor's intent to convey. Here the intent must be a separate one, not only because delivery as a method of conveyance is not a mere physical change of possession so that there must be an intent to convey in delivery, but also because the intent in the gift promise has no legally recognised binding effect so that a gift, *ex hypothesi*, does not involve any underlying contract at all. In other words, a gift by delivery could theoretically be conceptualised as one where there is nothing underlying; a prior gift promise is not the underlying basis of a transfer by way of gift. It is somewhat odd to say that in English law a gift is a 'dualistic' process in the sense that conveyance by delivery is to perform the voluntary promise to make a gift in the underlying 'obligation'.

### 2.2.2 Chinese Law

As a matter of black-letter law, the transfer of movables under Chinese law followed a

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<sup>86</sup> *Re Ridgway* (1885) 15 QBD 447.

intent plus approach since 1986, as the General Provisions of Civil Law provides:<sup>87</sup>

Unless the law stipulates otherwise or the parties concerned have agreed on other arrangements, the ownership of property obtained by contract or by other lawful means shall be transferred simultaneously with [the passing of possession of] the property itself.

Unfortunately, throughout the legislation there is no further explanation on the phrase ‘or the parties concerned have agreed on other arrangements’ quoted above. It remained ambiguous at the time as to whether this phrase includes the retention of title clause, the constructive delivery clause,<sup>88</sup> and/or more importantly, the transfer by contract clause which, unlike the two previous explanations, could to a substantial degree erode the delivery rule established in this provision.

Such vagueness in law was eliminated 21 years later, when the Property Law 2007 clearly articulates that ‘[t]he creation or transfer of the real right of a movable property shall become effective upon delivery, except it is otherwise prescribed by any law.’<sup>89</sup> According to the legislative interpretation to this article, those ‘exceptions’ to the

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<sup>87</sup> General Provisions of Civil Law 1986 (China), art 72(2). An important indication from the wording of this provision is that Chinese law on actual delivery does not accept symbolical delivery, ie, the delivery of one thing which symbolises the subject-matter (though by having the symbol, the transferee still cannot have access to the subject-matter) is equivalent to the actual delivery of that subject-matter. Symbolical delivery in English law, despite the sole authority *Rawlinson v Mort* (1905) 93 LT 555, is a highly contentious issue. Even in *Rawlinson*, the reason why title to the church organ passed without physical change of possession could be manual delivery by the transferee touching the church organ itself instead of symbolical delivery by the transferee receiving over the letter and three receipts. It was argued by Tyler and Palmer that it is better to discard the term ‘symbolical delivery’, ‘for there seems no doubt that delivery a mere symbol, such as a photograph of the chattel, would not amount to a gift of the chattel it represents’: E L G Tyler and N E Palmer, *Crossley Vaines' Personal Property* (5th edn, Butterworths 1973) 307.

<sup>88</sup> This is possible if we understand the meaning of ‘passing of possession’ in article 72(2) denotes to actual delivery only. The legally recognised ways of constructive delivery will be discussed immediately below.

<sup>89</sup> Property Law 2007 (China), art 23.

delivery rule mainly are: (i) the creation or transfer of property by operation of law,<sup>90</sup> (ii) conveyances by constructive delivery,<sup>91</sup> and (iii) the grant of charge to certain types of movables.<sup>92</sup> When it comes to the so-called ‘special chattels’ which refers to vessels, aircrafts and motor vehicles, transfer of ownership is still carried out through delivery just as the case of ordinary chattels. However, such acquisition cannot defeat third-party innocent purchasers who subsequently acquire the ownership from the original transferor unless the former acquisition is registered before the completion of the latter acquisition.<sup>93</sup>

Admittedly, from all these rules we can only reach the conclusion that Chinese law follows an *intent plus* (as opposed to intent alone) approach regarding transfer of ownership to movables. However, whether such intent plus system follows a *unitary* approach or a *separatist* approach is not easy to identify. It is submitted that a separatist answer could be inferred from an analysis of rules on constructive delivery.

### 2.2.3 Constructive Delivery

Generally speaking, all three forms of constructive delivery, namely *traditio brevi manu* (简易交付), *traditio longa manu* (指示交付) and *constitutum possessorium* (占有改定)

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<sup>90</sup> Property Law 2007 (China), arts 28–30.

<sup>91</sup> Property Law 2007 (China), arts 25–27. It can be inferred from this explanation that the word ‘delivery’ in article 23 is confined to actual delivery. Strictly speaking, this exception is not a genuine exception to the *traditio* system, which as a matter of principle does not exclude constructive delivery.

<sup>92</sup> Property Law 2007 (China), art 180(4)–(6).

<sup>93</sup> Property Law 2007 (China), art 24; Maritime Law 1992 (China), art 9; Civil Aviation Law 1995 (China), art 11. However, it could be expected that the ‘conveyance by delivery minus third-party binding effect without registration’ rule will be repealed and replaced by the simple rule of conveyance by delivery in the upcoming Chinese Civil Code.

are recognised in both English law and Chinese law with minor differences in each form. The key issue for the purpose of this chapter is whether the intent to convey can be conceptually separate from the intent to incur an obligation to convey, despite factually coinciding with one another.

Among the three forms, *traditio brevi manu* seems to be the best subject-matter for observation, because unlike *traditio longa manu* and *constitutum possessorium* where conveyance is in fact intent alone (without ‘plus’ in the form of change of possession), conveyance in *traditio brevi manu* only has a reversed sequence of the intent to convey and the physical change of possession delivery. If a separate intent to convey can be found in *traditio brevi manu*, then a fortiori such intent to convey should exist in actual delivery as well. In Chinese law *traditio brevi manu* is defined as:<sup>94</sup>

before the real right of a movable property is created or transferred, the transferee has already legally possessed the movable property, the real right [transfer] shall become effective upon the effectiveness of the juridical act.

What appears to be distinctive in Chinese law compared to most of the civilian Civil Codes, and perhaps English law too<sup>95</sup> is that to constitute a valid *traditio brevi manu* under Chinese law, the transferee’s prior possession of the thing in question must be a ‘legal one’, by which it means the such possession must be based on a valid underlying basis (eg, a bailment contract), whereas under German law,<sup>96</sup> Dutch law,<sup>97</sup> Swiss law<sup>98</sup> or

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<sup>94</sup> Property Law 2007 (China), art 25.

<sup>95</sup> The requirement that the prior possession must not be ‘illegal’ as explicitly provided in Chinese law, is not clear enough in English law, because the prior possession in all relevant cases is a legal one: *Winter v Winter* (1861) 4 LT 639; *Re Stoneham* [1919] 1 Ch 149; *Pascoe v Turner* [1979] 2 All ER 945.

<sup>96</sup> German Civil Code (Germany), s 929, 2nd sentence.

Japanese law<sup>99</sup> for instance, such restriction does not exist. This distinctive feature of Chinese law, albeit a contentious one, can nevertheless better explain what the phrase ‘juridical act’ means. If the juridical act is interpreted as an obligatory one, such as a contract, so that the constructive delivery is completed by the manifestation of an intention to contract, then an unpleasant aftermath will follow. Suppose the transferee is a person dispossessed the transferor of an antique, or a person whose chattel lease over the antique in question is due on Day 1. On Day 2, instead of directly bringing a lawsuit to get back the possession, the transferor entered into a contract of sale with the transferee agreeing to transfer the ownership of the antique to the transferee on Day 3 as long as the transferee pays the purchase price by the very Day 3, otherwise a lawsuit will be filed against the transferee. Then according to this interpretation, ownership to the antique cannot pass to the transferee, because ‘upon the effectiveness of the juridical act’ (being the contract on Day 2), the transferee is still a possessor who has not yet ‘legally possessed the movable property’. As a result, to complete the transfer, the transferee has to re-deliver the property to the transferor followed by the transferor’s delivery again to the transferee, a consequence not intended by the legislature, especially when the two do not live close to each other. On the contrary, if the juridical act is interpreted as an dispository one, ie, the manifestation of the transferor’s intent to convey, then in the above scenario ownership to the antique can pass to the transferee, because ‘upon the effectiveness of the juridical act’ with the transferor’s intent to convey on Day 3, the transferee indeed ‘has already legally possessed the movable property’ by the transferor’s

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<sup>97</sup> Dutch Civil Code (the Netherlands), art 3:115(b).

<sup>98</sup> Swiss Civil Code (Switzerland), art 922(1).

<sup>99</sup> Japanese Civil Code (Japan), art 182(2).

contract of sale on Day 3 with the payment. Through the above analysis it follows that the constructive delivery by *traditio brevi manu* in Chinese law follows a separatist approach in that it is the intent to convey not the intent to create a contractual obligation to convey that passes ownership.

*Traditio longa manu* can also be interpreted in a separatist way. In Chinese law it is defined as:<sup>100</sup>

before the real right of a movable property is created or transferred, a third party has legally possessed the movable property, the person bearing the obligation of delivery may, by assigning the right to return, request that third-party to return the object [to the transferee] in lieu of delivery.

The major difference between English law and Chinese law in this respect is, that under the English way of *traditio longa manu*, the transferor's assignment of the claim against the third-party possessor to make specific restitution to the transferee does not constitute a valid conveyance unless that third-party possessor 'attorns', ie, by some acknowledgment on the part of that possessor that he now no longer holds it for the transferor but for the transferee.<sup>101</sup> Whereas under the Chinese counterpart, the assignment of the contractual claim to recover the property from the possessor by the transferor for the transferee does constitute a valid conveyance even if such third party possessor is totally unaware of the act of assignment,<sup>102</sup> not to speak of any 'attornment'

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<sup>100</sup> Property Law 2007 (China), art 26.

<sup>101</sup> *Bentall v Burn* (1824) 3 B & C 423, 107 ER 791; *Farina v Home* (1846) 16 M & W 119, 153 ER 1124; *Mcewan v Smith* (1849) 11 HLC 309, 9 ER 1109; *Goff v Duffield* (1927) 63 ILTR 17, citing *Dublin City Distillery Ltd v Doherty* [1914] AC 823, 852 (Lord Parker). As for transfer of title to goods by sale, Sale of Goods Act 1979, s 29(4) applies.

<sup>102</sup> SUN Xianzhong and others, *物权法的实施 [the Implementation of Property Law]*, vol I (Social Science Academic Press 2013) 161. This is similar to German law but different to Dutch law where delivery does not complete until the possessor knows such assignment or that the notice of

made by the third party possessor.

The most commonly applicable scenario is where the physical custody of the thing in question is in the hands of a third party who is under a contractual duty in relation to this thing such as a duty to repair, or even a mere duty of keeping or warehousing. Here the conveyance of property rights is separate from a physical change of possession; property passes when the transferor assigns the claim against the third-party possessor to make specific restitution to the transferee. It is submitted that such an assignment is not an obligatory juridical act (负担行为) but a dispositive juridical act (处分行为), because there conceptually exist two juridical acts: namely, the act of incurring the underlying contractual obligation to convey between the transferor and the transferee, and the act of assigning another pre-existing contractual right between the transferor and his bailee. The latter act of assignment cannot be a factual act; it must be a juridical act with the intent to assign. Hence the contract to transfer by *traditio longa manu* cannot pass property rights in this scenario; it is a separatist rather than a unitary form of constructive delivery.

The third alternative of constructive delivery is *constitutum possessorium*, which is defined as:<sup>103</sup>

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such assignment is sent to the possessor by either the transferor or the transferee: German Civil Code (Germany), s 931, cf Dutch Civil Code (the Netherlands), art 3: 115(c).

<sup>103</sup> Property Law 2007 (China), art 27. This is also recognised in English law: *Elmore v Stone* (1809) 1 Taunt 458, 127 ER 912. the claimant was a horse dealer and livery stable keeper. He sold two horses on credit to the defendant. They additionally agreed that after the sale the horses in question should be kept at the claimant's stable for the defendant. Later on, the defendant refused to pay for the price of the horses, as a result of which the claimant sued him for price. This claim was successful. Notably, to support his plea, the defendant contended that his contractual obligation to pay was unenforceable due to Statute of Frauds 1677, s 17 (re-enacted in Sale of

when the real right of a movable property is transferred, and both parties agree to let the transferor continue to possess the movable property, the [conveyance of] real right shall become effective upon the effectiveness of the agreement.

A common example is, where the transferor intends to convey the ownership to his machine to a transferee, but the transferor also wants to retain possession of machine so that he could use it for another several days, then if they decides to adopt the aforesaid way of constructive delivery in lieu of manual delivery several days later, it is legally possible for the transferor to acquire ownership to the machine immediately without the need of waiting for the future actual delivery. Similar to what was explained in the paragraph of *traditio longa manu*, just because there is a phrase ‘shall become effective upon the effectiveness of the agreement’ does not mean that property conceptually passes by contract. As pointed out by Lord Atkinson,<sup>104</sup>

a contract to pledge a specific chattel ... is not in itself sufficient to pass ... property in the chattel to the pledgee. Delivery is, in addition, absolutely necessary to complete the pledge; but of course it is enough if the delivery be constructive ... instead of actual.

Although the quotation is about the creation of pledge not the transfer of the right to exclusive possession forever, it logically applies to the latter scenario, and therefore his Lordship’s understanding of *constitutum possessorium* is a good source of reference for

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Goods Act 1893, s 4, and finally repealed by Law Reform (Enforcement of Contracts) Act 1954, s 2). This section provided that a contract of sale with a value of over £10 was an unenforceable contract unless the goods to the contract had been ‘delivered’ to the buyer or the buyer had performed his consideration for the goods in full or at least in part. The crucial task for the claimant was therefore to prove a valid delivery for the purpose of the aforementioned statutory provision. While acknowledging that there was no manual delivery in this case, it was held by Mansfield CJ at 460 that after the defendant had said that the horses must be kept at the claimant’s stable, and the claimant had accepted his order, the claimant ‘possessed them from that time, not as owner of the horses, but as any other livery stable keeper might have them to keep.’

<sup>104</sup> *Dublin City Distillery v Doherty* [1914] AC 823, 843. See also *Ancona v Rogers* (1876) 1 Ex D 285.

Chinese law.<sup>105</sup> Admittedly, unlike the previous two forms of constructive delivery, it is difficult to find out a separatist evidence in *constitutum possessorium*. Nevertheless, such form of constructive delivery alone at least does not turn a separatist approach to a unitary one, because if conceptually speaking a contract to transfer ownership in itself does not pass ownership, then adding another contract of loan to retain possession does not turn the former contract to be able to pass ownership.

### 2.3 Unregistered Acquisition: Deed

In English law, apart from delivery as the traditional method of conveyance, deed became another way of transferring title to goods by the end of the fourteenth century, the earliest source of law of which can be found in an ancient case.<sup>106</sup> In *Pynchoun v Geldeford*, an action of debt brought by one Pynchoun, a creditor of the deceased, one Geldeford, incurred an obligation to the plaintiff in writing in 1383 (which was still partly unpaid after his death). The action was against two executors, who alleged to have acquired title to diverse chattels from the deceased by deed in 1384. The key fact was that these chattels were never in the hands of the two executors before they were appointed as the executors, but were, according to the deed, used by the deceased before his death in 1385. Since there was no actual delivery, the plaintiff asserted that title to these chattels should always belong to the deceased, and then was acquired by the two executors *qua* executor; hence his outstanding debt against the deceased can be satisfied

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<sup>105</sup> Notably, unlike transfer of ownership, a pledge cannot be created by way of *constitutum possessorium* under Chinese law. *Judicial Interpretation of the Supreme People's Court on Some Issues Regarding the Application of Surety Law* (Judicial Interpretation No 44, 2000) art 87.

<sup>106</sup> *Pynchoun v Geldeford* (1385) YB Hil 8 Ric II, p 215, pl 17.

from these chattels. The action failed, for the court held that it suffices to transfer title to chattels by deed without delivery. As a result, those goods were already the two defendants' before the death of the transferor, Geldeford, and thus those goods are no longer within the reach of the plaintiff.

The recognition of transfer by deed in cases of chattels in lieu of delivery was over four centuries earlier than the time when English people pioneered such an alternative method of conveyance parallel to the traditional 'livery of seisin' for transfers of title to land.<sup>107</sup> As a device originally designed to avoid hassles in the transactions caused by the old form of livery of seisin (which is then an essential part of all land conveyances), the original form of deed was a written charter solely for the purpose of evidencing both the intent to convey and the actual livery between the parties. By the end of the medieval period such form of charter was fixed to be a deed, which could be a 'deed poll', referring to the kind which involved and was sealed by only one party, or could be an 'indenture', referring to the kind which involved and was signed and delivered among two or more persons. It was after a long historical development that the deed was finally recognised as a substantive way of conveying title to land which 'lie in grant' by an Act of 1845,<sup>108</sup> together with various old ways of land conveyance such as livery of seisin, 'bargain and sale' (meaning 'contract and payment') with a further act of enrolment (as in the case of freehold transfer), and bargain and sale without a further act

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<sup>107</sup> For details, see Charles Harpum and others, *Megarry & Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) 257–309.

<sup>108</sup> Real Property Act 1845 (8 & 9 Vict c 106), ss 2, 106. For the requirements in detail of an effectual deed, see Conveyance of Real Property Act 1845 (8 & 9 Vict c 119)

of enrolment (as in the case of leasehold transfer), etc.<sup>109</sup> Since 1925, execution of deed have been ineffective to convey registered title to land,<sup>110</sup> though it has been the only method to convey unregistered title to land.<sup>111</sup>

The issue with respect to deed for the purpose of this chapter is somewhat different from that of registration and delivery. As for registration and delivery, the difficulty lies not in identifying whether it follows intent plus or intent alone; as long as registration and delivery is a constitutive element rather than a mere third-party binding element (eg, in French law and Japanese law)<sup>112</sup>. Rather, the difficulty lies in finding the intent to convey. By contrast, as for deed, because it could be understood by outsiders as a formal written manifestation of intention to convey, it is quite plain to find an intent to convey in the execution of deed containing a clear statement to this effect. However, since the context of deed might be contract, it caused different understandings among Chinese lawyers as to whether deed is something contractual, so that transfer by deed is not intent plus, but intent alone.<sup>113</sup>

As illustrated earlier, a deed used to be a piece of writing signed, sealed, and delivered by the transferor. Since 1989 the requirement of seal was abolished and was

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<sup>109</sup> W S Holdsworth, *An Historical Introduction to Land Law* (Clarendon Press 1927) 112–6, 291–5.

<sup>110</sup> Land Registration Act 1925, s 19(1).

<sup>111</sup> Law of Property Act 1925, s 52(1).

<sup>112</sup> As discussed in chapter 1, in these two jurisdictions, ownership passes by contract, though it just cannot bind third-parties without registration (in cases of immovables) or delivery (in cases of movables).

<sup>113</sup> See eg, LIANG Huixing (ed), *中国物权法研究 [Study on Chinese Real Rights Law]* (Law Press 1998) 176, cf WU Yiming, ‘契据交付: 英美法中的物权行为? [Delivery of Deed: Juridical Act of Real Rights in Common Law?]’ (2010) 34 *Nanjing University Law Review* 336; 英美物权法: 一个体系的发现 [*Anglo-American Property Law: A Systematic Exploration*] (Shanghai People’s Publishing House 2011) 124.

replaced by the requirement of attestation, ie, signed by the transferor along with the signature of two witnesses.<sup>114</sup> It could be argued that the deed can be seen as just another kind of contract in writing (or a consensual ‘instrument’ in writing in cases of gift),<sup>115</sup> so that a transaction ‘could very easily be collapsed into a single, uniform requirement’<sup>116</sup> of a ‘deed-like’ instrument serving both as a deed and a contract to make the entire transaction unitary rather than separatist. Nevertheless, in modern days it becomes increasingly clear that a deed can never be replaced by the underlying contract, regardless of the fact that such contract is made in however a formal way. An instrument is not a deed unless it makes it clear on its face that it is intended to be a deed whether by describing itself as a deed or expressing itself to be executed and signed as a deed.<sup>117</sup> Also, an instrument shall not be taken to make it clear on its face that it is intended to be a deed merely because it is ‘executed’ under seal.<sup>118</sup> As a result, conveyance by deed, just as by delivery and registration, follows a separatist intent plus approach in English law.

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<sup>114</sup> Law of Property (Miscellaneous Provisions) Act 1989, s 1(3)(a).

<sup>115</sup> Despite those publicity mechanisms during its execution, such as delivery, deposit, and registration.

<sup>116</sup> Simon Gardner, *An Introduction to Land Law* (Hart Publishing 2007) 69.

<sup>117</sup> Law of Property (Miscellaneous Provisions) Act 1989, s 1(2)(a).

<sup>118</sup> Law of Property (Miscellaneous Provisions) Act 1989, s 1(2A), inserted by Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906, s 8.

### CHAPTER 3 SEPARATION IN ‘INTENT ALONE’ TRANSFERS: SALE OF GOODS

As illustrated in the previous two chapters, transfer of property rights has a variety of methods and underlying bases in both English law and Chinese law. Following the separatist approach, it is the role of property law to determine the subject-matter and method of a transfer while it is the role of the law of obligations, especially contract law to determine the underlying basis of such transfer. Following the unitary approach, by contrast, such ‘division of labour’ does not exist in the sense that rules regarding transfer are carved out from property law and are partly or even entirely incorporated in the law of contract. The exception in English law is in the law of sale of goods, which, as described by Professor Bridge, ‘deals with a hybrid transaction that consists of contract and conveyance.’<sup>119</sup> This chapter aims to analyse whether contract and conveyance are genuinely ‘hybrid’ as a whole in the context of sale of goods. The meaning of such enquiry, as illustrated in the following section, is of huge importance. To put it in a nutshell, suppose there is a field of law where contract on its own is the method of conveyance, then it can be said that there is no principle of separation in such field of law, and it follows that it is impossible for the principle of abstraction to exist in such field of law; such field of law must follow the principle of causality. The reason is simple: if the method of conveyance is contract, then there is no conceptual distinction between contract and conveyance; contract is both the underlying basis and the method of conveyance, by which it follows that wherever the contract is void, the conveyance must be void exactly for the same ground, even if there is a subsequent delivery or execution

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<sup>119</sup> M G Bridge, *The Sale of Goods* (3rd edn, OUP 2014) para 3.01.

of deed.<sup>120</sup> Compared to the Chinese law of sale of goods where it is easier to find the aforementioned assumption is inexistent in Chinese law, rules in English law of sale of goods do somewhat look like this model. Nevertheless, after a scrutiny of these rules and annotations both by judge and jurists, it is submitted in this chapter that the contract is by no means a method of conveyance in either jurisdiction. Rather, it is the intent to convey that completes the conveyance in some of the contexts involving sale of goods. What is rendered unnecessary in such context is merely the additional factual step of conveyance, but not the intent to convey. Although contract and conveyance may happen simultaneously as a matter of fact, the conceptual separation between the underlying obligation to transfer and the transfer itself is nevertheless existent in the parties' intent, ie, the distinction between the intent to create a contractual obligation to convey and the intent to convey. Having considered the difference in the degree of contention regarding this issue between the two jurisdictions, this chapter will first deal with English law and afterwards Chinese law.

## **3.1 English Law**

### **3.1.1 Scope of Exception**

Before the substantial analysis is carried out, it is better briefly to identify the application scope of this exception to the normal rule that transfer of property requires both the intent

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<sup>120</sup> It is based on such reasoning that some comparative lawyers believed that in English law 'the principle of separation is not recognised': Basil Markesinis and others, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart Publishing 2006) 31. See also Ugo Mattei, *Basic Principles of Property Law* (Greenwood 2000) 106; Ulrich Drobnig, 'Transfer of Property' in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer 2011) 1006, 1014. This, as will be argued in the following sections, is a misunderstanding of English law.

to convey and an additional act of conveyance such as alternation of the register, execution of deed, or handing over possession of the *res*.<sup>121</sup> In other words, the preliminary issue is the conceptual boundary of the phrase ‘sale of goods’. The qualification inside sale (in its strict sense) is clear: property can pass without an additional act of conveyance so long as an unconditional sale<sup>122</sup> of ascertained goods<sup>123</sup> is concerned. By contrast, the qualification outside sale (ie between sale and other similar transactions) is relatively unclear: whether or not such rule applies to other kinds of contracts involving passing of property. Obviously, there are a variety of such non-gratuitous contracts in English law, for example, contract of barter (exchange) and contract for work and materials. Notably, the conceptual boundary between contracts of sale and other kinds of contracts involving transfers of title in English law is not as straightforward as it appears in Chinese law. Take the distinction between sale and barter as an example. At first blush such distinction simply lies in whether the consideration provided by the buyer for the seller’s promise to transfer title to goods is in money (so that it is a sale), or in specie (so that it is a barter).<sup>124</sup> However, previous case law implies that this is not necessarily the case especially where the very transaction involves both things and money.<sup>125</sup> The test, as suggested in *Benjamin*, might be whether the money is

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<sup>121</sup> As already illustrated in chapter 2 above.

<sup>122</sup> Otherwise it is an agreement to sell not sale: Sale of Goods Act 1979, s 2(3).

<sup>123</sup> Sale of Goods Act 1979, s 16.

<sup>124</sup> This is the prevailing notion in Chinese academia, which was also confirmed by the National Congress by way of legislative interpretation for Contract Law 1999 (China), art 177: <[www.npc.gov.cn/npc/flsyywd/minshang/2000-11/25/content\\_8371.htm](http://www.npc.gov.cn/npc/flsyywd/minshang/2000-11/25/content_8371.htm)> accessed 6 December 2015.

<sup>125</sup> For example in *Aldridge v Johnson* (1857) 7 E & B 885, 119 ER 1476, the agreement between the plaintiff and one Knights that Knights promised to transfer certain amount of barley valued at £215 to the plaintiff in exchange for the plaintiff’s promise to transfer certain number of bullocks valued at £192 to Knights was recognised unanimously by the Queen’s Bench judges as a contract of sale, thus property passed by intent without delivery. By contrast, in *Chappell & Co v Nestlé Co*

seen as ‘money’ or as a form of cash adjustment based on the valuation of the things exchanged.<sup>126</sup>

The meaning of such distinction, for the purpose of this thesis, is that only the contract of sale of goods is the applicable scenario where property can pass without an additional act of conveyance, which, by and large does not apply to other contractual scenarios,<sup>127</sup> not to speak of the law of gifts. The reason of it could be traced back to *Cochrane v Moore*.<sup>128</sup> Over seventy years before, in *Irons v Smallpiece*<sup>129</sup> it was already held that title to a colt did not pass by a mere verbal gift made by the owner to his son without actual delivery. Such rule of delivery, mentioned by Abbott CJ, responded to the case of gratuitous transfers at that time, leaving all kinds of non-gratuitous transfers untouched: ‘by the law of England, in order to transfer property by gift there must be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee.’<sup>130</sup> This buried a hidden trouble which was first revealed seventy years later. On

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[1960] AC 87 109, Lord Reid doubted whether an agreement involving a gramophone record in exchange for 1s 6d plus three chocolate wrappers could be called as a genuine ‘sale’.

<sup>126</sup> M G Bridge and others (eds), *Benjamin’s Sale of Goods* (10th edn, Sweet & Maxwell 2017) para 1-037. In addition, in *Flynn v Mackin* (1974) IR 101, the Supreme Court of Ireland held that a contract to supply a new car in return for £250 and an old car is not a contract of sale but a contract of barter, probably because the parties to the agreement did not ascertain or determine either the price of the new car or the price of the old car.

<sup>127</sup> However, there was an exception in case law applying Sale of Goods Act analogously to the case of a contract of transferring all the ‘walking possession of the contents of the house’ in exchange for the transferee’s certain conducts, including childcare, disposition of her own furniture and giving up her own home: *Koppel v Koppel* [1966] 2 All ER 187, 193 (Harman LJ). This made English law somewhat ambiguous on such issue of application scope.

<sup>128</sup> (1890) 25 QBD 57.

<sup>129</sup> (1819) 2 B & A 551, 106 ER 467.

<sup>130</sup> *Irons v Smallpiece* (1819) 2 B & A 551, 552; 106 ER 467, 468 (Abbott CJ); See also *Douglas v Douglas* (1905) 93 LT 555; *Re Ridgway* (1885) 15 QBD 447. It was correctly explained by Fry CJ that the phrase ‘instrument of gift’ used here as contrast with ‘deed’ simply denoted ‘testamentary instrument of gift’, rather than any inter-vivos ‘instrument in writing not under seal’ (as mentioned

the one hand, when the Chief Justice's statement was cited by Lord Esher in *Cochrane v Moore*, the scope of application, according to his Lordship's reasoning, should include the field of gift only.<sup>131</sup> However, whether his Lordship believes the scope should be *confined* to gift only is unclear. This made some put forward the proposition that the requirement of delivery does not apply to all kinds of scenarios where the underlying basis of a transfer is non-gratuitous.<sup>132</sup> On the other hand, it was explicitly stated by Fry and Bowen LJJ in the same judgment that the case of 'contracts of *sale* where the intention of the parties is that the property shall pass before delivery' is one of the only two exceptional scenarios (the other being transfer by deed) to which the requirement of delivery does not apply. Given that Lord Esher said he was 'not prepared to differ in any respect from the judgment' of Fry and Bowen LJJ, which of course include their Lordships' explanation on the common law rules regarding transfer of title to chattels,<sup>133</sup> it can be inferred that his Lordship was also opposite to the proposition that the application scope of the delivery rule should be confined to gift only. Rather, the requirement of delivery should apply to transfer of title to goods involving all kinds of non-gratuitous transactions other than sale, as long as the title in question is not transferred by deed.

### 3.1.2 Intent or Contract

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in chapter 2, which did not count as a deed at that time): *Cochrane v Moore* (1890) 25 QBD 57, 61.

<sup>131</sup> *Cochrane v Moore* (1890) 25 QBD 57, 74–7 (Lord Esher).

<sup>132</sup> Sean Enright (ed), *Halsbury's Laws of England*, vol 80 (5th edn, 2013) para 859; Andrew P Bell, *Modern Law of Personal Property in England and Ireland* (Butterworths 1989) 323.

<sup>133</sup> *Cochrane v Moore* (1890) 25 QBD 57, 72–3.

While the separate status of the intention of conveyance is relatively easy to identify where there is a separate stage of conveyance, as in cases of land transfers, or chattel transfers in the context of gifts or barter and so forth, this is less apparent in cases of sale of goods. Section 17 of the Sale of Goods Act 1979 provides that property passes when parties ‘intend’ it to pass.<sup>134</sup> The wording of this section leaves open the question as to whether it is possible to have a separate stage of conveyance by deed or delivery in the context of sale of goods. If the meaning of section 17 is that property passes by ‘intent’, then delivery and deed could possibly convey title, for they could be the carrier of such intent. If the meaning is that property passes by ‘contract’, then delivery and deed can no longer be the device to pass property to goods after the contract of sale came into existence.<sup>135</sup> Clarifying this point is important, because assuming the latter is the law, it follows that in the context of sale of goods, contract serves to be both the underlying obligation to convey and the conveyance itself, then the validity of the conveyance strictly depends on the validity of the contract, and we therefore have to admit that the entire English law of sale of goods is not only purely consensual, but also purely causal without any possibility to be abstract. The following analysis will prove that such assumption is not the law.

The most obvious reason why it is intent not contract that is the method of conveyance lies in the provisions themselves. The first indication lies in section 17(2).

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<sup>134</sup> The predecessor of this section, found in the Sale of Goods Act 1893, s 17 has exactly the same expression.

<sup>135</sup> Though theoretically speaking they could if one accepts the German jurist Theodor Kipp’s theory of ‘double effect’, meaning ‘two sets of events, occurring at the same time or one after another, could both have identical legal consequences.’ Birke Häcker, ‘Causality and Abstraction in the Common Law’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (CUP 2010) 220.

Apart from section 17(1) which explicitly articulates this point, subsection 2 also implies it by stating that: the intent is not necessarily to be ascertained from the terms of the contract, but also the conduct of the parties and surrounding circumstances of the case.<sup>136</sup> As a matter of fact, while some ‘conduct of the parties’ and ‘surrounding circumstances’ can be shown by terms of the contract, others cannot; they may well exist outside the contract, especially those arising after the contracting stage. It is therefore inappropriate to say that ‘intent’ in section 17 simply means ‘contractual intent’.

Moreover, since in commercial practice it is unusual for the parties to specify their intentions as to the passing of property except for the case of retention of title,<sup>137</sup> section 18 provided some ‘rebuttable presumptions’<sup>138</sup> for ascertaining implied intention as to the timing of conveyance.<sup>139</sup> The second indication lies in the following five rules of this section. No matter the primary fact is either (i) goods already in a deliverable state,<sup>140</sup> (ii) goods subsequently in a deliverable state known to the buyer,<sup>141</sup> (iii) goods subsequently weighed, measured or tested and known to the buyer,<sup>142</sup> (iv) goods

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<sup>136</sup> Sale of Goods Act 1979, s 17(2).

<sup>137</sup> Sarah Worthington, ‘Passing of Property’ in Ewan McKendrick (ed), *Sale of Goods* (LLP Professional Publishing 2000) para 2–004.

<sup>138</sup> *Kulkarni v Manor Credit (Davenham) Ltd* [2010] EWCA Civ 69; [2010] 2 All ER (Comm) 1017 [29] (Rix LJ).

<sup>139</sup> However, whether these rules of ascertaining intention are strictly speaking ‘presumptions’ is not beyond doubt. On the one hand, this can be said as a presumption in the sense that as long as any of those primary facts listed in rules 1-5 of section 18 can be proven by evidence, the secondary fact of the seller’s intent to convey is then ‘presumed’ to be existent without the need to be proven by evidence. On the other, such ‘presumption’ does not look like a typical presumption, for there is no clear shift of the burden of proof from one to the other, which at least cannot be inferred from the expression ‘unless a different intention appears’ in this section.

<sup>140</sup> Sale of Goods Act 1979, s 18, r 1.

<sup>141</sup> Sale of Goods Act 1979, s 18, r 2.

<sup>142</sup> Sale of Goods Act 1979, s 18, r 3. According to these three rules, it was rightly summarised that ‘[i]n the absence of any particular agreement, the moment of transfer of property will be, loosely

delivered on approval with a condition precedent satisfied,<sup>143</sup> or (v) unascertained or future goods or goods forming part of a bulk which are unconditionally appropriated to the contract,<sup>144</sup> the consequence of applying any of these rules is nothing more than to result the secondary fact of intent to convey which passes property. Taking the aforementioned rule 5 as an example, the intent inferred from ascertainment or appropriation can factually coincide with the conclusion of the contract; it can also be independently generated after the conclusion of the contract.<sup>145</sup> This is just a matter of timing, but conceptually speaking it is still the intent of the seller not the contract between the seller and the buyer that passes property.

Similarly, factual separation between the intent to incur an obligation to convey and the intent to convey itself can be inferred from the aforementioned rule 2 too, exemplified by the possibility of the transferor's change of mind after the contract is concluded, but before title passes. Specifically, section 18 rules 2 provides where there is a contract for the sale of specific goods and the seller is bound to do something (eg,

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speaking, the first moment when the goods are *ready for delivery*': Michael C Blair, *Sale of Goods Act 1979* (Butterworths 1980) 14.

<sup>143</sup> Sale of Goods Act 1979, s 18, r 4.

<sup>144</sup> Sale of Goods Act 1979, s 18, r 5. That such an unconditional appropriation with the seller's intent to convey may be clearly distinctive from the contract of sale itself can also be seen from the wording of Sale of Goods Act 1979, s 19: 'the seller may, by the terms of the *contract or appropriation*, reserve the right of disposal of the goods until certain conditions are fulfilled.' This section, which 'provides one of the legislative foundations for reservation of title at least in so far as the simple reservation of title clause is concerned' (Gerard McCormack, *Reservation of Title* (2nd edn, Sweet & Maxwell 1995) 16), demonstrates that for a contract of sale of goods with a retention of title clause, property also passes by intent not contract.

<sup>145</sup> To pass property in the context of sale of goods without deed or delivery, there could be either a pre-existing ascertainment of the goods, or a subsequent ascertainment (by eg, appropriation of the goods to the contract) with 'an intention to attach the contract irrevocably to those goods': *Carlos Federspiel & Co v Charles Twigg & Co* [1957] 1 Lloyd's Rep 240, 255 (Pearson J). However, it should be noted that strictly speaking it is ascertainment not appropriation that is the necessary condition for passing of property by parties' mere intent: *Karlshamns Oljefabriker v Eastport Navigation Co* [1982] 1 All ER 208, 215 (Mustill J).

packing, repair or dismantling) to the goods for the purpose of putting them into a deliverable state, title does not pass until the thing is done and the buyer has notice that it has been done. Thus, where the seller and the buyer agree on Day 1 in the contract of sale that title to trunks of trees in question shall pass when the trunks have been served and trimmed by the seller on Day 2. On Day 2, however, the seller goes into insolvency after the conclusion of the contract, and his assignee may well change his mind and elected not to do the work to put the trunks into a deliverable state, in order to prevent title from passing to the buyer. This is because the seller's contractual intent on Day 1 is to incur an obligation to convey on certain event, which is not the same thing as his intent to convey; title cannot pass in absence of such 'real/proprietary intent' despite the aforementioned contractual intent. The buyer's failure to fulfil his promise to convey might lead to liabilities for breach of contract, but the breach does not make the seller commit himself irrevocably to the conveyance. The result that title does not pass to the buyer will not change if the buyer serve the tops and sidings from the trunks by himself on Day 2, even though such act will put the trunks into a deliverable state according to the contractual consent, because this makes no difference to the fact that the seller has no intent to convey.<sup>146</sup> Moreover, even if the seller has done something to put the goods into a deliverable state, as long as he does not give notice to the buyer, it is still not too late for him to prevent title from passing, as long as the seller did not express an intent to convey

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<sup>146</sup> The example given here is based on *Acraman v Morrice* (1849) 8 CB 449, 137 ER 584. Notably, this does not mean the intent to convey is always *factually* separate from the contractual intent whenever there is a contract under the 'rule 2 fact-pattern'. If the court finds out that the seller's intent to convey is already manifested in the contracting stage, and the obligation 'to do something to put the goods into a deliverable state' is not a condition of conveyance, but a mere supplemental obligation, then title can pass by intent on the conclusion of the contract even though something remains to be done: *Pritchett & Gold and Electrical Power Storage Co Ltd v Currie* [1916] 2 Ch 515. Nevertheless, this does not change the legal position that it is still the intent to convey (*conceptually* separate but *factually* coincide with the contractual intent) not the contractual intent to incur an obligation to convey that passes property.

early on.<sup>147</sup> Consequently, like rule 5 discussed in the paragraph immediately above, rule 2 also indicates the separateness of contract and conveyance; the manifestation of the intent to convey can happen after the manifestation of the contractual intent, or it can never happen at all despite the manifestation of the contractual intent.

Although the wording of sections 17 and 18 are all based on ‘intent’ which seems to support the former notion that ‘intent passes property’ as illustrated in the previous paragraph, the latter notion that ‘contract passes property’ is however, the prevailing view as could be found in many textbooks. For instance, it is commonly understood that ‘an agreement of sale is both a contract and a conveyance ... property passes by virtue of the contract itself.’<sup>148</sup> Such a general statement was further explained in a way where the transferor makes a contract of sale, he is indicating that he does not intend to transfer the property by ways other than contract, and therefore:

[title] cannot then pass again by reason of delivery, nor, usually would the parties intend it to. Even if, under the contract, property is to pass on delivery, this is still as a result of the contract and not otherwise.<sup>149</sup>

The logical consequence, as the authors later on point out, is that if a transferor delivers the property under a void contract of sale or a voidable contract of sale which is

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<sup>147</sup> This can be inferred from a Canadian case *Jerome v Clements Motor Sales Ltd* [1958] OR 738. Although in that case it is unclear whether the seller deliberately elected not to inform the buyer after having done the repair to a second-hand car, the legal position held by the court that title to the car does not pass for want of notice is an objective one, so that whether the seller was deliberate or not should not make any difference to the result of the case, as long as there was no manifested intent to convey.

<sup>148</sup> Roy Goode, *Goode on Commercial Law* (edited and fully revised by Ewan Mckendrick, 4th edn, Penguin 2010) 147. Similar expression in E L G Tyler and N E Palmer, *Crossley Vaines' Personal Property* (5th edn, Butterworths 1973) 325. Aubrey L Diamond, ‘When Is a Gift ... ?’ (1964) 27 MLR 357, 360, citing *Ramsey v Margrett* [1894] 2 QB 18.

<sup>149</sup> Michael Bridge and others, *The Law of Personal Property* (2nd edn, Sweet & Maxwell 2017) para 30-037..

rescinded, the law would say that there must be no valid intention of him to transfer the property even in a subsequent act of physical delivery.

What is certain is that, given the codification nature of the Acts which is to represent the previous law relating to the sale of goods whether found in statute or common law,<sup>150</sup> where the statute is ambiguous or silent on this question, we could at least try to find the answer from pre-1893 laws. In *Simmons v Swift*, Bayley J used the word ‘bargain’ to describe the method of passing of property:

Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately ... If anything remains to be done on the part of the seller, until that is done the property is not changed.<sup>151</sup>

In *Tarling v Baxter*,<sup>152</sup> Bayley J used the word ‘immediate sale’:

The rule of law is, that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee.<sup>153</sup>

In *Gilmour v Supple*, Sir Cresswell Cresswell said, ‘by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer.’<sup>154</sup> On the contrary, Blackburn, who wrote the first textbook specifically on the English law of sale of goods, clearly stated that the pre-1893 law in a different way that it is the intent that passes

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<sup>150</sup> M G Bridge and others (eds), *Benjamin’s Sale of Goods* (10th edn, Sweet & Maxwell 2017) para 1-002.

<sup>151</sup> *Simmons v Swift* (1826) 6 B & C 857, 862; 108 ER 319, 321.

<sup>152</sup> (1827) 6 B & C 360, 108 ER 484.

<sup>153</sup> *Tarling v Baxter* (1827) 6 B & C 360, 364; 108 ER 484, 486.

<sup>154</sup> *Gilmour v Supple* (1858) 11 Moo PC 551, 566; 14 ER 803, 809.

property: ‘the property does not pass unless there be an intention to pass it.’<sup>155</sup> Such ambiguity remained so; even the case law on the eve of 1893 did not show a clear and consistent line with respect to this question. On one side, Lord Cairns stated that:

if the property in the goods in question passed, it could only pass by way of contract; there is nothing else which could have passed the property. ... that [the case namely in which the contract never comes into existence] being so, it is idle to talk of the property passing.<sup>156</sup>

Accordingly, as the intent to convey title is strictly attached to the contract of sale as a part of it, there can be no valid intent to pass property where the contract is void, because the contract itself is the method of conveyance. On the other side, as has been cited from time to time in this thesis, Fry LJ stated that:

according to the old law no gift or grant of a chattel was effectual to pass it ... unless accompanied by delivery: that on that law two exceptions have been grafted, one in the case of deeds, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery.<sup>157</sup>

This logically follows that even in the context of sale of goods, at least there could be a valid intent incorporated in conveyance (whatever the method is), not in the contract itself. Further, this means we have to resort to the old rules in common law to find the

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<sup>155</sup> Colin Blackburn, *A Treatise on the Effect of the Contract of Sale on the Legal Rights of Property and Possession in Goods, Wares, and Merchandise* (London 1845) 147. Surprisingly, in the second edition of this book written not by Blackburn himself, the author added his own remarks without citing any authority in the next chapter of this part II, that ‘[i]n the English law a contract of sale has two effects. It operates as a contract giving rise to obligations or rights in personam ... and it also, in some cases, operates as a conveyance of property’: J C Graham, *A Treatise on the Effect of the Contract of Sale on the Legal Rights of Property and Possession in Goods, Wares, and Merchandise* (2nd edn, Stevens & Sons 1885) 243.

<sup>156</sup> *Cundy v Lindsay* (1877–78) LR 3 App Cas 459, 466. Similar statement in *Tarling v Baxter* (1827) 6 B & C 360, 108 ER 484.

<sup>157</sup> *Cochrane v Moore* (1890) 25 QBD 57, 72-73. Followed by Harman LJ in *Re Cole* [1964] Ch 175, 187.

answer. The following paragraphs will demonstrate that the latter one is the more accurate proposition, and that the ‘contract’ itself has never been the method of conveyance in the context of sale of goods throughout English legal history.

### 3.1.3 Implication from Exigibility

Despite the lack of any decisive authority regarding this point to be found among pre-1893 cases, it is suggested that insights could be gained through a closer look at the relation between sale of goods and the law of detinue. For example, legal historians elucidated the available claims against vendors for non-delivery of goods in the context of sales of chattels under early English law, including the circumstance that:

If the purchase price were paid, or the buyer’s sealed obligation for the price delivered, Detinue would lie from early times. The buyer’s right was extended in 1442 or thereabouts, so that he could claim the specific property though he had not paid the price...<sup>158</sup>

The authority for such radical change around 1442 mentioned by him came from Fortescue CJ’s illustration in Henry VI’s day:

If I buy a horse of you, the property is straightway in me, and for this you shall have a writ of debt for the money, and I shall have detinue for the horse on this bargain.<sup>159</sup>

But why could the purchaser maintain a claim of detinue? What is the underlying rationale of the legal position? As an old form of writ and later a form of action, the

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<sup>158</sup> W T Barbour, ‘The History of Contract in Early English Equity’ in P Vinogradoff (ed), *Oxford Studies in Social and Legal History*, vol IV (Clarendon Press 1914) 114–15.

<sup>159</sup> YB 20 Hen VI Trin pl 4. Translation from Law French to Modern English is in James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Harvard UP 1913) 77.

content of detinue is that ‘a person claimed the specific return of goods wrongfully detained from him,’<sup>160</sup> and the effect is to ‘command the sheriff to order the defendant to yield up to the plaintiff the chattels which he unjustly detained from him.’<sup>161</sup> The elements of the action are:

(i) a *property* in the plaintiff, either *absolute or special* ... in personal goods, which are capable of being ascertained; (ii) a possession in the defendant by bailment, finding, etc.; (iii) an unjust detention on the part of the defendant.<sup>162</sup>

Parties usually involved in detinue were described in Comyn’s Digest, that detinue ‘lies by him who has property in a thing certain, against him who detains it.’<sup>163</sup> Accordingly, a classic example of such action could be where A lends B a horse, and B refused to return it. In this case, A could be the one holding the highest title, or could be a mere finder, or a bailee authorised by the title-holder holding the higher title under the English system of relativity of title. What the defendant unjustly detains and refuses to return could not be the title, but the thing. As concluded by Sir William Holdsworth, ‘the proper sphere was the recovery of a possession which had formerly belonged to the plaintiff.’<sup>164</sup> Dr Douglas also implies that as a species of tort, the precondition for maintaining detinue is to breach a kind of legal duty which is:

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<sup>160</sup> WJ Byrne, *A Dictionary of English Law* (Sweet and Maxwell 1923) 301.

<sup>161</sup> JH Baker, *An Introduction to English Legal History* (4th edn, Butterworths 2002) 391.

<sup>162</sup> AS Oppe, *Wharton's Law Lexicon* (14th edn, Stevens and Sons 1938) 326; Daniel Greenberg (ed), *Jowitt's Dictionary of English Law*, vol I (3rd edn, Sweet and Maxwell 2010) 697 (emphasis added). Element (i) is also described in another way: ‘a right to immediate possession’ according to Michael Jones and others (eds), *Clerk & Lindsell on Torts* (21th edn, Sweet & Maxwell 2014) para 17–03. All materials are secondary due to the fact that no case law ever gave a definition for ‘detinue’.

<sup>163</sup> Sir John Comyns, *A Digest of the Laws of England*, vol III (5th edn, London 1822) 378.

<sup>164</sup> W S Holdsworth, *A History of English Law*, vol III (5th edn, Sweet & Maxwell 1942) 355.

... that the claimant's *property right* in his chattel (which could be ownership, a possessory security interest or a reversionary interest) imposes a legal duty on others not to interference with the chattel ...<sup>165</sup>

The gist that 'a pre-existing better title is a prerequisite for maintaining detinue' is plain in the above circumstances because A (the owner/finder/authorised possessor) has already got a pre-existing title beforehand, at least as compared to B (the custodian). But when it comes to the vendor-purchaser scenario, the purchaser's right to maintain detinue seems anomalous because it is very rare there would be a pre-existing title, ie a better right to immediate possession against the vendor by the moment when the purchaser pays money. One possible answer could be that the prerequisite to maintain detinue has extended to a person without title to goods. Another possible answer could be that the purchaser has got the title by vendor's consent. If the real answer is the latter, a crucial implication follows: the contract on its own could pass title to the purchaser after the 1442 rule; and even before 1442, 'contract plus payment' could also achieve so.

### 3.1.4 Historical Exploration of the Rules

Since the reasoning above shows that at some earlier stage there might be a rule to the effect that property passed if the purchase price was paid, and that there must have also been a time even earlier where there is a rule to the effect that it did not pass without delivery, we now turn to an investigation of the original rules regarding chattel transfer under a sale.

Perhaps the earliest evidence in the history of the common law regarding a

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<sup>165</sup> Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Hart Publishing 2011) 89 (emphasis added).

separate step of chattel conveyance could be found in early textbooks, though writers such as Glanvill, the great twelfth-century jurist, did not make things clear enough at the outset:

The cause of a debt may also be purchase or sale ... A purchase and sale is effectively complete when the contracting parties have agreed on price, provided that this is followed by delivery of the thing purchased and sold, or by payment of the whole or part of the price, or at least by the giving and receipt of earnest.<sup>166</sup>

This is ambiguous, for the phrase ‘a sale is complete’ may imply transfer of title,<sup>167</sup> or merely concern the contract itself and implies nothing on the transfer of title.<sup>168</sup> Fortunately, Bracton gave his answer a century later. When he was discussing the old rule in his era on acquiring title to goods by purchase, he pointed out that:

There is another *causa* for acquiring the dominion of things which is called that of purchase and sale. When one sells his property to another ... as we may be seen above in the portion of gifts, without *delivery* dominion over things is not transferred. ... [T]he risk attending the thing bought and sold both before delivery and after it, falls generally upon him who has it in his possession, ... for obviously he who has not yet delivered the thing to its buyer will still himself be its *owner*...<sup>169</sup>

Several decades later in the late thirteenth century, *Fleta*, anonymously written by an imprisoned judge also reaffirmed the position that ‘dominion over things is not

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<sup>166</sup> Ranulf de Glanvill, *The Treatise on the Laws and Customs of the Realm of England* (GDG Hall ed, Nelson 1965) 129.

<sup>167</sup> See JH Baker, *An Introduction to English Legal History* (4th edn, Butterworths 2002) 384.

<sup>168</sup> See John Hudson, *The Oxford History of the Laws of England*, vol II (OUP 2012) 688.

<sup>169</sup> Henry de Bracton, *Bracton on the Laws and Customs of England*, vol II (George E Woodbine ed, Samuel E Throne tr, Belknap Press 1968) 181, 183 (footnotes omitted) (emphasis added). As for the ‘portion of gifts’, it is on page 124, that ‘A gift is not valid unless livery follows.’ Bracton also cited the *Codex Justinianus* to support his view: ‘The ownership of property is transferred by delivery ... but not by naked pacts.’ (C. 2.3.20) See Fred H Blume, ‘*Annotated Justinian Code*’ <<http://www.wyo.edu/lawlib/blume-justinian/ajc-edition-2/book-2.html>> accessed 07 November 2013.

transferred without delivery.’<sup>170</sup> Pollock and Maitland also hold the same opinion that in the thirteenth century, it is fairly certain that the ownership of a chattel could not be transferred from one person to another, either by way of gift, or by way of sale, without a ‘*traditio rei*’ (delivery of the thing).<sup>171</sup>

Sir William Holdsworth, after a review of previous works, concluded that, at least before the reign of Henry VI, the purchaser could not sue on detinue for the goods that the vendor had yet to deliver,<sup>172</sup> as the only remedy for the purchaser on payment was a writ of debt in *detinet* — an action simply alleging that the vendor was wrongfully withholding the money, and that ‘the purchaser on payment could *not* sue for the goods by action of detinue ... because he could not allege that the things were his.’<sup>173</sup> Yet he believed that this changed at some point between Edward III’s and Henry VI’s reign.

What could be drawn from such a leap of faith regarding detinue? Can the implication truly be that the alteration of the conveyance rule is the reason for the alteration of detinue, just as some legal historians described? The answer is no. It is submitted that detinue changed only because its eligibility<sup>174</sup> changed, and no implications relating to the conveyance rule can be drawn from it. Since Sir William Holdsworth’s view is the most popular one and the one often cited in other historians’

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<sup>170</sup> HG Richardson and GO Sayles (eds), *Fleta*, vol II (HG Richardson and GO Sayles trs, Selden Society 1955) 194.

<sup>171</sup> Frederick Pollock and Frederick William Maitland, *The History of English Law before the Time of Edward I*, vol II (2nd edn, Liberty Fund 2010) 179.

<sup>172</sup> W S Holdsworth, *A History of English Law*, vol III (5th edn, Sweet & Maxwell 1942) 353–55.

<sup>173</sup> W S Holdsworth, *A History of English Law*, vol III (5th edn, Sweet & Maxwell 1942) 355, citing YB 50 Ed III Tri pl 8.

<sup>174</sup> Ie, one of the constituent elements as to who is eligible to maintain detinue against the ‘detainer’.

works on this point, we will examine the flaw in his reasoning below.

According to Sir William Holdsworth, the reason why the vendor could, even before his performance, sue on debt for payment is because he had provided a sufficient *quid pro quo* for this right – namely, the grant of the right to the purchaser to sue for delivery of goods. It apparently follows from this that, the converse should also be true – ie the purchaser could, by his contractual promise of performance sue on detinue for the delivery of the goods since he had provided also a sufficient *quid pro quo* – namely, the grant of the right to the vendor under the contract to sue for payment. Though this is a flawless explanation as to why the parties could sue on the actions of debts and detinue respectively, it is irrelevant as to the passing of property. The fact that the vendor could sue in debt has no logical bearing as to the passing of the *property in money*. The right to get that amount of money (right *in personam*) and the right to vindicate title to that amount of money (right *in rem*) are two different things. The vendor only acquires the former before the purchaser actually makes payment. Unfortunately, by insisting that such right is a property right, Sir William Holdsworth in turn states that:

[t]his being the case, it is not difficult to see how the idea arose that the property *passes* upon an agreement to sell a specific chattel. ... A can bring debt ... because he has *a right to it* by virtue of B's grant ... B can bring detinue for the horse because he has *a right to the possession* by virtue of A's grant. ... [T]his right to possession is very often called 'property' in the Year Books. ... [I]t took upon itself more of the characteristic of ownership. ... If, therefore, a contract of sale were made which gave the purchaser the right to bring detinue for the thing sold, it was easy to say that he had the property as the result of the sale.<sup>175</sup>

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<sup>175</sup> W S Holdsworth, *A History of English Law*, vol III (5th edn, Sweet & Maxwell 1942) 356 (emphasis added, footnotes omitted).

So there is a logical confusion between property rights and personal rights regarding the nature of ‘the right to possession’ in Sir William Holdsworth’s reasoning, although he might be misled by the old, ambiguous use of the word ‘property’ in the Year Books. Regardless, it is this misconception that led him to the argument that the extension of detinue altered the nature of the rights held by the purchaser. Yet, it is submitted that, this extension of the scope of detinue did not alter the property rights of the purchaser, but rather, it was merely an extension of the availability of detinue to those which have not yet acquired such property rights. This was done through changing the eligibility to sue from a requirement of a ‘pre-existing title’ to a ‘right to possess’, which covers both (i) a pre-existing title and (ii) a subsequent right to acquire title from the owner. In other words, the action of detinue had come to be multi-causal, in the sense that it could not only be brought by *title-holders* out of possession to assert their right to *possession*, but also be brought by *non-title-holders* to assert their right to possession, and thereby acquire *title*. This being the case, it follows that the reason why the purchaser could maintain detinue after the fifteenth century is not because that he was the owner (right *in rem*) before he entered into the contract, but because that he acquired a right to receive the property right (right *ad rem*), which is in essence still a right *in personam*. In this case, the subject-matter of reciprocal grants between contractual parties is simply the right to acquire the property – ie money for the vendor, and goods for the purchaser. Neither the vendor acquires property rights in money, nor does the purchaser acquire property rights in goods. Thus such radical change of the scope of detinue cannot be regarded as historical evidence for the position that property passes by way of contract suggested by Sir William Holdsworth, who omitted the possibility that the reason may

well be that the scope of detinue has been extended to a person without title to goods.

Other findings regarding the unstable exigibility of detinue by legal historians also cast doubt on Sir William Holdsworth's reasoning and could be used as evidence to support the submitted proposition that detinue has nothing to do with passing of property by contract. As discovered by Milsom, a passing reference in 1347 labelled the buyer's action as detinue, 'but this may have been just because the goods were *specific* ... If so, the earlier *casual* naming of the action may have been partly responsible for the passing of property idea.'<sup>176</sup> Indeed, if we look beyond the sale of goods, we can find clues in 1308 when a son could bring a writ of detinue against his father's executors who refused to transfer certain goods to him after the death of his father.<sup>177</sup> Of course the fact that the son could claim in detinue does not imply that title to goods in question passed to him immediately upon his father's death. In fact, the fluctuating scope of detinue throughout English legal history renders it impossible to determine the passing of property through the law of detinue. As illustrated by Fifoot, at the outset detinue was even a part of the writ of debt, and even they became distinct from each other by the close of the thirteenth century, the test dividing these two was simply whether the claim is for fungibles or

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<sup>176</sup> S F C Milsom, 'Sale of Goods in the Fifteenth Century' (1961) 77 LQR 257, 273–74 (emphasis added), citing YB P 21 Ed III pl 2. It should be noted that Milsom, in surveying the vicinity of the landmark when the '*real* (passing of property) nature of contracts' came into being, also tried to connect this point to constructive delivery, bailment, and conversion against bailees. But he found no direct authority confirming this point. By contrast, the meaning of conversion in the old days 'seems to have meant no more than appropriation' which an owner could also be liable for, and does not necessarily infer a pre-existing property right in the claimant: A W B Simpson, 'The Introduction of the Action on the Case for Conversion' (1959) 75 LQR 364. For instance, an executor can be liable for 'conversion' in the old days for misappropriating the deceased's goods and exposing his own to execution. This does not mean that title to the deceased's goods is immediately divested from the executor to the successors upon the testator's death. Thus, even if the seller is liable for so-called 'conversion' akin to a bailee in that era, it did not infer that title to goods passed to the buyer upon contract.

<sup>177</sup> YB 1 & 2 Ed II pl 10, *Anon.* (1308) 17 SS 39.

specific chattels.<sup>178</sup> Obviously, the test of ‘specific chattels’ include both those chattels the title to which belongs to the claimant and those that do not. From these historical findings, it can be inferred that what happened in the mid-fifteenth century led by Fortescue’s judgment regarding detinue does not suffice to deny the existence of a separate intent to convey recognised in the 1893 Act. Strictly speaking, despite loose talk in numerous cases using ‘contract’, ‘bargain’, ‘sale’ and ‘intent’ interchangeably, contract has never become a method of conveyance throughout English legal history. Before moving on to the discussion of the counterpart in Chinese law, the next sub-section is to demonstrate why it could be said that the 1893 Act recognised that it is the intent not the contract which passes the property.

### 3.1.5 The Draftsman’s Assertion

Among numerous cases in the field of sale of goods, there was one case cited by the draftsman of the 1893 Act, Sir Mackenzie Chalmers, to reach the conclusion that it is an ‘undoubted’ rule as old as the year books that ‘by English law the property may pass by the contract itself’ can be tested.<sup>179</sup> This is *Dixon v Yates*,<sup>180</sup> but did this case genuinely deliver such idea? It is submitted that the answer should be in the negative. The plaintiffs in this case purchased of the defendant, one Yates, several puncheons of rum and then sold 46 of those on to one Collard. As those puncheons had been placed in Yate’s

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<sup>178</sup> C H S Fifoot, *History and Sources of the Common Law: Tort and Contract* (Stevens & Sons 1949) 25–28.

<sup>179</sup> Michael Mark and Jonathan Mance, *Chalmers’ Sale of Goods Act 1979: Including the Factors Acts 1889 & 1890* (18th edn, Butterworths 1981) 144–45. Such 18th edition did not make any change to this point compared to the first edition, which was written by Sir Mackenzie Chalmers himself: MD Chalmers, *The Sale of Goods Act 1893, Including the Factors Acts, 1889 & 1890* (W Clowes 1894) 37.

<sup>180</sup> (1833) 5 B & Ad 313, 110 ER 806.

warehouse at all times prior thereto, the plaintiffs issued Collard an invoice, specifying the marks and numbers of each puncheon, in exchange of Collard's two bills. After two of these puncheons were taken out by Collard, both of the bills became dishonoured due to Collard's insolvency. As a result, the plaintiffs were no longer willing to issue delivery order to Collard and also ordered Yates not to deliver these 44 puncheons. Later on, Collard sold on 26 of those to one Kaye, and the remaining 18 to two other sub-vendees. Upon the request made from Collard and the sub-vendees, Yates finally allowed Kaye to gauge all the 26 puncheons and delivered three of the 18 puncheons to the other two sub-vendees. Such conduct of Yates was alleged by the plaintiff to be liable for allowing Collard to deal on his own account. The plaintiffs asked for confirming the right of lien to these puncheons of rum and ordering the aforementioned sub-vendees to deliver these puncheons in question back to the plaintiffs. These claims were successful.

The ratio of this case is, based on unpaid sellers' lien, that the plaintiffs never had the intent to deliver the aforementioned 46 puncheons of rum to the purchaser, Collar, regardless of the fact of the delivery order for the first two puncheons. This is because of, as explained by Denman CJ, the lack of the sellers' intent to hand over possession to the purchaser, which is the prerequisite for the extinction of the seller's right of lien: '[i]t is said that the delivery of a part operates in law as a constructive delivery of the whole; but that is so only where the delivery of part is *intended* to be delivery of the whole.'<sup>181</sup> It is based on the sellers' exercise of their right of lien which made them win the case. In other words, this case is a matter of delivery as a method of changing possession, not as a method of passing property; delivery in this case has nothing to do with the right to

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<sup>181</sup> *Dixon v Yates* (1833) 5 B & Ad 313, 336; 110 ER 806, 815 (emphasis added).

exclusive possession forever, but just has something to do with the right of lien. It follows that what was discussed in the judgment of the case with respect to the issue of passing of property is, technically speaking, not the ratio decidendi but the obiter dictum.

Even assuming those statements regarding the passing of property in the judgment is ratio, a closer look at the statement of Parke J regarding passing of property can also reveal that what Parke J meant was not the notion that ‘contract passes property’. Before his Lordship delivered his opinion on the issue of lien, he first stated his proposition as to a preliminary issue, ie the passing of property:

I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. The general doctrine that the property in chattels passes by a contract of sale to a vendee without delivery is questioned ... but I apprehend the rule is correct as confined to a bargain for a specific chattel. Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods are sold are not ascertained ... The very *appropriation* of the chattel is equivalent to *delivery* by the vendor, and the *assent* of the vendee to *take* the specific chattel ... is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.<sup>182</sup>

According to such quotation, the findings which lead to the aforesaid conclusion are as follows. (i) That the rule of passing property in the context of sale of goods contract derives from the rules of passing property by delivery.<sup>183</sup> (ii) That the ascertainment of goods is a necessary condition for passing property in the context of sale of goods contract. (iii) That the transferor’s act of appropriation is an alternative for his act of delivery. (iv) That the transferee’s assent is an alternative for his consent of

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<sup>182</sup> *Dixon v Yates* (1833) 5 B & Ad 313, 340; 110 ER 806, 816.

<sup>183</sup> Such finding was also discussed in William Swadling, ‘Rescission, Property, and the Common Law’ (2005) 121 LQR 123, fn 18.

accepting the delivery. Adding up all these four findings, it follows that the reason why only ‘a contract for sale of specifically ascertained goods which are appropriated by the transferor with the assent of the transferee’ passes title is because of two elements, ie (i) a contract (either general or specific) plus, more importantly, (ii) the transferor’s declaration of intention of ascertainment and appropriation together with the transferee’s declaration of intention of taking. It is the former that set the scene (so that no actual delivery or execution of deed is required for conveyance in this context); and it is the latter which conveys the right to exclusive possession forever. This must be so, because when Parke J said ‘appropriation being equivalent to delivery’, it makes no sense if it means that the *physical* appropriation equals to the *physical* aspect of delivery (ie, change of possession), for the location is not changed to the transferee’s place by physical appropriation. The only explanation that makes sense should be: that it is the transferor’s *intention* accompanied by such appropriation that equals to the *mental* aspect of delivery (ie, the intent to convey title by delivery).

If this is the correct way of understanding Parke J’s statement of law, it then follows that his Lordship’s conclusion at the end of the paragraph above that the ‘effect of contract ... is to vest the property’ does not mean what it says. Rather, it is a merely loose way to say that ‘intent, which in normal case is the effect of contract ... is to vest the property’ in the transferee. Based on these analyses on the role and the essence of Parke J’s statement of law, it can be concluded, with respect, that *Dixon v Yates* cannot serve as the support for understanding Sir Mackenzie Chalmers’ statement that it is an old and undoubted rule that ‘by English law the property may pass by the contract itself, if

such to be the intention of the parties. Contract may include a conveyance'<sup>184</sup> in an anti-separationist way. Rather, *Dixon v Yates* demonstrated that property may pass by intent to convey which, although sometimes is understood as an effect of the contract, is nevertheless conceptually independent of the (intent to) contract itself. It might seem odd that Sir Mackenzie Chalmers said 'contract passes property' but then draft the statute of 1893 in a different way, recognising it is literally the 'intent' not 'contract' that passes title. It is submitted that an explanation to this could be, that it is reasonable to assume that when Sir Mackenzie Chalmers said so in the book, the distinction between contract and intent in the sense of their roles in passing of property was arguably not in his mind; to use intent and contract interchangeably was just his loose talk, and therefore one cannot make very much of it to deny the existence of a separate intent to convey which passes title in the context of sale of goods.

With respect to the 'loose talk' argument in the paragraph immediately above, One could of course argue that a historical survey reveals that Sir Mackenzie Chalmers was strongly influenced by Benjamin's *Law of Sale*,<sup>185</sup> first published in 1868. And since Benjamin was a lawyer practising at New Orleans, Louisiana before he escaped to England due to the defeat of the Confederacy in the American Civil War, his work was very heavily influence by the French Civil Code of 1804. It could therefore seemingly be implied that Sir Mackenzie Chalmers specifically intended to implement a French-style conveyancing mechanism, which is unitary rather than separatist, thus the term 'intent'

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<sup>184</sup> MD Chalmers, *The Sale of Goods Act 1893, Including the Factors Acts, 1889 & 1890* (W Clowes 1894) 37.

<sup>185</sup> JP Benjamin, *A Treatise on the Law of Sale of Personal Property: With References to the American Decisions and to the French Code and Civil Law* (London 1868).

written in section 17 of the Sale of Goods Act 1893 really means ‘*contract* passes property’. However, a counter-argument could be submitted that before 1893, there were in reality *two* authoritative books on sale of goods written in this country, the first one being indeed Benjamin’s Law of Sale, the other being Blackburn’s *Contract of Sale*, which was published in 1845, in fact 23 years earlier than the first one. In the latter work, notably, pre-1893 law was clearly restated in the way that ‘property does not pass unless there be an *intention* to pass it.’<sup>186</sup> Moreover, when the translation of Pothier’s treatise on various types of contracts made French law of sale extremely popular among English colleagues in the first half of the nineteenth century,<sup>187</sup> Blackburn again expressed his ‘anti-French’ reminder by saying that the French positions ‘are not always to be considered as universally proved of the civil law and far less to be taken as authorities for English law.’<sup>188</sup> Given that there is no clear evidence that between the two textbooks, Sir Mackenzie Chalmers accepted Benjamin’s pro-French idea instead of Blackburn’s anti-French idea regarding the section 17 issue, it is therefore highly questionable that to understand his choice of word, ie, ‘intent’ in the 1893 Act, we can simply depart from the *prima facie* interpretation, and convert ‘intent’ to ‘contract’ thus interpret it as ‘contractual intent’ following the unitary approach.

## 3.2 Chinese law

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<sup>186</sup> Colin Blackburn, *A Treatise on the Effect of the Contract of Sale on the Legal Rights of Property and Possession in Goods, Wares, and Merchandise* (London 1845) 147 (emphasis added).

<sup>187</sup> For more historical information on Pothier, Blackburn, Benjamin and Chalmers relating to Sale of Goods, see eg Clive M Schmitthoff, *The Sale of Goods including the Hire-Purchase Act 1965 and other Enactments* (2nd edn, Sweet & Sons 1966) 9–14.

<sup>188</sup> Colin Blackburn, *A Treatise on the Effect of the Contract of Sale on the Legal Rights of Property and Possession in Goods, Wares, and Merchandise* (London 1845) 172.

### 3.2.1 The Starting Point

As a matter of black-letter law, the transfer of movables under Chinese law followed a delivery rule since 1986, as the General Provisions of Civil Law provides:

Unless the law stipulates otherwise or the parties concerned have agreed on other arrangements, the ownership of property obtained by contract or by other lawful means shall be transferred simultaneously with [the passing of possession of] the property itself.<sup>189</sup>

Unfortunately, throughout the legislation there is no further explanation on the phrase ‘or the parties concerned have agreed on other arrangements’ quoted above. It remained ambiguous at the time as to whether this phrase includes the retention of title clause, the constructive delivery clause,<sup>190</sup> and more importantly, the transfer by contract clause which, unlike the two previous explanations, could to a substantial degree erode the delivery rule established in this provision.

Such vagueness in law was eliminated 21 years later, when the Property Law 2007 clearly articulates that ‘[t]he creation or transfer of the real right of a movable property shall become effective upon delivery, except it is otherwise prescribed by any law.’<sup>191</sup> According to the legislative interpretation to this article, those ‘exceptions’ to the delivery rule mainly includes: (i) the creation or transfer of property by operation of law,<sup>192</sup> (ii) conveyances by constructive delivery,<sup>193</sup> and (iii) the grant of certain types of

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<sup>189</sup> General Provisions of Civil Law 1986 (China), art 72(2).

<sup>190</sup> This is possible if we understand the meaning of ‘passing of possession’ in article 72(2) denotes to actual delivery only.

<sup>191</sup> Property Law 2007 (China), art 23.

<sup>192</sup> Property Law 2007 (China), arts 28–30.

lesser property rights to movables. Scenarios of Category (iii) include: (a) the creation and transfer of charge to certain types of movables,<sup>194</sup> where property rights may pass on conclusion of the contract, but cannot bind innocent third parties without registration,<sup>195</sup> (b) the passing of ownership under a retention of title clause, by which ownership to movables can be retained in the transferor's hands until the instalment is fully paid by the transferee despite that there had been already physical delivery.<sup>196</sup> Apart from these exceptions, the *inter-vivos* consensual creation or transfer of property rights to movables in Chinese law generally follows the *traditio* system, ie, property does not pass without delivery. These include (i) the transfer of ownership to movables,<sup>197</sup> (ii) the creation and transfer of the right of pledge to movables by actual delivery,<sup>198</sup> or (iii) by delivery of certain kinds of document of title,<sup>199</sup> and (iv) the creation of a contractual lien.<sup>200</sup>

### 3.2.2 Passing of Property in Sale of Goods

Similarly to English law, an exceptional scenario in Chinese law again may lie in the context of the contract for sale of goods, which provides that '[t]he ownership of a

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<sup>193</sup> Property Law 2007 (China), arts 25–27. It can be inferred from this explanation that the word 'delivery' in article 23 is confined to actual delivery. Strictly speaking, this exception is not a genuine exception to the *traditio* system, which as a matter of principle does not exclude constructive delivery.

<sup>194</sup> These includes (i) manufacturing facilities, raw materials, semi-manufactured goods and products, (ii) vessels and aircrafts that are under construction, and (iii) other means of transportation equipment: Property Law 2007 (China), art 180(4)–(6).

<sup>195</sup> Property Law 2007 (China), art 188.

<sup>196</sup> Contract Law 1999 (China), art 133.

<sup>197</sup> Property Law 2007 (China), art 23.

<sup>198</sup> Property Law 2007 (China), art 212.

<sup>199</sup> Property Law 2007 (China), art 224. The two explicitly listed in the legislation are warehouse receipts and bills of lading: Property Law 2007 (China), art 223(3).

<sup>200</sup> Property Law 2007 (China), art 188.

subject-matter shall be transferred upon the delivery of the object, except as otherwise stipulated by law or agreed upon by the parties.’<sup>201</sup> It is clear that this provision allows the seller and purchaser to have the property passed without an additional step of delivery, which is different from the provision in property law. However, this does not mean that such provision of passing property in contract law promulgated eight years earlier than the provision of starting point in property law, should be abolished because the former does not contradict the latter due to the existence of the phrase ‘except it is otherwise prescribed by any law’ in the wording of the latter.<sup>202</sup>

Nevertheless, the question still remains: what exactly does it mean by saying ‘otherwise agreed upon by the parties’? Some asserted that we should interpret it in a loose way, in the sense that the expression should be interpreted in a way that ownership should shall pass upon conclusion of the contract, or shall pass when the purchaser performs his obligation (eg, to pay for the monetary value of the subject-matter).<sup>203</sup> By contrast, if we adopt a systematic approach of interpretation, as reminded by some, then it can be interpreted that such party autonomy does not include the meaning of passing by mere intent. First,<sup>204</sup> if such article is interpreted systematically with article 135,<sup>205</sup> the

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<sup>201</sup> Contract Law 1999 (China), art 133. Moreover, as for contract of barter, its rule regarding passing of property should adopt the same rule for contract of sale in Chinese law, which is somewhat different from that of English law as discussed in the previous section of this chapter: Contract Law 1999 (China), art 175.

<sup>202</sup> Property Law 2007 (China), art 23.

<sup>203</sup> LIU Shuqiang, *买卖合同* [*Contract of Sale*] (People's Court Press 2001)106; MI Qi (ed), *买卖合同* [*Contract of Sale*] (Minzhu Fazhi Publishing 2002) 84.

<sup>204</sup> WANG Liming, *合同法研究* [*Study on Contract Law*], vol III (Renmin University Press 2012) 71.

<sup>205</sup> Contract Law 1999 (China), art 135 provides that ‘[t]he seller shall perform the obligations of delivering to the buyer the subject-matter or handing over the documents for the buyer to take possession of the subject matter and of transferring the ownership thereto.’

wording of which implies that the meaning of ‘delivery’ in the minds of the legislature at that time denoted to merely two default ways, namely, (i) physical delivery of the very thing and (ii) delivery by sending title documents. Apparently these are actual delivery only. Therefore, the exception provided in article 133 should denote to other ways of delivery, especially those methods of constructive delivery.<sup>206</sup> Second,<sup>207</sup> that the parties can mutually agree on the retention of title clauses is another exception implied in article 133, for this can respond to the immediate subsequent provision, that ‘the ownership shall belong to the seller if the buyer fails to pay the price or perform other obligations’<sup>208</sup>

Such view can also be found accepted by the High Court of Shandong Province in an appealed case reported in the Supreme Court’s Gazette. A textile company, the claimant entered into a credit transaction with a dyeing company, according to which the textile company transferred ownership to certain amount of cloth to the dyeing company, who promised to pay the price in the future. Later on, the textile company realised that the dyeing company was in financial distress, hence they reached another contract stating: (i) that the dyeing company agreed to give up seven machines in order to discharge the overdue debt, and (ii) that ownership to these machines were conveyed to the textile company upon signing of the contract. Soon afterwards the dyeing company went into insolvency, and the office-holder<sup>209</sup> appointed for liquidation refused to deliver these

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<sup>206</sup> Such as *traditio brevi manu*, *traditio longa manu* and *constitutum possessorium* which has now been explicitly recognised since 2007: Property Law 2007 (China), arts 25–27.

<sup>207</sup> SUN Yingzheng (ed), *买卖合同法律原理与实证解析* [Rationales and Doctrines of the Law of Contract of Sale] (People's Court Press 2005) 220; WANG Liming, *合同法研究* [*Study on Contract Law*], vol III (Renmin University Press 2012) 71.

<sup>208</sup> Contract Law 1999 (China), art 134.

<sup>209</sup> Unlike English law where the bankrupt’s estate shall vest in the trustee immediately on his appointment, the office-holder, the counterpart in Chinese law is a mere administrator in the sense

seven machines upon the request of the textile company. The textile company therefore brought the case before the local Intermediate Court and claimed for vindication. Due to lack of physical delivery, the textile company claimed that article 133 of the Contract Law 1999 allows property to goods to pass by contract as long as parties have agreed upon this, which was just the fact of the present case. The office-holder of the dyeing company denied, pleading that ownership to these machines in question did not pass for want of delivery; a mere contract cannot pass ownership, and article 133 was no exception. The textile company's claim was dismissed by the Liaocheng Intermediate Court and then the Shandong High Court, both holding that property did not pass to the claimant and thus formed part of the bankrupt's distributable assets. It is notable in the reasoning part of the appeal judgment that the High Court explained that the role of article 133 is no more than providing ways of constructive delivery in lieu of actual delivery, rather than serving as an exception allowing passing of property by virtue of contract.<sup>210</sup> Thus, it can be summarised that, unlike in English law, where title to chattels can be transferred by parties' mere intent so long as the underlying basis is a contract of unconditional sale of ascertained goods, in Chinese law, however, ownership to goods cannot be transferred by parties mere intent without an additional step of delivery, even if this is in the context of sale of goods.

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that the office-holder does not own the bankrupt's property but has the power to manage and dispose of the property: Enterprise Bankruptcy Law 2006 (China), art 25(1)(vi), cf Insolvency Act 1986, s 306.

<sup>210</sup> *Qingdao Yuanhongxiang Textile Co Ltd v Gangrun (Liaocheng) Printing and Dyeing Co Ltd* 青岛源宏祥纺织有限公司与港润(聊城)印染有限公司债权转让纠纷上诉案 (SPC Gazette, Issue 4, 2012). Note that the reason why there was no *constitutum possessorium* recognised in this case was because, as the Shandong High Court pointed out, that the parties did not 'make clear a clause specifically stipulating that the dyeing company shall remain to be the possessor of these machines in question.'

### 3.2.3 The Separate Intent to Convey

Even though sale of goods in Chinese law is not a genuine exception to the requirement of delivery, debates regarding the existence of the principle of separation remain in Chinese academia. The core issue here, unlike the issue of English law as discussed in the previous section, is whether the act of delivery is a juridical act with its own element of intention, or is merely the performance of the contract (of sale of goods, for example). Antagonists to the principle of separation do not deny that the fact of reaching consensus between the parties and the fact of passing property between the parties are two distinct facts. What they do deny, however, is that the aforementioned two facts are conceptually not two juridical acts but one juridical act, with only one coherent intention ‘to pass property right’ embodied in the contract.<sup>211</sup>

Admittedly, such view reflects the conventional notion in Chinese academia denying the separation principle. Under such influence, unfortunately, the contract law even once took roles that it should not have taken. Following their logic, the contract contains both the underlying contract in the law of obligations and the result of property transfer of such underlying contract. It is then not surprising to see the contract law

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<sup>211</sup> This argument is led by LIANG Huixing, ‘我国民法是否承认物权行为 [Is Juridical Act of Real Rights Recognised in Chinese Civil Law?]' [1989] 6 Chinese Journal of Law 56. See also WANG Liming, ‘物权行为若干问题探讨 [On Several Issues Concerning Juridical Act of Real Right]' [1997] 3 Chinese Legal Science 58; DONG Ansheng, *民事法律行为 [Juridical Act in Civil Law]* (Renmin UP 2002) 128–30; CUI Jianyuan, ‘从解释论看物权行为与中国民法 [Dingliches Rechtsgeschäft and Chinese Civil Law from a Pointview of Hermeneutics]' [2004] 2 Journal of Comparative Law 60; CHEN Huabin, *民法物权论 [on Civil Law Property]* (China Legal Publishing House 2010) 136. A number of Chinese academics refused to acknowledge conveyance being a juridical act but a factual act. The core difference between juridical acts and ‘factual acts’ (eg Property Law 2007 (China), art 30) is that the latter take effect regardless of the parties’ intention. For a general view of ‘juridical act’ in English, see eg, Jan Peter Schmidt, ‘Juridical Act’ in Jürgen Basedow and others (eds), *The Max Planck Encyclopedia of European Private Law*, vol II (OUP 2012).

articulating that to be a valid contract, ‘the subject-matter to be sold shall be owned by the seller or of that the seller shall have the right to dispose.’<sup>212</sup> Fortunately, now such rule has been negated since 2007 by the property law codification, where it was clarified that the validity of contract is independent from the fact whether the ‘transferor’ actually has the power to dispose of the thing.<sup>213</sup> Such rule has been further disaffirmed in 2009 and 2011 by the Supreme Court in the second and third Judicial Interpretation of contract law, which affirm the position that a contract of sale cannot be rendered void by the mere fact that the ‘transferor’ does not have the ownership to the goods. Instead, the proper remedy is that the infringed buyer can sue for breach of contract.<sup>214</sup> Arguably, this point has no direct relation to passing of property, but it may well entail the gist of the principle of separation in the sense that determinants for a valid contract are not the same as determinants for a valid conveyance. Indeed, that ‘the seller must have the power of disposition’ should not be a precondition for the validity of the underlying contract of sale. Rather, it is a precondition for the validity of the conveyance of ownership to goods. Such pro-separationist judicial interpretation did influenced judges in lower courts in China, and even encouraged some of them started to explicitly recognise the existence of

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<sup>212</sup> Contract Law 1999 (China), art 132.

<sup>213</sup> Property Law 2007 (China), art 15. For the recognition in the juridical practice of the separation between obligatory juridical act and the dispositive juridical act, see HUANG Longyi, ‘负担行为与处分行为区分的实务继受 [the Practical Reception of Discrimination between Verpflichtungsgeschäft and Verfügungsgeschäft]’ [2015] 5 Hebei Law Science 144.

<sup>214</sup> *Interpretation II of the Supreme People's Court of Several Issues Concerning the Application of the Contract Law 1999* (Supreme Court Interpretation No 5, 2009) art 15; *Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts* (Supreme Court Interpretation No 8, 2012) art 3.

the principle of separation in dicta of their judgments.<sup>215</sup>

In response to antagonists' view that conveyance is a factual act rather than a juridical one, the most crucial issue is to find a separate intent to convey different from the intent to create a contractual obligation to convey. Protagonists argued that retention of title<sup>216</sup> could be said as a good indication.<sup>217</sup> The seller and the purchaser agree that physical delivery of the goods shall be done in the first place but unless the price of the goods is fully paid, ownership does not pass. Such stipulation in essence sets a condition to the completion of the *conveyance* rather than the completion of the underlying *contract*, because the validity of contract is not affected by the condition. This being correct, it follows that the conveyance must be understood as a juridical act rather than a factual act, because a factual act (eg, taking first possession, manufacture and mixture) cannot be subject to any condition at all.

In addition, it was argued by other protagonists<sup>218</sup> that another example to demonstrate the separation between contract and conveyance, though outside sale, is

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<sup>215</sup> *Liu Tabin v Chen Tianfu* 刘体斌与程天福房屋买卖合同纠纷上诉案 (Henan Jiaozuo Civil Final No 1140, 2009); *Chen Biao v Jin Kunyao* 陈表与金坤尧房屋买卖合同纠纷上诉案 (Zhejiang Shaoxing Civil Final No 357, 2011). Cf pre-2009 dicta, eg, *Jinan Public Transport Company v Jinan Runhua Real Estate Investment Co Ltd* 济南市公共交通总公司与济南润华投资置业有限公司、济南新惠德实业有限公司土地使用权转让合同纠纷上诉案 (Supreme Court Civil I Final No 3, 2008).

<sup>216</sup> Contract Law 1999 (China), art 134.

<sup>217</sup> See eg, ZHU Qingyu, '物权行为的规范结构与我国之所有权变动 [The Normative Structure of Dingliches Rechtsgeschäft and the Transfer of Ownership in China]' [2013] 6 *The Jurist* 62.

<sup>218</sup> See eg, LI Yongjun, '我国民法上真的不存在物权行为吗?' [Does the Juridical Act of Real Rights not Exist in Chinese Civil Law?] [1998] 4 *Science of Law* 55; GE Yunsong, '物权行为理论研究 [Study on the Theory of Real Juridical Act]' [2004] 6 *Peking University Law Journal* 702; '物权行为: 传说中的不死鸟 [the Real Juridical Act: A Legendary Phoenix]' [2007] 6 *ECPL Journal* 102.

where a third party (C) is willing gratuitously to provide his property as the subject-matter of a charge for a debtor (B) to secure B's loan from the debtor's creditor (A),<sup>219</sup> then C's declaration of his intent (together with A's acceptance) to create a charge on his property for the benefit of A in the registry<sup>220</sup> is exactly an example of real agreement between A and C, which has nothing to do with (if any) underlying contractual obligations between A and C.<sup>221</sup> Apart from this, there are many other scenarios under the operation of the black-letter law which demonstrates the independent existence of the intent to convey. These include: (i) transfer of property for the purpose of discharging the non-consensual-based liability such as unjust enrichment,<sup>222</sup> *negotiorum gestio*<sup>223</sup> or *culpa in contrahendo*;<sup>224</sup> (ii) transfer of property for the purpose of performing the obligation based on unilateral juridical act such as *Auslobung* (roughly translated as 'offer as a reward');<sup>225</sup> (iii) transfer of property to a third party pursuant to a contract with the counterparty;<sup>226</sup> and (iv) transfer of property for the purpose of discharging debts owed to secured creditors.<sup>227</sup> Since in all of these scenarios there could be no obligatory juridical act as an underlying basis of the transfer of property, the validity of conveyance must be

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<sup>219</sup> General Provisions of Civil Law 1986 (China), art 89(2).

<sup>220</sup> At the moment when his argument was forwarded, there was no official attempt to establish a unified 'Land Registry' for all types of property rights to immovables yet in China.

<sup>221</sup> SUN Xianzhong, 论物权法 [on Real Rights Law] (rev edn, Law Press 2008) 400. For counter-examples not to be applauded happened in judicial practice for not recognising the principle of separation, see SUN Xianzhong, '物权变动的原因与结果的区分原则 [the Principle of Separation between the Reason and the Result of the Alteration of Property Rights]' [1999] 5 Chinese Journal of Law 28.

<sup>222</sup> General Provisions of Civil Law 1986 (China), art 92.

<sup>223</sup> General Provisions of Civil Law 1986 (China), art 93.

<sup>224</sup> Contract Law 1999 (China), art 42.

<sup>225</sup> *Interpretation II of the Supreme People's Court of Several Issues Concerning the Application of the Contract Law 1999* (Supreme Court Interpretation No 5, 2009) art 3.

<sup>226</sup> Contract Law 1999 (China), art 64.

<sup>227</sup> Property Law 2007 (China), arts 195, 219, 236.

determined by a valid *intent to convey* plus an additional step of conveyance. Given both protagonists and antagonists agree that Chinese law should be either unitary or separatist but not straddle in between,<sup>228</sup> all these examples implicitly demonstrate that the separation between the intent to convey and the intent to create a contractual obligation to convey can be interpreted as existent in Chinese law.

### **3.3 Summary for Chapters 2 and 3**

This chapter deals with ‘intent alone’ transfers, which refers to transfers completed by parties’ intent alone. A typical example in English law lies in sale of goods. It can be summarised that the scope of exception to the ‘intent plus’ transfers discussed in chapter 2 should be confined to the context of sale of goods and does not apply in the context of gift, though the distinction of ‘sale of goods’ compared to other non-gratuitous contracts (such as the contract of barter) is relatively vaguer than that in Chinese law. It is argued that the statutory provisions of section 17 of the Sale of Goods Act 1979 means title can pass by parties’ intent to convey, rather than that title can pass by contract. In addition, the widely-accepted assertion, ie, property may pass by the contract itself has a long history in common law, is an erroneously held one. The intent to convey and the contract sometimes coincide as a matter of fact, but the former is conceptually separate from the latter (though not necessarily in the form of ‘real contract’). Although ‘transfer of title by intent alone’ has no counterpart in Chinese sale of goods law, a separate intent to convey can nevertheless be found in Chinese law by analysing juridical acts in various contexts.

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<sup>228</sup> A hypothetical example of straddling unitary and separatist approaches could be: as for transfers in the context of sale of goods, a system is unitary while as for transfers outside sale of goods, a system is separatist.

Overall, chapters 2 and 3 demonstrate that rules in both English and Chinese law regarding how property rights are transferred by and large fall within the principle of separation in the sense that the validity of the transfer depends on an effective conveyance, which has its own physical constituent elements (either by way of delivery or by way of registration) and mental constituent elements (ie, the intent to convey) conceptually distinct from the underlying contractual basis. Such conveyance and the underlying contract may factually coincide with each other, exemplified by some sale of goods cases in English law, but this by no means indicates the possibility of transferring title to goods by virtue of contract. Rather, it is still the intent to convey that passes property. Nevertheless, abstraction does not always follow separation, as a system of transfer could be, *ex hypothesi*, (i) intent alone and causal, (ii) intent alone and abstract, (iii) intent plus and causal, or (iv) intent plus and abstract. Therefore, whether a valid conveyance would be infected by a flawed underlying basis is quite another question to be handled in the following chapters. So far as such matrix is concerned, at this stage we can draw a conclusion that a significant difference between English law and Chinese law in this respect is that English law of transfer of title does not have a uniform separation principle. Admittedly, separation in Chinese law is not clear enough because transfers of ownership can be interpreted in a unitary way or a separatist way depending on whether we treat conveyance as a juridical or factual act. However, no matter which approach we choose, it must be intent plus not intent alone. This is different from English law of transfer of title, which is intent plus generally and could be intent alone in the context of sale of goods.

## CHAPTER 4 ABSTRACTION IN TRANSFERS INVOLVING IMPAIRED CONSENT

The previous chapters 2 and 3 have demonstrated the principle of separation in both English law and Chinese law, in the sense that there is a separate intent to convey which is logically distinctive from the intent to create an underlying obligation to convey. Now it is time to turn to the second main issue of the thesis, ie, the more nuanced topic regarding the existence of abstraction between the validity of contract and that of conveyance in both English law and Chinese law. As regards invalidating factors, it is generally true in both English law and Chinese law that a contractual obligation as the underlying basis of conveyance could be void or voidable due to four sets of factors, namely, capacity, impaired consent, illegality, and formality. Yet the following three chapters will not spill the ink evenly among these four segments, because quite a number of the contentious authorities and commentaries in both English law and Chinese law involve impaired consent scenarios, especially fraudulently induced mistake. These are dealt with here in chapter 4, where it is concluded that in both jurisdictions, as long as there is a valid conveyance based on a valid intent to convey title on the part of the transferor, title passes, there will be no general automatic reversion of title by the transferor's exercise of the power of contractual rescission. However, such general proposition backed by a series of old authorities is subject to certain qualifications in English law, ie according to the leading but problematic modern case *Car & Universal Finance v Caldwell*, title may be reversioned via rescission of a fraudulently induced contract, which at first blush makes English law neither typically abstract nor typically causal by civilian standard. However, *Caldwell* is also possible to be understood in an abstractionist way by accepting the ideas of separation in sale of goods, identity of defect,

and rescission of conveyance. As regards Chinese law, although there is no equivalent qualification as in English law, there is no clear-cut black-letter rule directly expressing the abstractionist position either, though it is argued that such position can be inferred from a clue in rules for limitation periods. Chapter 5 will focus on transfers involving invalidating factors other than impaired consent. Note that the discussion of English law in chapter 4 and 5 only covers transfer of title at law; as regards the intervention of equity in English law, those will be dealt with from both notional and effective perspectives in chapter 6.

## 4.1 English Law

Unlike German law where authorities are by and large consistent in terms of the recognition of the principle of abstraction,<sup>229</sup> English law has two lines of cases, as will be analysed immediately below, one of which depicts an ‘abstractionist’<sup>230</sup> position in the sense that the invalidity of the underlying contractual obligation does not infect the validity of conveyance, while another delineates an anti-abstractionist position in the sense that the invalidity of the contractual obligation does infect the validity of conveyance. Due to differences in understanding such two lines of cases, unsurprisingly, English private law academia is divided over such contention, which is most fiercely debated in the law of sale of goods, but not limited to it.

As for antagonists of such ‘infection’, Professor Swadling argued that so long as

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<sup>229</sup> See generally Birke Häcker, *Consequences of Impaired Consent Transfers: A Structural Comparison of English and German Law* (Mohr Siebeck 2009) ch 3.

<sup>230</sup> This word was first used by William Swadling: ‘Rescission, Property, and the Common Law’ (2005) 121 LQR 123, 145. This chapter is written with substantial reference to Swadling’s theory in (2005) LQR 123 above with certain modifications.

the validity requirements of a delivery are met, rescission or nullification of the underlying contract should not carry with it any reversion of title.<sup>231</sup> Similar statements were also expressed by Professor Weir, who described English law in this respect with Roman terminology that, ‘modern practice is overwhelmingly based on the view that property may pass by *traditio* despite the invalidity of the *causa*.’<sup>232</sup> Their position is approved by Professor Sheehan, who pointed out that even as to the rescission cases where the claimant has a power to reversion title, such title is, in the more common cases, equitable, and only in rare cases, legal.<sup>233</sup> Professor McFarlane also implicitly supported such proposition by drawing a line between the flaws in the transferor’s intention preventing or not preventing the title transfer, and saying that the former case happens only where the transferor has no intention to transfer that *specific* right to the *specific* transferee.<sup>234</sup>

By contrast, protagonists of such ‘infection’ argued that English law is causal not abstract, at least in the sale of goods. According to them, the intent to convey will be flawed if the intent to incur the underlying obligation to convey is flawed, which represents ‘the causal nature of English sale law that the property passes by reason of the contract and is dependent on its validity.’<sup>235</sup> They believe that the causal position in the rescission of voidable cases has been followed for more than a century and must be taken

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<sup>231</sup> William Swadling, ‘Rescission, Property, and the Common Law’ (2005) 121 LQR 123.

<sup>232</sup> Tony Weir, ‘Taking for Granted—the Ramifications of Nemo Dat’ (1996) 49 CLP 325, 344.

<sup>233</sup> Duncan Sheehan, *The Principles of Personal Property Law* (2nd edn, Hart Publishing 2017) 182.

<sup>234</sup> Ben McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 167–8.

<sup>235</sup> Michael Bridge and others, *The Law of Personal Property* (2nd edn, Sweet & Maxwell 2017) para 30-036. For a more detailed expression of their anti-abstractionist position in the causal/abstract debate, see para 18-030.

to represent the law.<sup>236</sup> Professor Cartwright even extended this principle to void contracts and asserted that ‘if a contract for the sale of goods was void, then the purchaser did not acquire any property rights in the goods even if they were physically delivered to him by the seller.’<sup>237</sup> Such a causal position was also raised by a number of civilian academics writing a chapter for English law from a comparative perspective.<sup>238</sup>

#### 4.1.1 Abstractionist Cases Involving Spontaneous Mistakes

Unlike cases involving fraudulently induced mistakes to be explored in the following sections, cases involving spontaneous mistakes plainly show that English law is abstract in this respect, in the sense that were the transferor (or an authorised person) mistakenly conceived of an obligation of the transferor to convey, title nevertheless passes as long as the conveyance is validly done with the transferor’s intent to convey. A clear authority is *Chambers v Miller*.<sup>239</sup> Although it is not a civil case but a criminal one concerning assault and false imprisonment, transfer of property is nevertheless the core issue in it.

In *Chambers v Miller*, the plaintiff went to a bank and presented for payment a cheque of his employer. The cheque was previously drawn on the bank by one of its customers, though at that time the customer’s account was insufficient to meet the amount on the cheque. Overlooking such fact, the bank’s cashier decided to honour the

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<sup>236</sup> *Load v Green* (1846) 15 M & W 216, 153 ER 828; *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525; *Lewis v Averay* [1972] 1 QB 198.

<sup>237</sup> John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (3rd edn, Hart Publishing 2016) 161.

<sup>238</sup> See eg, Lars van Vliet, ‘The Transfer of Moveables in Scotland and England’ (2008) 12 Edin LR 173.

<sup>239</sup> (1862) 3 F & F 202, 176 ER 91 (Nisi Prius); (1862) 13 CB NS 125, 143 ER 50 (Court of Common Pleas and Exchequer Chamber).

cheque and therefore handed the plaintiff the banknotes. While the plaintiff was double-checking the number of cash, the cashier realised the mistake, therefore detained the plaintiff and forced him to return the money in question from his pocket. The plaintiff handed over the money and was given back the cheque, and he afterwards brought trespass to the person. Counsel for the defendant's plea was (i) that he was not guilty, (ii) that the money still belonged to the bank, and (iii) that the plaintiff had wrongfully possessed the money in question and refused to return, making the defendant able to lawfully detain and retake possession of the money. As a result, the core question of such criminal case was in reality a civil one, ie, whether title to money in question had passed to the bearer of the cheque. In the first instance, Erle CJ held that 'the moment the cash was laid down in return for the cheque the property was changed.'<sup>240</sup> In the appeal, all the judges again unanimously held that title had passed despite the spontaneous mistake which led the bank conceive of its obligation to pay money to the bearer of the cheque. Consequently, the plaintiff won the case as the transferee of the money in question. In addition, as pointed out by Byles J, the correct action available to the bank is money had and received,<sup>241</sup> a cause of action now commonly understood as an unjust enrichment claim completely different from a property tort claim. This also indicates that title passed and the transferor only got a personal claim against the transferee.

A modern confirmation of *Chambers v Miller* is *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*,<sup>242</sup> a landmark case described by Professor Virgo as 'the

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<sup>240</sup> *Chambers v Miller* (1862) 3 F & F 202, 205; 176 ER 91, 91.

<sup>241</sup> *Chambers v Miller* (1862) 13 CB NS 125, 137; 143 ER 50, 54.

<sup>242</sup> [1980] QB 677.

*Donoghue v Stevenson*<sup>243</sup> of restitution for mistake.’<sup>244</sup> The facts of *Simms* somewhat resemble that of *Chambers* in that it is also a case where a bank clerk, due to his spontaneous mistake, honoured a cheque and transferred title to money in performance of a mistakenly believed obligation to pay. Considering *Chambers*, Robert Goff J said:<sup>245</sup>

It was part of the defendant’s argument that the money was recoverable, as having been paid under a mistake of fact. However that was, as at least two members of the court recognised ... irrelevant to the question whether property had passed; indeed, where an action is brought to recover money paid under a mistake of fact, property will almost invariably have passed to the defendant, the effect of the action, if successful, being simply to impose on the defendant a personal obligation to repay the money.

This quotation clearly shows the abstractionist approach in English law with respect to transfers involving spontaneous mistake. Robert Goff J went on to say:<sup>246</sup>

Furthermore, the kind of mistake that will ground recovery is ... far wider than the kind of mistake which will vitiate an intention to transfer property.

This is another significant statement, not only because it reminds that just as contract, conveyance also has its own consistent elements including a true intent, but also because it delivers the idea that to understand abstraction, one has to distinguish one kind of mistakes from another; some only vitiate the underlying obligation, while others vitiate both the obligation and the conveyance — The latter is called ‘identity of defect’, which is an inherent part of the principle of abstraction rather than a genuine *exception* to the

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<sup>243</sup> [1932] AC 562.

<sup>244</sup> Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 174.

<sup>245</sup> *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677, 689.

<sup>246</sup> *Ibid.*

abstractionist idea that ‘the flaw in the underlying obligation does not infect the validity of conveyance.’

Specifically, a transaction could possibly involve both a flawed underlying (contractual) obligation and a flawed conveyance, where two defects involved are exactly identical to each other. For instance, as ‘false representation made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false’,<sup>247</sup> fraudulently induced mistakes could hypothetically lie in both the stage of contract and the stage of conveyance. In this kind of situation which could be called ‘identity of defect’, since the conveyance itself can be avoided due to lack of constituent element of a genuine intent, it is technically wrong to say that it is the avoided contractual obligation to convey which negates the validity of the conveyance. It follows that English cases which fall within this category should not be counted as exceptions to the abstraction principle at all, though some judges’ reasonings are so misleading to make readers conceive those cases as examples of causality. For instance, as for cases where the transferor mistakenly delivered the property to a person impersonating the identity of the person to whom the transferor actually intended to transfer title,<sup>248</sup> judges built the premise of their position (that title did not pass) on an analogy that if only a voidable title could pass under a voidable contract, then no title could pass under a void contract.<sup>249</sup> Yet it seems that they

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<sup>247</sup> *Derry v Peek* (1889) 14 App Cas 337, 374 (Lord Herschell).

<sup>248</sup> *Cundy v Lindsay* (1877–78) LR 3 App Cas 459; *Ingram v Little* [1961] 1 QB 31.; Birke Häcker, ‘Rescission of Contract and Revesting of Title: A Reply to Mr Swadling’ [2006] RLR 106, fn 27 correctly questioned Lord Cairns’ reasoning in *Cundy* that title did not pass due to lack of a valid contract, but due to an identical defect in conveyance.

<sup>249</sup> Eg, in *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919 the majority of their Lordships held the contract as void for mistake, whereas the minority contended that since it is conceptually difficult to differentiate the ‘identity’ and other attributes in relation to the transferee, and since a contract should never be void for mistake, the contract should be merely voidable. For

went unnecessarily too far; it is in essence not a matter of contract being voidable or void, but a matter of invalidity in contract or in conveyance. A valid conveyance needs at least a valid intent of the transferor both as to the correct subject-matter to transfer and the correct identity of the transferee; these elements can also be tainted by mistakes independent from either the voidness or voidability of the underlying contract.<sup>250</sup> Thus, the reason in cases like *Cundy v Lindsay* and *Ingram v Little*<sup>251</sup> as to why title is seen as never having been passed to the transferee should not be *because* the contract is void, but due to lack of a valid intention to transfer title to the correct person to form a valid conveyance.<sup>252</sup> The underlying logic is, if there is no valid conveyance for want of a valid intent in the first place, the ‘passing of property’ question could have already been

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more discussion on such practical importance of a mistake of identity, see John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (4th edn, Sweet & Maxwell 2017) paras 14-08–14-11.

<sup>250</sup> For similar academic views in criminal law, see Glanville Williams, ‘Mistake in the Law of Theft’ [1977] CLJ 62; David Fox, ‘The Transfer of Legal Title to Money’ [1996] RLR 60. Admittedly, sometimes it is difficult to clearly identify whether the conveyance or the underlying obligation alone is tainted by a fraudulently induced mistake. Take *R v Prince* (1865–72) LR 1 CCR 150 as an example. Henry Allen deposited £900 in a bank on a deposit account in his name. Later on, his wife, by ‘a forged order purporting to be the order of the said Henry Allen for payment of the deposit,’ got all the money in cash and handed over one banknote of £100 to the prisoner, who were therefore prosecuted but acquitted of handling stolen goods. The reason why he was not guilty was because the wife did not commit larceny. Channell B stated that even though the bank clerk made ‘a mistake as to the genuineness of a signature’, as long as he had authority and decided to pay ‘money on a forged order, the property therein passed from the master, and cannot be said to have been stolen.’ While from a positive perspective it could be used as an authority for abstraction in transfers involving fraudulently induced mistake, from a normative perspective it could be said that title to money should not pass, because the forgery might not only have affected the bank’s understanding as to the obligation to pay, but also have affected the intent to convey title to money as well.

<sup>251</sup> These are mistake as to identity cases. For mistake as to subject-matter, see *Cartwright v Green* (1803) 8 Ves 405, 32 ER 412; *Merry v Green* (1841) 7 M & W 623, 151 ER 916, for mistake as to quantity, see *Ilich v R* (1987) 162 CLR 110. All these are mistakes in conveyance. Cf William Swadling, ‘Unjust Delivery’ in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) questioned *Ilich v R* and argued that conveyance could still be valid despite mistake as to quantity.

<sup>252</sup> Therefore, *Cundy v Lindsay* should not be cited as an authority demonstrating causality in English law, cf Basil Markesinis and others, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart Publishing 2006) 31.

answered without the need to answer the controversial question whether the contract should be defined as void or voidable under such circumstances. This being the correct understanding, as will be shown below, we can avoid erroneously viewing some more identity of defect cases in English law as anti-abstractionist examples.

#### 4.1.2 Abstractionist Cases Involving Fraudulently Induced Mistakes

##### A. *Haswell v Hunt*

The first abstractionist case involving a fraudulently induced mistake, although not independently reported in English law in this regard is *Haswell v Hunt*.<sup>253</sup> The facts of the case are simple. One Lacey bought a parcel of tobacco from the plaintiffs' place and left without paying or taking possession of that parcel. However, Lacey said that he prepared a ready money for the plaintiffs to collect upon delivery at Lacey's place. Lacey soon afterwards went to France to absent himself from his creditors, which was an act of bankruptcy. Later that day, unfortunately, the plaintiffs who were totally unaware of the deceit in the contract as to Lacey's credit-worthiness (ie, he did not have the means to pay), made his servant deliver the parcel of tobacco to Lacey's place. Worse still, the servant forgot to demand the payment. Being unwilling to let the parcel of tobacco become a bankruptcy asset for distribution among Lacey's creditors, the plaintiffs brought an action of trover<sup>254</sup> against the defendants, who were the assignees in

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<sup>253</sup> Noted by Buller J in *Tooke v Hollingworth* (1793) 5 TR 215, 232; 101 ER 121, 130.

<sup>254</sup> Trover is an old version of the modern tort of conversion, which was 'an action for damages based upon a fictitious loss and a subsequent conversion to the use of the defendant': F W Maitland, *Equity Also the Forms of Action at Common Law* (CUP 1913) 365. As has discussed in chapter 1 of this thesis, its remedy originally in the form of damages does not prevent trover from being

bankruptcy of Lacey.

The core issue of such trover case is whether title to the goods ever passed to Lacey and afterwards to the defendants upon Lacey's bankruptcy, and whether such passing of property was voidable due to Lacey's fraud thus title could be seen as never having been passed to the him. If these two questions were answered in the affirmative, the defendant would be held liable in trover for wrongful interference with plaintiffs' title to the parcel. Yet the plaintiffs were non-suited. Although the contract of sale was fraudulently induced implied by Lacey's non-payment of money and abscondence, Eyre CB, in delivering the judgment, said that 'the sale was complete' (ie, the transfer was validly complete) 'by the act of the plaintiffs, who, by *delivery* of the goods without demand of the money, vested the property in Lacey by their own *assent* as a complete sale ab initio.'<sup>255</sup> At first blush it reads confusing why a sale fraudulently induced (which the plaintiffs elected to rescind for sure) could at the same time be 'a complete sale ab initio.' However, a closer look at Eyre CB's wording reveals his Lordship's idea that it was not the contract which was valid ab initio; rather, it was just that the transfer, by the plaintiffs' own assent (intent to transfer) and the act of delivery which was valid. The fact stressed by Eyre CB that the transfer by intent plus delivery has been done without (even the demand of) the ready money indicates a crucial point: although the plaintiffs' intent to contract was tainted by Lacey's fraud as to credit-worthiness, the plaintiffs' intent to convey was nevertheless tainted by such credit-worthiness in such voidable contract — because when the act of delivery was made, the transferors did have a valid intent

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recognised as a species of property tort. For a detailed discussion, see F B Ames, 'The History of Trover' (1897) 11 Harv LR 277.

<sup>255</sup> *Haswell v Hunt* (1787x1792) 5 TR 233, 101 ER 130 (emphasis added).

(expressed via their servant) to pass property to the transferee, the validity of which, unlike the intent to contract, had no direct relation to the transferee's impecuniosity. With such abstractionist way of analysis, it makes sense to describe the sale of tobacco in *Haswell v Hunt* is, as was said by Eyre CB, a 'complete' one, by which it means the title transferred could not be seen as never having been passed from the transferor who was fraudulently induced into the underlying contact.

*B. Parker v Patrick*

The second abstractionist case, as was argued by Swadling can 'be said to have decided two things ... [the first being] that property can pass by delivery even though the contract of sale was fraudulently induced'<sup>256</sup> is *Parker v Patrick*.<sup>257</sup> A fraudster obtained the goods in question from the defendant by false pretences, and afterwards pledged it to an innocent plaintiff, who was a pawnbroker. After realising such fraud, the defendant went to the pawnbroker's place and took possession of the goods again, which led to the plaintiff bringing trover. The court held it to be successful. Despite lack of clear reported arguments of the counsel in this case, Swadling correctly pointed out that the defendant's counsel built the claim on two grounds, one in statute and the other in property: since the point based on statute was incorrect because the statutory provision of title-revesting on conviction only applied to goods feloniously taken not to goods fraudulently taken,<sup>258</sup> and

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<sup>256</sup> William Swadling, 'Rescission, Property, and the Common Law' (2005) 121 LQR 123, 147.

<sup>257</sup> (1793) 5 TR 175, 101 ER 99.

<sup>258</sup> Restitution of Stolen Goods Act 1529 (21 Hen 8 c 11). Since *Parker v Patrick* was decided before 1827, it should be noted that the result would have been changed had such case been decided after 1827, when the Larceny Act 1827, s 57 extended the applicable scope of such title-revesting provision (as against a third party bona fide purchaser) to the case of misdemeanour such as deceit: *Bentley v Vilmont* (1887) 12 App Cas 471, 477-8 (Lord Watson). However, since it is unclear either from the wording of the statute or from *Bentley* whether such 'obtaining by false

since the defendant transferor lost the case, it logically follows that counsel's claim on property, ie no property right to the goods vested in the pawnbroker regardless of the disposition (creation of the right of pledge) between the fraudster and the pawnbroker due to the fraudster's prior fraud when obtaining the goods from the defendant, must have been objected by the court as well.

So far so good, yet it is added here that Swadling did not attempt to deal with another obscurity in the facts of *Parker v Patrick*: by the wording of the report 'the goods in question had been obtained from the defendant by false pretences', it is hard to know it was the intent to contract or the intent to convey that was affected by false pretences.<sup>259</sup> If it was the latter, there would be no effective conveyance by delivery at all. Nonetheless, given the result that the plaintiff's action of trover was successful, it was highly unlikely for us to conceive of such false pretence having affected the defendant's intent to convey, otherwise title simply could not have passed to the fraudster, and it makes no sense for the court to confirm the validity of the grant of pledge to the plaintiff availing against the defendant via an (otherwise) unauthorised disposition by the fraudster.<sup>260</sup> Another clue

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pretence' denotes the scenario where intent to contract alone is tainted by false pretence or where both the intent to contract and the intent to convey are tainted by false pretence, it is impossible to label the 1827 Act as with an abstractionist provision or an anti-abstractionist provision. Moreover, even if the title-revesting provision in the 1827 Act (re-enacted in Larceny Act 1861, s 100) had been an anti-abstractionist one, it has already been abolished: Sale of Goods Act 1893, s 24; Theft Act 1961, sch 3.

<sup>259</sup> It is not necessarily a 'single choice question', the answer could be 'both' as will be discussed in section 4.1.3.D below.

<sup>260</sup> In which case the fraudster would merely have an inferior title by his act of taking possession, and thus could not grant a security right to the pawnbroker binding the superior title holder (the defendant), unless the pawnbroker could raise a bona fide purchase defence, which, according to the facts of *Parker v Patrick*, was not the case.

that supports such inference lies in Parke B's understanding of *Parker v Patrick* in *Stevenson v Newnham*, that<sup>261</sup>

the effect of ... ordinary frauds, is not absolutely to avoid the *contract or transfer* which has been caused by that fraud, but to render it voidable, at the option of the party defrauded. The fraud only gives a right to rescind. In the first instance, the property passes in the subject-matter. An innocent purchaser from the fraudulent possessor may acquire an indefeasible title to it, though it is voidable between the original parties. ... [All] mesne dispositions to persons not parties to, or at least not cognisant of, the fraud, are valid.

It can be inferred from such statement that the false pretences involved in *Parker v Patrick* did not affect the transfer but only the contract, which was rescinded by the defendant, leaving the valid conveyance uninfected. Thus *Parker v Patrick* could be construed as another abstractionist authority.

### C. *Milward v Forbes*

Compared to the vagueness in facts in *Parker v Patrick*, the third abstractionist case, ie *Milward v Forbes*<sup>262</sup> is a clearer one. One Gates, by a conspiracy between him and one Winter as to Gates' creditworthiness, induced Forbes to enter into a contract of sale of flour in the expectation of payment in the form of cash that was already available (as was fraudulently misrepresented so by Gates). Forbes then transferred title to fifteen sacks of flour to Gates by delivery on Friday, with Gates' reply that a cheque will be delivered to Forbes on Monday. After handing over possession of these sacks on Saturday to Winter, a skilled worker of Gates, Gates immediately absconded and thus constituted an act of bankruptcy. Afterwards Forbes came to Gates' place and took away the fifteen sacks in

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<sup>261</sup> *Stevenson v Newnham* (1853) 13 CB 285, 301–2; 138 ER 1208, 1215.

<sup>262</sup> (1802) 4 Esp 171, 170 ER 680.

question, as a result of which the assignees of Gates brought trover against Forbes. Lord Ellenborough approved of the assignees' petition, for 'there is a sufficient change of property to sustain the action', thereby making the assignees who acquired title to the goods in question after Gates became bankrupt, eligible to maintain trover, despite the contract of sale between the transferor (Forbes) and the transferee (Gates) was voidable and thus avoided due to fraud.

Notably, to reject the defendant's counsel's argument that a fraud always prevents property from passing, Lord Ellenborough distinguished the present case from the *Aickles*' case,<sup>263</sup> which was mentioned by the counsel. A doctrine adopted in *King v Aickles* is that a delivery is not a voluntary one only if the delivery itself is induced by felonious intention on the part of the buyer. A typical example of such scenario mentioned in *King v Aickles*, the facts of which are substantially distinct from those of *Milward v Forbes*:<sup>264</sup>

*Sharpless* went to the shop of a hosier, and ordered a quantity of goods to be sent to his lodgings. The hosier with proper caution ordered the servant not to leave the goods without the money. *Sharpless*, however, contrived to send back the servant and keep the goods, which he afterwards converted to his own use.

It is fraudulent misrepresentation of this kind that equals to a felonious taking thus prevents title from passing due to want of a valid intent to deliver. Therefore, it could be summarised that a combined review of *Sharpless*, *Aickles* and *Milward* somewhat reveals the independence of the intent to convey which would be affected not by a fraud in contract but by a fraud in conveyance.

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<sup>263</sup> *King v Aickles* (1784) Thomas Leach, *Cases in Crown Law* (London 1789) 266.

<sup>264</sup> *Sharpless and Greatrix's Case* (1772) Thomas Leach, *Cases in Crown Law* (London 1789) 95.

#### D. *Sinclair v Stevenson*

Another case is *Sinclair v Stevenson*.<sup>265</sup> One Proctor entered into a transaction dressed up as a letting of a plant and some utensils of distillery, the real character of which was a contract of sale with the defendant in exchange of a ready money. After the defendant delivered these goods to Proctor, the latter committed an act of bankruptcy, and the unpaid defendant immediately retook possession of these goods from the bankrupt's assignees. Based on strong evidence as to the defendant's trading beyond his capital, the defendant contended that 'the possession, order, and disposition were obtained by fraud', thus he was not liable for trover. Unfortunately, an accident of trial happened that the jury found 'no pretence for saying there was any fraud', which means both the contract of sale and the conveyance by delivery were valid. Nonetheless, Best CJ went on to comment that even if there was a fraud inasmuch as where 'a person purchase ... utensils of a trade, knowing that he is not able to pay for them; if possession be delivered to him ... the property in these utensils pass to him.'<sup>266</sup> It could be inferred from Best CJ's division between 'purchase' and 'deliver' that a fraudulently included contract of sale does not invalidate conveyance so long as the intent to convey plus delivery is sufficient.

#### 4.1.3 Anti-abstractionist Cases: Rescission and Revesting of Title

We have seen in previous sections that rules regarding property transaction in English law could fit into the abstractionist framework. But as discussed in the introduction, there exists another line of objections where at first blush it looks that although a transaction

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<sup>265</sup> (1825) 2 Bing 514, 130 ER 404.

<sup>266</sup> *Sinclair v Stevenson* (1825) 2 Bing 514, 517; 130 ER 404, 406.

could be conceptually divided into two separated stages, rescission of contract (stage one) involving impaired consent will nevertheless infect the validity of conveyance (stage two), irrespective of a valid conveyance by delivery *ab initio*. And as a result, the whole transaction is nullified, with the further consequence of title re-vesting. This section will give a detailed critique on the so-called concept of re-vesting of title by doubting the rationale of these anti-abstractionist cases.

#### A. *Rescission cases*

The first counter-example against the abstractionist proposition that title does not re-vest even if the underlying contract is rescinded is *Read v Hutchinson*,<sup>267</sup> a case where one Read provided a bill of exchange for Hutchinson for seven pipes of red wine, which was later dishonoured. Although the head of the instrument showed ‘sale’ and the transferor, Hutchinson sued Read for *indebitatus assumpsit* accordingly, Lord Ellenborough non-suited Hutchinson for failing to choose the correct form of action, for it was not a contract of sale, but a contract of barter, thus Read was not indebted to Hutchinson for any price. But suppose it is a voidable contract of *sale*, his Lordship explains in *obiter* the following:

If the contract is altogether rescinded, there is no sale. The defendant is ... a person who has *tortuously* got possession of them. If he knew at the time that the bill was worth nothing, I think he is answerable to the plaintiff to the amount of the value of the goods ... The plaintiff should have brought trover, or an action of deceit.<sup>268</sup>

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<sup>267</sup> (1813) 3 Camp 352, 170 ER 1408.

<sup>268</sup> *Read v Hutchinson* (1813) 3 Camp 352, 353; 170 ER 1408, 1408 (emphasis added).

The underlying logic of such explanation could be that if a contract involves fraudulent misrepresentation as to the credit-worthiness of the payor, then it can be rescinded. Consequently, the conveyance is infected and thus invalid and the transferor immediately becomes the owner again at the moment of contractual rescission, for otherwise he cannot maintain trover.

Yet in *Milward v Forbes*,<sup>269</sup> an abstractionist case which was decided eleven years before *Read*, as was already set out above,<sup>270</sup> his Lordship reached a completely different conclusion. Anti-abstractionists may argue that presumably Lord Ellenborough changed his mind eleven years later so we should treat *Read v Hutchinson* as correct, rather than *Milward v Forbes*. But in fact, there are three arguments demonstrating that *Read v Hutchinson* cannot be interpreted as a counter-example against the abstraction principle.

Firstly, the key issue of *Read v Hutchinson* is about a contract of barter rather than sale, so the discussion quoted above, which is based on the premise of a contract of sale is in essence an *obiter dictum*. On the contrary, the position in *Milward v Forbes* forms part of the *ratio decidendi* because the core subject matter of that case is indeed a contract of sale. Second, it should be noted that *Read v Hutchinson* did not cite the relevant authority of *Milward v Forbes*, which means that it is a decision given *per incuriam*. So it is difficult to say that Lord Ellenborough in 1813 did intend to overrule *Milward v Forbes*. Third, the background of the extensive discussion in 1813 is simply the question whether Hutchinson can obtain a monetary remedy of any kind for ‘the value of the

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<sup>269</sup> (1802) 4 Esp 173, 170 ER 680.

<sup>270</sup> See above text to nn 262–264.

goods' rather than a proprietary remedy only. The word 'tortuously' in the context does not necessarily indicate his Lordship's inference that Read merely had possession without title, but merely indicates the fact that Read would be liable in tort. Indeed, as Lord Ellenborough finally says, Hutchinson could sue in trover *or* an action of deceit – the tort of deceit usually cannot be a causative event for proprietary restitution. All these manifest that the abstractionist position was consistently supported by Lord Ellenborough, both in 1802 and 1813.

*B. 'Fake' rescission cases*

Before examine the following cases, it is necessary to explain why these cases are labelled as 'fake'. From a practical perspective, the plaintiff in each of these cases does not need to challenge the validity of contract — challenging the validity of conveyance itself would be enough for them to maintain trover. This is because in the following cases although the contract was avoided, it was nevertheless irrelevant to the validity of conveyance because the conveyance in itself was not perfect due to lack of constituent element. In this sense we say that the cases discussed below are 'fake' rescission cases, in order to distinguish from those 'genuine' rescission cases discussed immediately above.

The second alleged counter-example is *Noble v Adams*,<sup>271</sup> a case decided three years later before the Court of Common Pleas. The purchaser sued in trover against the defendant, a wharfinger for wrongfully detaining the handkerchiefs under the vendor, Cross & Co's instruction. Though the jury held that there were no invalidating factors such as fraud in the contract, Gibbs CJ said that 1) 'there had been an absolute delivery to

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<sup>271</sup> (1816) 7 Taunt 59, 129 ER 24.

the Plaintiff, and that the right of stoppage *in transitu* was at an end,<sup>272</sup> and 2) if ‘the Plaintiff had been guilty of a fraud, and that the sale would not change the property.’<sup>273</sup> This infers the anti-abstractionist proposition that if a sale induced by fraud is rescinded, it goes on to infect the conveyance, rendering it void.

Yet this line of reasoning is problematic. It is confusing why the delivery was deemed already complete when handkerchiefs were still in Edinburgh waiting to be shipped, and why Cross & Co could not prevent goods from being finally delivered to the plaintiff. Gibbs CJ gave no further explanation on this point. In fact before 1893,<sup>274</sup> since there was no clear rule barring the seller from changing his mind when the goods are *in transitu*, and since there was no clear rule articulating that property passes immediately when the goods are handed to the carrier, what Cross & Co was able to do in the case was nothing more than to dispose of its own property in the way of stoppage. Even if there was a set of rules for ascertaining intention which was identical to the 1893 Act<sup>275</sup> that existed in common law beforehand, these rules just help determine the vendor’s intention to pass property before delivery and can be rebutted by evidence of that vendor’s contrary intention. That was the case in *Noble v Adams*: the notice of the seller to the wharfinger constitutes a change of mind: a new intention to rebut the presumption of passing of property (based on his previous intention). Indeed, although the original contractual intention of the vendor would suffice to pass property *in transitu* despite the fraud, it is

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<sup>272</sup> *Noble v Adams* (1816) 7 Taunt 59, 60; 129 ER 24, 24.

<sup>273</sup> *Noble v Adams* (1816) 7 Taunt 59, 61; 129 ER 24, 25.

<sup>274</sup> Sale of Goods Act 1893, s 18.

<sup>275</sup> Sale of Goods Act 1893, s 18. Rule 5(2) articulates that once the seller delivers the goods to the buyer or to a carrier, he is presumed to have unconditionally appropriated the goods to the contract and the property to the goods passes to the buyer.

not nevertheless unchangeable: before delivery if the vendor, suspecting the insolvency of the purchaser, exercises his right to disaffirm that intention to pass property, then the ongoing conveyance is successfully cut off. The wharfinger, therefore, was merely an authorised person possessing the goods under the owner's updated instructions. The fact that the plaintiff was aware of the carriage did not constitute the act of receipt and thus acquisition of property in advance. All this means that there was no conveyance completed at all in *Noble v Adams*, whether according to the default method (delivery or deed) outside sale or the alternative method (contractual intention) inside sale. It follows that no matter whether the decision in *Noble v Adams* is wrong, it cannot be used as a counter-example to the abstraction principle for there was definitely no completed conveyance as a 'target' for the voidable contract to infect at the outset.

The third one is *Earl of Bristol v Wilsmore*,<sup>276</sup> where Abbot CJ holds that a contract of sale with a preconceived design of not paying for the goods is voidable, and thus no property passes to the vendee.<sup>277</sup> Unfortunately, *Noble v Adams* and *Read v Hutchinson* were cited by Abbot CJ as the premise of his anti-abstractionist reasoning. Hence the core problem in this case is that, a weak *obiter* and an irrelevant decision cannot add up to a strong *ratio* after all.

### C. 'Right to revest' cases

Similar to the cases above, this group of cases also involve rescission. By contrast, however, the effect of contractual rescission here is not that the law deems that no

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<sup>276</sup> (1823) 1 B & C 514, 107 ER 190.

<sup>277</sup> *Earl of Bristol v Wilsmore* (1823) 1 B & C 514, 521; 107 ER 190, 192.

property passed *ab initio*, but that, although the property indeed passed beforehand, exercising the right to rescind the contract can create a ‘defect in title’ and thus a right to re-vest it. As a result, title magically rebounds from the transferee back to the transferor.

The leading modern case is *Car and Universal Finance Co Ltd v Caldwell*.<sup>278</sup> One Norris bought Caldwell’s title to a Jaguar car by cheque, and had another car as the collateral. When Caldwell, the defendant, realised that Norris was a fraudster, he quickly reported to the police, the bank and the Automobile Association, which was ‘an unequivocal act of rescission.’<sup>279</sup> Unfortunately the Jaguar was sold on later by Norris to Motobella Ltd. Then the car was sold on to subsequent buyers again and again, finally to the innocent plaintiff, Car and Universal Finance Co Ltd. Both the plaintiff and the defendant claimed to be the title-holder of the car. Certainly, the core debate in this case during the two instances is the question of whether the defendant’s act of rescission can affect property rights even without communication to third party successors who do not notice the defect in title. But one preliminary question is, given that the act of informing the police counts as contractual rescission, whether and in which way Caldwell could retake the title to the Jaguar. Lord Denning said that:<sup>280</sup>

on January 13 the contract of sale to these rogues was avoided and Caldwell then became the owner of the car *again*. It was only after he avoided it (so that it was *once again* his property), that these rogues purported to sell it to Motobella and Motobella purported to sell it to G. & C. Finance. Those sales were ineffective to pass the property because it had already been re-vested in Caldwell ... before there was any resale ... and it has never gone from him *since*.

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<sup>278</sup> [1965] 1 QB 525.

<sup>279</sup> *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525, 532 (Lord Denning).

<sup>280</sup> *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525, 534 (emphasis added).

This is apparently different from those anti-abstractionist cases discussed in subsections A and B above, in that the title is not deemed here to be always in the vendor throughout. Rather, by adding a defect in title to make it voidable, the vendor acquires a power to re-vest the title (which currently does not belong to him) at the moment when he acquires a power to rescind the contract. Albeit the difference, just as those early anti-abstractionist cases above, such ‘right to re-vest’ provides a proprietary remedy too in the sense that it not only binds the original transferee, but also those who claim through him, especially his assignee/trustee in insolvency.<sup>281</sup> Notably, Lord Denning did not invent such right himself, but only assumed the pre-existence of it. The probable origin of the position that the transferor’s rescission of a contract fraudulently induced by the transferee leads to re-vesting of title is Parke B’s judgment in *Load v Green*,<sup>282</sup> though it was not cited by Lord Denning in *Caldwell*.

In *Load v Green*,<sup>283</sup> the plaintiffs sold and delivered goods to one Bannister on credit, though Bannister actually had no intention to pay at all. Bannister later on committed an act of bankruptcy and the goods in question were in the custody of the defendants, ie, his assignees in bankruptcy. The plaintiffs therefore sued the defendants in trover. The defendants’ plea was on the basis of reputed ownership,<sup>284</sup> a rule that could be used as a shield so long as the defendants could demonstrate that by the time of Bannister’s bankruptcy, he was in the possession of the goods by the ‘consent and permission’ of the ‘true owner’. In order to argue that reputed ownership does not apply

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<sup>281</sup> *Re Eastgate* [1905] 1 KB 465; *Tilley v Bowman Ltd* [1910] 1 KB 745.

<sup>282</sup> (1846) 15 M & W 216, 153 ER 828. Parke B expressed similar idea before in *Ferguson v Carrington* (1829) 9 B & C 59, 109 ER 22; *Strutt v Smith* (1834) 1 Cr M & R 312, 149 ER 1099.

<sup>283</sup> (1846) 15 M & W 216, 153 ER 828.

<sup>284</sup> Bankruptcy Act 1825, s 72.

to the defendants' situation, the plaintiffs' counsel put forward two submissions, both accepted by Parke B. The counsel's main submission was, that the plaintiffs were not the 'true owner' because they had not rescinded the voidable contract until after Bannister's bankruptcy, so that it is not the plaintiffs but Bannister who was the 'true owner' at the time of the act of bankruptcy. The counsel's alternative submission was, even if the first submission failed, as a defrauded vendor, the plaintiffs had no 'consent with knowledge of all the circumstances' to Bannister being reputed owner and thereby misleading Bannister's creditors. Both submissions led to the conclusion that the reputed ownership defence was not available to the defendants. In addition, but more importantly for the purpose of the present topic, Parke B said that the plaintiff 'had a right to annul the contract, and be again the real owners.'<sup>285</sup> Notably, the word 'again' indicated the *causal* relation between contract and conveyance in the sense that although title passed despite a voidable contract, as long as the transferor rescinded the contract, the conveyance would be infected and accordingly the title reverted from the transferee to the transferor. Parke B's position remained unchallenged and could presumably support Lord Denning in *Caldwell* regardless of the fact that Parke B did not follow the line of abstractionist cases from late 18th century to early 19th century discussed above.

Nevertheless, such reversioning of title model in *Caldwell* still cannot stand up to scrutiny. For instance, Swadling launched an attack on the rationality of the so-called 'right to revert' from three angles. First, the origin of such an innovation of right is in Parke B's questionable dictum in *Load v Green*, which relied on two cases, *Noble v Adams* and *Parker v Patrick* discussed above, but the decision itself contradicts both

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<sup>285</sup> (1846) 15 M & W 216, 223; 153 ER 828, 831.

authorities. Secondly, there are two ‘oddities’ in such right in relation to the operation of the bona fide purchase defence, one being its universal acceptability, and the other being its reversed burden of proof of knowledge of the vitiating factors. Thirdly, it is not easy to define the nature of such right, nor is it easy to find a suitable causative event for it.<sup>286</sup>

What is added here is that problems also lie on the logical basis of such ‘right’. A ‘right’ to re-vest is not retainable as it does not exist as one of the incidents of the property right at the outset before the sale. The logic in the judgment should be that a contractual rescission generates a defect in title which makes the title voidable, thus newly creates a ‘right’ to re-vest for the transferor. However, the use of the phrase ‘defect in title’ is a term of art, because the word ‘defect’ is normally used to describe a problem in the quality of a *thing*, or in constituent elements of an *act*, rather than a problem in the *right* in relation to a thing. To make it meaningful in law, we must translate it into the language of rights. Which species of right, via contractual rescission being engrafted onto or carved out of the purchaser’s property right can indicate the nature of such defect? It cannot be a right *in rem*, for if the defrauded vendor does not exercise his ‘right’ to re-vest, he does not hold any kind of lesser property rights in relation to that thing.<sup>287</sup> It is the purchaser who fully holds the property beneficially at the moment. It cannot be a right *in personam* either. This is because, even if the defect can be described as a right to order

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<sup>286</sup> William Swadling, ‘Rescission, Property, and the Common Law’ (2005) 121 LQR 123. Cf Birke Häcker, ‘Rescission of Contract and Revesting of Title: A Reply to Mr Swadling’ [2006] RLR 106, where Professor Häcker questioned Swadling’s thesis in that how title to goods can pass twice over, first by intent and then again by delivery. Note that she later on modified her view and recognised the possibility of an abstract transfer inside sale: Birke Häcker, ‘Causality and Abstraction in the Common Law’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (CUP 2010) 210–1.

<sup>287</sup> Of course he could have title to the thing if he finds and possess the thing, according to the relativity of title doctrine. But he does not hold any title to the thing *qua* the defrauded vendor alone.

the purchaser to return the thing and not to resale it, which is based on consent imputed by operation of law between the defrauded vendor and the fraudster, such right still cannot explain the current scenario, as it usually cannot bind third party successors.<sup>288</sup> It is suggested that Professor Häcker correctly pointed out that this should not be a right, but a ‘power’ *in rem* held by the defrauded vendor to revoke his impaired consent after conveyance.<sup>289</sup> The exercise of such power via unilateral acts, such as communication, repossession or other overt means changes the legal relationship between the parties. Nonetheless, despite the rationality of her analysis, it does not sit comfortably with Lord Denning’s judgment that revesting of title is based on contractual rescission. As Häcker herself mentioned, such a power *in rem* is not necessarily depended on a power *in personam* — the power of the vendor to rescind the contract alone.<sup>290</sup> This makes a substantial difference between her ‘power model’ and Lord Denning’s ‘right model’.

From the analysis above we could see that the premise of the reasoning in *Caldwell*, viz, the ‘contractual rescission generates a defect in title’ is still a myth. Consequently, that which was built on that premise is a myth as well — a contractual rescission logically implants nothing meaningful in law into the title, thus the title which legally passed (outside sale, usually by delivery) to the fraudster and the following third-party successors afterwards is not ‘voidable’, and it therefore could not be ‘rescinded’ simultaneously with the contract save for identity of defect.

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<sup>288</sup> This is the *numerus clausus* principle as discussed in chapter 1.

<sup>289</sup> Birke Häcker, ‘Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model’ (2009) 68 CLJ 324.

<sup>290</sup> That is why in situations involving third parties, as Häcker discussed, the bona fide purchase defence only bars the original transferor’s power *in rem* of revoking his consent in the conveyance *regarding the specific chattel* but not bar the original transferor’s power *in personam* of revoking his consent in the contract *regarding the bargain* between the original contracting parties: Birke Häcker, ‘Rescission and Third Party Rights’ [2006] RLR 21.

Even from a positivist perspective, the applicable sphere of such re-vesting of title is nevertheless limited to the context of *sale of goods* where the underlying obligation to transfer is induced by the transferee's *fraudulent misrepresentation*. As we know, defects negating the validity of a contract are numerous. Except fraudulent misrepresentation, the notion of abstraction received hardly any challenge in cases involving other kinds of impaired consent so far as common law is concerned. Rather, as will be shown in chapter 6, when it comes to cases involving spontaneous mistake, induced mistake, undue influence and failure of basis in the underlying obligations, English law is often reluctant to deny the validity of passing of property at law, but sometimes uses constructive trust to provide proprietary restitution for the transferor, the nature of which is substantially different from the re-vesting of title by contractual rescission. Moreover, as will be shown in chapter 5, when it comes to transfers of land or chattels involving other invalidating factors such as illegality, incapacity and lack of formality, English law were often reluctant to deny the validity of passing of property as well.

#### *D. An abstractionist interpretation of Caldwell*

Although *Caldwell* is intuitively seen as authority demonstrating causality in English law, it is argued in this sub-section that it can in fact be construed as an abstractionist authority provided that one accepts the possibility of a separatist interpretation for the sale of goods, identity of defect, and rescission of conveyance.

More specifically, a power to rescind may cover two objects, the rescission of the contract and the rescission of the conveyance; the latter is parallel to but not necessarily based on the former. Furthermore, where there is an induced mistake which renders the

underlying contract voidable, such mistake normally renders the conveyance voidable simultaneously. Consequently, if one takes the separatist approach to the interpretation of a sale of goods elucidated in chapter 3, ie, it is the intent to convey rather than the contract which passes title to goods in the context of sale, *Caldwell* can be understood as a case involving an induced mistake rendering the conveyance voidable, so that the defrauded transferor, following rescission of the conveyance (by informing the police and the Automobile Association of his desire to find the car and have it back), had the title in question re-vested prospectively from the moment of rescission. The defrauded transferor's aforementioned act of informing may well have also constituted rescission of the contract of sale, but that did not 'infect' the conveyance; conceptually speaking, it is still the rescission of the conveyance which led to the re-vesting of title.

Four clarifications are added here. First, we have already had discussion on identity of defect in cases involving mistakes as to identity and subject-matter in section 4.1.1 above. However, given that the defrauded transferor in *Caldwell* made a mistake not as to identity or subject-matter, but as to the fraudster's credit-worthiness, the question here is therefore why the transferor's mistake as to credit-worthiness can render both contract and conveyance voidable. The result lies in stark contrast to civilian treatment of mistakes as invalidating factors.<sup>291</sup> In civilian jurisdictions, generally speaking, whether a mistake constitutes an invalidating factor depends on whether it is fundamental or motivational. If fundamental, then according to the 'will theory', because

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<sup>291</sup> See generally John Cartwright, 'Defects of Consent and Security of Contract: French and English Law Compared' in Peter Birks and Arianna Pretto (eds), *Themes in Comparative Law in Honour of Bernard Rudden* (OUP 2002); *Misrepresentation, Mistake and Non-Disclosure* (4th edn, Sweet & Maxwell 2017) paras 12-13–12-16.

the core of a contract is the subjective meeting of minds of the parties, such mistake will generally invalidate a contract for want of consensus. If motivational, then such mistake normally does not count unless it has been fraudulently induced.<sup>292</sup> In English law, by contrast, an objective rather than subjective test is used to determine whether a contract is validly formed. This leads to a crucial distinction between induced mistake (or more commonly called ‘misrepresentation’) and spontaneous mistake which seems to be somewhat radical in the eyes of civilian lawyers. Specifically, where there is a spontaneous mistake, the starting point in English law is that one is not allowed to plead his own mistake and thereby rescind the contract no matter how fundamental such mistake is,<sup>293</sup> for it would otherwise be too easy to escape from contractual obligations,<sup>294</sup> and it would be against the idea of ‘security of contract’. Where there is an induced mistake, however, English law is quite generous in allowing the induced party to bring his claim based on misrepresentation and thereby rescind the contract. The law of misrepresentation has two features relevant to the present thesis. First, the representor’s state of mind does not matter; rescission applies to fraudulently induced mistakes, negligently induced mistakes and even innocently induced mistakes.<sup>295</sup> Second and more importantly, the content of the induced mistake does not matter; rescission applies to mistakes as to identity, subject-matter, credit-worthiness, or even motivation, as long as

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<sup>292</sup> See eg, French Civil Code (France), art 1139.

<sup>293</sup> For instance, a unilateral mistake about the subject-matter is not sufficient for contractual rescission: *Smith v Hughes* (1870–71) LR 6 QB 597, mentioning the doctrine of *caveat emptor* (let the buyer beware). When it comes to a common mistake, such mistake may affect the validity of the contract, but it only renders the contract void (and null) not voidable (and rescindable): *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255, citing *Bell v Lever Brothers Ltd* [1932] AC 161.

<sup>294</sup> *Tamplin v James* (1880) 15 Ch D 215, 221 (James LJ), unless ‘it is against the reasonable expectation of honest men’: *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd’s Rep 25, 27.

<sup>295</sup> *Derry v Peek* (1889) 14 App Cas 337, 359 (Lord Herschell).

the statement is ‘material’ in the sense that such statement did induce the party to enter into the contract.<sup>296</sup> As a result, given that the mistake made by the defrauded transferor in *Caldwell* was *induced* by the fraudster rather than being a *spontaneous* mistake, his act of conveyance could be said as based on such *induced* mistake, even though it is just a mistake as to credit-worthiness, so that he can rescind both the contract and the conveyance for the *identical defect*.

Second, one might ask even if there is an identity of defect rendering both contract and conveyance voidable in cases of mistake as to credit-worthiness, why *rescission of conveyance* is possible in English law. Indeed, unlike German law where the concept of ‘juridical act’ governs all transactions so that it sounds quite natural that both contract (obligatory juridical act) and conveyance (dispositive juridical act) can be targets for rescission, in the eyes of most English lawyers, ‘rescission’ normally only denotes recession of contract rather than conveyance. Nevertheless, this by no means indicates that rescission of conveyance is nowhere to be found in English law. In *Moynes v Cooper* for instance,<sup>297</sup> Lord Goddard CJ said that where ‘a transfer of property is obtained by fraud, there is no doubt but that the property does pass, subject, however, to the right of the defrauded party on discovering the fraud to disaffirm the *transaction* and resume his property.’<sup>298</sup> A clearer example is *Banque Belge pour l’Etranger v Hambrouck*.<sup>299</sup> Hambrouck obtained by fraud from his employer some cheques purporting to be drawn by the employer upon the plaintiff bank, Banque Belge. He

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<sup>296</sup> *Mathias v Yetts* (1862) 46 LT 497, 502 (Jessel MR).

<sup>297</sup> [1956] 1 QB 439.

<sup>298</sup> *Moynes v Copper* [1956] 1 QB 439, 445 (emphasis added).

<sup>299</sup> [1921] 1 KB 321.

subsequently defrauded Banque Belge by depositing the cheques into his own account at another bank, so that Banque Belge mistakenly parted with about £6,000. He then gave some of the money to his mistress for no valid consideration. When Banque Belge realised the fraud, it sued the mistress for a declaration that title to the money in her account belonged to Banque Belge. The claim succeeded. Atkin LJ explained that:<sup>300</sup>

it appears to me that the plaintiff Bank intended to pass the property in and the possession of the cash ... I will assume therefore that this is a case not of a void but of a voidable transaction by which Hambrouck obtained a title to the money until the plaintiffs elected to *avoid his title*, which they did when they made their claim in this action. The title would then revest in the plaintiffs subject to any title acquired in the meantime by any transferee for value without notice of the fraud.

Given that there was no *contract* for the transferor to rescind in the present case, what was ‘avoided’ (ie, rescinded) must be, loosely speaking, *title*, but strictly speaking, *conveyance*. As a result, ‘rescission of conveyance’ as a legal concept indeed exists in English law.

Third, such interpretation might still seem somewhat surprising because Professor Häcker, the original proposer of the ideas of recession of conveyance and identity of defect,<sup>301</sup> herself did not interpret *Caldwell* in an abstractionist way but still saw it as a case for causality. However, the reason why she did not use the ideas in this way is not because it could not hypothetically be used in proving abstraction, but because of her unitary not separatist understanding of English law of sale of goods. Indeed, if one takes

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<sup>300</sup> *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321, 332 (emphasis added).

<sup>301</sup> Birke Häcker, ‘Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model’ (2009) 68 CLJ 324, 329; ‘Causality and Abstraction in the Common Law’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (CUP 2010) 207.

a unitary approach to property aspects of sale of goods, then there could be just one single act with the sole contractual intent to pass property, making it nonsensical to talk about identity of defect and a conceptually separate act of rescission of conveyance. By contrast, if the central argument submitted in chapter 3 (ie, separation between the intent to convey and the contractual intent) is correct, then it is possible to have identity of defect in both the intent to convey and the contractual intent, and to have rescission of conveyance conceptually separate from rescission of contract.

Lastly, the abstractionist interpretation can further be strengthened by looking at the result of the so-called ‘revesting of title’, ie, the transfer being avoided, in that it can only help the transferor assert his property right against those third parties who acquire the title in question *after* his exercise of the power of rescission.<sup>302</sup> If those subsequent acquisitions happen *before* the rescission of the conveyance, because the title is seen in English law as having passed to the transferee despite the fraudulently induced mistake,<sup>303</sup> it could be passed on to third parties who act in good faith. This is, by definition, not a typical consequence of the operation of causality compared to French, Dutch, and Austrian law where the avoidance of a voidable or void contract has the effect that ownership is deemed never to have been passed to the transferee from the outset. This means that under a typical causal system, despite the special regime of bona fide acquisition, no third party can acquire ownership to defeat the transferor’s power to

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<sup>302</sup> *White v Garden* (1851) 10 CB 919, 138 ER 364; *Stevenson v Newnham* (1853) 13 CB 285; 138 ER 1208; *Kingsford v Merry* (1856) 11 Ex 577, 156 ER 960; *Lewis v Averay* [1972] 1 QB 198; Sale of Goods Act 1979, s 23. Note that section 23 of the 1979 Act is not an example of bona fide acquisition in English law despite the requirement of ‘in good faith’, because the acquisition here is a *derivative* (disposition by the *owner*) not *original* (disposition by the *non-owner*) one, cf Sale of Goods Act 1979, ss 24, 25.

<sup>303</sup> *Clough v London and North Western Railway Co* (1871–72) LR 7 Ex 26, 34.

rescind, no matter whether such third party acquires ownership *before* or *after* the transferor's contractual rescission.<sup>304</sup> Consequently, *Caldwell* could more reasonably be construed in an abstractionist way thanks to such discrepancy between the *prospective* ('coming-back-again') effect of the English version of 'transfer being avoided' and the *retrospective* effect of the civilian version of 'transfer being avoided'.<sup>305</sup>

### *E. Abstraction in 'intent alone' transfers*

If the abstractionist interpretation of *Caldwell* in the sub-section immediately above can stand up to scrutiny, then a crucial comparative observation follows, ie, the possibility of a system to be both (separatist) 'intent alone' and abstract. Logically speaking, as was already discussed in chapters 1, the intent alone system is opposite to the intent plus system, and the abstract system is opposite to the causal system; they answer different questions: the former division deals with the question whether conveyance can be completed solely by the transferor's intent to transfer the property right, whereas the latter division deals with the question whether invalidity of the intention to incur an underlying obligation to transfer property would infect the validity of the intent to transfer property. Nevertheless, one cannot say that an intent alone system logically has no choice but to be causal. A system could either be, ex hypothesi, (i) intent plus and

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<sup>304</sup> See Sjeff van Erp and Bram Akkermans (eds), *Cases, Materials and Text on National, Supranational and International Property Law* (Hart Publishing 2012) 823–35.

<sup>305</sup> However, this by no means indicate that retrospectivity of 'transfer being avoided' is nowhere to be found English law at all. As will be discussed in chapter 5 below, a counter-example could be where passing of property is done under an illegal thus void contract of sale, and where identity of defect applies, conveyance is therefore also void *ab initio*, so that title is seen as never having been passed both *before* and *after* the transferor brings his claim before the court.

causal, or (ii) intent plus and abstract, or (iii) intent alone and causal, or (iv) intent alone and abstract. This sub-section focuses on the fourth possibility.

If we look back about the standard abstractionist view in English law, we can see Professor Swadling accepted a line between transfer of property rights by intent and by other methods (namely, delivery, deed and registration), and argued that so long as there is a valid delivery constituting a valid conveyance, defects in the validity of the underlying contract do not infect the validity of such conveyance.<sup>306</sup> In this sub-section it is submitted that the principle of abstraction logically can and does exist in the context of intent alone transfers by sale as well, as long as there is an identity of defect in both the intent as to the contractual obligations and the intent of conveyance. The abstraction principle indeed can be demonstrated by those cases involving a separate stage of delivery, but the point is, a valid delivery is not the necessary condition for the operation of the abstraction principle. No matter whether there is a separate stage of delivery, the principle can exist so long there is a valid conveyance, whether by 'intent' or by 'plus' such as delivery. It is the transferor's intent, not physical delivery that is the core idea of conveyance. No matter whether a system chooses to be intent alone or intent plus, an intent to convey must be there following a separatist approach (as opposed to a unitary approach). The difference is merely whether an additional step of delivery is needed to complete the conveyance. Similar to the intent plus system where in many cases the invalidity of conveyance is due to lack of a valid intent to convey regardless of the existence of a physical change of possession, in the intent alone system, conveyance could also be set aside due to lack of a valid intent to transfer property rights.

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<sup>306</sup> William Swadling, 'Rescission, Property, and the Common Law' (2005) 121 LQR 123.

In other words, ‘intent alone’ and ‘causality’ are concepts which are, strictly speaking independent of each other. A system of transfers can logically be intent alone and abstract simultaneously, as long as the so-called ‘intent alone transfers’ in this particular system denotes transfers involving two stages (transfer by an obligatory agreement plus an intent to convey) rather than one stage (transfer by contract).<sup>307</sup> The English law of sale of goods involving fraudulently induced mistake is a good example of this, although one cannot deny that the principle of abstraction is more demonstrated by a valid conveyance which comprises a valid intent in delivery, rather than transfers by intent alone. The reason is plain. Unlike *Caldwell* where title to goods can be said as having passed by *intent alone* because the contract is *voidable* not *void* (hence there was a valid contract at the moment of transfer by intent) for fraudulently induced mistake, title to goods can only be passed by *intent plus* such as delivery in contexts where the contract is *void* not *voidable* due to invalidating factors such as illegality. This is because a void contract means no contract at all from the beginning, making it impossible for title to be passed by *intent alone*, given that transfer by intent alone is only possible in the context of sale of goods according to section 17 of the Sale of Goods Act 1979, and a prerequisite of applying section 17 is that there must be a valid contract at the moment of transfer by intent, no matter how long the contract remains valid for.

## 4.2 Chinese Law

### 4.2.1 Contractual Rescission and Revest

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<sup>307</sup> From a traditional perspective among many comparative property lawyers, this is the very reason why for instance, it is impossible for the transfer system in French law to be consensual and abstract, though as discussed in chapter 1 of this thesis, such mainstream unitary analysis of French-Belgian law is under academic challenge.

### A. *Rescission of a juridical act*

To observe whether rules in Chinese law regarding transfers involving impaired consent could fit into the framework of abstraction, the approach is different from English law in that efforts must be taken in sticking to the wording of legislation rather than cases, as there is hardly any case the fact of which is similar to those discussed above. Luckily, it is still possible to give a brief idea about the role of rescission in impaired consent transfers, especially those under fraudulently induced contracts.

Unlike in the English leading case *Car and Universal Finance Co Ltd v Caldwell* discussed above where both Sellers and Davies LJ employed the terminology of the ‘right to rescind’,<sup>308</sup> the notion of rescission being a power not a right has already been accepted in Chinese law since 1980s. It was later systematically clarified by Professor Liang that the ability to rescind a contract is a power (形成权) as opposed to a claim-right (请求权), the former being the ability to alter the legal relationship by unilateral intent independent from any act of the counter-party, whereas the latter being the ability to ask the counter-party to perform, to act in a certain way, or to restrain from acting in a certain way.<sup>309</sup> Two additional attributes of power as distinct from claim-right are that a power is impossible to be infringed by a third party, nor it is possible to be assigned to a third party.<sup>310</sup>

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<sup>308</sup> *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525, 549, 557.

<sup>309</sup> LIANG Huixing, *民法总论 [General Principles of Civil Law]* (Law Press 2001) 81–2.

<sup>310</sup> WANG Yuanzhi, ‘形成权理论初探 [Preliminary Inquiries on the Concept of Power]’ [2003] 3 *China Legal Science* 94.

The governing rule as to the applicable scope for exercising the power to rescind a voidable juridical act is article 59 of the General Provisions of Civil Law 1986,<sup>311</sup> which provides:

A party shall have the power to request a court or an arbitration agency to rescind the following juridical acts:

(1) those performed by an actor who seriously misunderstood the contents of the acts; and

(2) those that are obviously unfair.

Rescinded juridical acts shall be null and void from the very beginning.

Apart from the distinctive feature in Chinese law compared to English law that rescission must be made within one year since the act happened<sup>312</sup> only via the adjudication or arbitration, not by other means such as unilateral declaration or conviction, the most eye-catching point to be mentioned here is that there are only two scenarios where a party can rescind a juridical act. The second one, the so-called obvious unfairness (显失公平), denotes scenarios where any party, with a manner ‘obviously violate the principle of fairness, makes use of his own advantages or takes advantage of the counter-party’s lack of experiences to incur obligation’<sup>313</sup>, roughly equals to undue influence in English law. The first one, the so-called significant misconception (重大误解), denotes scenarios where<sup>314</sup>

an actor performs his conducts on the basis of false understanding of the nature of the conduct, the opposite party, the variety, quality, specification

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<sup>311</sup> Now General Provisions of Civil Law 2017 (China), arts 147, 151.

<sup>312</sup> *Interpretation of the Supreme People’s Court on Several Issues concerning the Implementation of the General Principles of the Civil Law* (Supreme Court Interpretations No 6, 1988) art 73.

<sup>313</sup> *Interpretation of the Supreme People’s Court on Several Issues concerning the Implementation of the General Principles of the Civil Law* (Supreme Court Interpretations No 6, 1988) art 72.

<sup>314</sup> *Interpretation of the Supreme People’s Court on Several Issues concerning the Implementation of the General Principles of the Civil Law* (Supreme Court Interpretations No 6, 1988) art 71.

and amount of the objects, etc., which leads to the consequence of the conduct going against his own will ...

We have already seen in the previous section how English law took a fundamentally different approach to mistake scenarios by treating spontaneous mistakes and induced mistakes differently. In addition, more importantly, as to a subcategory of induced mistake in Chinese law, namely fraud,<sup>315</sup> it does not fall within the definition of significant misconception, because of the operation of law in article 58(3) of the General Provisions of Civil Law 1986, which lists fraud (欺诈) among invalidating factors rendering a juridical act void not voidable.<sup>316</sup> This is another difference between English and Chinese law. Although both void juridical act and rescinded voidable juridical act are both null and void with a retroactive effect,<sup>317</sup> it follows from such operation of law that it is impossible to rescind a juridical act that is done by the counter-party's fraud. Apply it to transfer of property: as a kind of juridical act, the act of conveyance made by a purchaser fraudulently induced by a vendor is impossible to be rescinded; the conveyance is void *ab initio* without the need of any additional act on the part of the transferor. With such position in mind, one can easily find the difference between the general rules for the rescission of a juridical act (one sub-category being conveyance) and specific rules for the rescission of a contract (as a sub-category of juridical act) as elaborated immediately below.

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<sup>315</sup> *Interpretation of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law* (Supreme Court Interpretations No 6, 1988) art 68.

<sup>316</sup> However, this has been partly changed by the General Provisions of Civil Law 2017 (China), art 149, providing that fraud only renders a juridical act voidable not void, though according to the General Provisions of Civil Law 2017 (China), art 147, a juridical act done based on a false manifestation of intention is void. As a result, even under the new law after October 2017, if a manifestation of intention is both false and fraudulent, the juridical act in question can still be void not voidable.

<sup>317</sup> General Provisions of Civil Law 1986 (China), arts 58, 59, now General Provisions of Civil Law 2017 (China), art 155.

## *B. Rescission of a contract*

Article 54 of the Contract Law 1999 copied article 59 of the General Provisions of Civil Law 1986 in that significant misconception and obvious unfairness are two incidents where a contract can be rescinded. This surely makes sense since contract is a sub-species of a juridical act. However, the legislature added one additional subparagraph in article 54 of the Contract Law 1999, according to which enables one party to a contract to rescind it where such contract is ‘fraudulently included by the counter-party’ and is ‘against the true will of that party’.<sup>318</sup> Such discrepancy between the two articles makes the notion of abstraction in property transfers more visible. Hypothetically speaking, in the typical scenario where there is a conveyance by delivery under an unconditional contract of sale of specific goods,<sup>319</sup> due to different kinds of fraud involved, there could be (1) both a valid contract and a valid conveyance, (2) a rescinded contract and a valid conveyance, (3) a valid contract and a void conveyance, and (4) a rescinded contract and a void conveyance.

Of course this only create a hypothetical room for the existence of abstraction, since none of any provisions mentioned above has a direct reply to the consequences of transfers involving impaired consent as to whether or not: whenever a hypothetical case (2) above arises, it automatically turns to the ultimate consequence of (4).

### 4.2.2 The Myth of ‘Return the Property’

#### *A. The puzzling rule*

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<sup>318</sup> Contract Law 1999 (China), art 54.

<sup>319</sup> Contract Law 1999 (China), art 133; Property Law 2007, art 23.

Suppose a transferee fraudulently induces a transferor to enter into a contract of sale<sup>320</sup> and convey the property in question to the transferee. When the transferor elects to exercise his power to rescind the contract, what is the consequence of such impaired consensual transfer under Chinese law? Of course there is hardly any doubt about the existence of a right *in personam* for the transferor which can turn into a monetary claim or a claim for restitution in kind. What is contentious is whether the transferor could (by rescinding the contract) be granted any proprietary remedy, specifically a remedy retrospectively revesting ownership of the property in question to him.

The governing rule is article 58 of the Contract Law 1999,<sup>321</sup> which provides:

After a contract becomes invalid or is rescinded, any property obtained under the contract shall be returned. If it is impossible or unnecessary to return the property, compensation shall be made at an estimated price ...

Due to the lack of further authorised clarification, the using of the words ‘property’ and ‘returned’ remain ambiguous, for it does not clarify the object of restitution. Abstractionists would contend that ‘property’ means ‘property rights’, and ‘returned’ means ‘the re-conveyance of rights’, whereas anti-abstractionists would assert that ‘property’ only means ‘thing’, and ‘returned’ only means ‘change of possession’. Indeed, if we look into the entire statute, we will find that the word ‘return’ is used in an

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<sup>320</sup> Contract Law 1999 (China), art 130.

<sup>321</sup> See also General Provisions of Civil Law 2017 (China), art 157.

inconsistent way: sometimes it refers to possession,<sup>322</sup> sometimes property rights,<sup>323</sup> and sometimes unclear.<sup>324</sup>

Such vagueness in law is not a minor one; rather, it is of huge significance so far as the issue of abstraction versus causality is concerned. Although both of these two explanations equip the defrauded vendor with the right to ask for specific restitution,<sup>325</sup> the juridical basis for specific restitution differs; it is from such difference that the abstraction or causality can be inferred. If ‘property’ means ‘property rights’, and ‘returned’ means ‘the re-conveyance of rights’, the juridical basis for such claim is unjustified enrichment,<sup>326</sup> meaning the conveyance itself is valid but the purchaser acquires the property right without a justified legal basis (*causa*), which was the underlying contract obligation but now being retrospectively void due to the vendor’s exercise of the power to rescind the contract. Such result can be called the ‘application of the law of unjustified enrichment at the expense of the *rei vindicatio*.’<sup>327</sup> Two practical consequences follow. First, where the thing in question is transferred on to a third party,

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<sup>322</sup> Contract Law 1999 (China), arts 235, 295, 352, 365, 373, 377.

<sup>323</sup> Contract Law 1999 (China), arts 111, 308, 378.

<sup>324</sup> Contract Law 1999 (China), arts 58, 59, 194.

<sup>325</sup> The term specific restitution roughly equals to restitution in specie or restitution in kind, the latter more often adopted by German lawyers: Gerhard Dannemann, *The German Law of Unjustified Enrichment and Restitution: A Comparative Introduction* (OUP 2009) 124.

<sup>326</sup> General Provisions of Civil Law 1986 (China), art 92, now General Provisions of Civil Law 2017 (China), art 122. It should be noted that in this regard Chinese law follows the German approach that transfer ‘without legal ground’ is, without more, enough to be the judicial basis for an obligation of unjustified enrichment; technically speaking, fraud is not recognised as an ‘unjust factor’ (as in English law), but merely an invalidating factor rendering the transfer to be retroactively ‘without legal ground’: LIU Yanhao, *不当得利法的形成与展开 [The Formation and Development of the Law of Unjustified Enrichment]* (Law Press 2013) 319. For such civilian approach, see generally Reinhard Zimmermann, ‘Unjustified Enrichment: The Modern Civilian Approach’ (1995) 15 OJLS 403.

<sup>327</sup> Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996) 867.

such transfer is valid (surely subject to fulfilment of all constituent elements for a valid transfer), and the thing in question is treated as ‘impossible to be returned’ within the meaning of article 58 of the Contract Law 1999; hence the defrauded vendor cannot ask for specific restitution against that third party, but merely for pecuniary damages against the fraudster. Second, where the thing in question is possessed by the insolvency administrator (破产管理人),<sup>328</sup> it becomes assets available for *pari passu* distribution among the fraudster’s general creditors including the defrauded vendor; thus the defrauded vendor has no ‘right to take back’ (取回权) the possession of the thing, otherwise he will be liable in tort.<sup>329</sup> If ‘property’ means ‘thing’, and ‘returned’ only means ‘change of possession,’ this implies the position that the property right in question has automatically been revested to the defrauded vendor upon his exercise of the power to rescind, what he needs is merely to regain possession of the thing. Due to the retroactive effect of rescission and revesting, property right is treated as never departed from the defrauded vendor, as a result of which the defrauded vendor can exercise his ‘right to take back’ the property which ‘does not belong to the bankrupt’<sup>330</sup> from the hands of the insolvency administrator; the defrauded vendor can also claim for vindication against the fraudster and any third party recipient of the property,<sup>331</sup> for all transfers are treated as ultra vires thus void and null unless there is a bona fide purchase cutting off the chain for following the property.<sup>332</sup>

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<sup>328</sup> Enterprise Bankruptcy Law 2006 (China), art 25(6).

<sup>329</sup> Enterprise Bankruptcy Law 2006 (China), art 56; Tort Liability Law 2009 (China), art 2.

<sup>330</sup> Enterprise Bankruptcy Law 2006 (China), art 38.

<sup>331</sup> Property Law 2007 (China), art 34.

<sup>332</sup> Property Law 2007 (China), art 106.

## B. *Clue in limitation period*

Indeed, such vagueness article 58 of the Contract Law 1999 brought debates not only among academics in mainland China, but also confused academics writing on Chinese law from a common law perspective. For example, when Professor Ho tried to draw an analogy from rescission in Chinese contract law to resolve issues in rescission of voidable trusts in Chinese trust law, she understood art 58 as a provision providing ‘*restitutio in integrum*’,<sup>333</sup> ie a personal remedy of ‘restoration of the property to its original state’ based on restitution of unjust enrichment ‘*in specie* [which] naturally includes returning the original properties that have been transferred.’<sup>334</sup> However, when it comes to the question whether such restitutionary claim under art 58 is limited by the change of position defence, she became hesitant again as to whether the judicial basis for return of property under this article is unjust enrichment or vindication.<sup>335</sup>

Admittedly, to find a clue in black-letter laws, judicial interpretations or judgements which directly responded to this puzzle is difficult. It is nevertheless submitted that there does exist a clue which, though neglected by almost all the abstractionists and anti-abstractionists in Chinese academia, could at least provide an indirect reference. Article 7 of the *Judicial Interpretation on Limitation*<sup>336</sup> provides:

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<sup>333</sup> Lusina Ho, *Trust Law in China* (Sweet & Maxwell 2003) 164.

<sup>334</sup> Lusina Ho, *Trust Law in China* (Sweet & Maxwell 2003) 165, citing (albeit mistakenly) ZHAO Jinlong, ‘浅论合同无效而返还财产的几个基本问题 [Brief Discussion on Several Basic Questions Regarding the Return of Property in Void Contracts]’ [1999] 3 Contemporary Legal Science 63, who asserted that the judicial basis for return of property is not unjust enrichment but property.

<sup>335</sup> Lusina Ho, *Trust Law in China* (Sweet & Maxwell 2003) 191, possibly influenced by LING Bing, *Contract Law in China* (Sweet & Maxwell Asia 2001), 204–5.

<sup>336</sup> *Provisions of the Supreme People's Court on Several Issues concerning the Application of Statute of Limitations during the Trial of Civil Cases* (Supreme Court Interpretation No 11, 2008).

As for the time limit for a party ask for rescission of contract, the one-year period articulated in article 55 of the Contract Law 1999 applies.

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The limitation periods for a claim-right for return of property or compensation for losses due to rescission of a contract shall start to run from the date of rescission of the contract.

As having mentioned earlier in this section, the capability to rescind a fraudulently induced contract is a power. This is not the final word here, for a power merely grants the power-holder the ability to alter the legal relationship between him and the counter-party; what the power holder really wants, for instance in our present case, is to get back the property. No matter whether this claim-right is something proprietary or personal, the remedy has to be realised, not by the power to rescind alone, but by such claim-right created after the exercise of such power. Nevertheless, a proprietary claim-right and a personal claim-right are different in many aspects, one of which is the applicable rules on limitation. From article 7 of the *Judicial Interpretation on Limitation* quoted above it is clear that the time limit (除斥期间, *Ausschlussfrist*) for contractual rescission in article 54 of the Contract Law 1999 is one year since the power holder know or ought to know the invalidating factor,<sup>337</sup> whereas the limitation period (诉讼时效, *Verjährung*) for the claim-right for ‘return of property’ in article 58 of the Contract Law 1999 is three years<sup>338</sup> from the date when the contract is rescinded.

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<sup>337</sup> Contract Law 1999 (China), art 55.

<sup>338</sup> It was two years according to General Provisions of Civil Law (China) 1986, art 135. Now General Provisions of Civil Law (China) 2017, art 188 has extended it to three years.

The clue now arises. Although there is no legislative provision explicitly provides so, it is an axiom shared by almost all Chinese lawyers<sup>339</sup> that unlike other personal claim-rights which are subject to limitation periods, the claim-right for vindication is a proprietary one thus is not subject to any limitation period.<sup>340</sup> It follows the claim-right for the return of ‘any property obtained under the contract’ in article 58 of the Contract Law 1999 must be a personal one (based on unjust enrichment not property), so that it makes sense for article 7 of the *Judicial Interpretation on Limitation* to clarify that the limitation period for such claim-right ‘starts to run from the date of rescission of the contract’. Otherwise, suppose the claim-right for the return of ‘any property obtained under the contract’ in article 58 is a proprietary one (based on property not unjust enrichment), it is nonsensical for the Supreme Court to clarify how the limitation period should calculate — because following such anti-abstractionist explanation, there is totally no limitation applicable to such claim-right at all. From the reasoning here it can be inferred that such anti-abstractionist explanation is not the way the Supreme Court understands article 58 of the Contract Law 1999; rather, the way the Supreme Court understands should be compatible with the abstractionist explanation, ie, the claim-right of ‘return of property’ after contractual rescission means an unjust enrichment based personal claim for re-conveyance of the property right transferred.

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<sup>339</sup> See eg WANG Liming, *民法总论 [General Principles of Civil Law]* (Renmin University Press 2009) 719–20; YU Yanman, *民法原论 [Civil Law Theories]* (3rd edn, Law Press 2007) 253; SHI Shangkuan, *民法总论 [General Principles of Civil Law]* (CUPL Press 2000) 630–1.

<sup>340</sup> It was argued in HAN Shiyuan, *合同法总论 [The Law of Contract]* (3rd edn, Law Press 2011) 228 that this can also be implied from the *Provisions of the Supreme People's Court on Several Issues concerning the Application of Statute of Limitations during the Trial of Civil Cases* (Supreme Court Interpretation No 11, 2008) art 1.

## **CHAPTER 5 ABSTRACTION IN TRANSFERS INVOLVING OTHER**

### **INVALIDATING FACTORS**

Chapter 4 has already explored the consequence where the underlying obligation is voidable due to impaired consent such as spontaneous mistakes, which is generally abstract, and induced mistakes, which can be interpreted in an abstractionist way as well even if the very mistake is a fraudulently induced one. The aim of this chapter is to demonstrate where title has been transferred under a contract involving certain incidents of voidness such as illegality, incapacity, or informality as to validity, the conveyance nevertheless remains valid, as long as all necessary requirements for conveyancing have been met.

Apart from discussing rules and cases from one vitiating factor to another, a general but crucial issue which has to be dealt with in this chapter is the transfer of property rights to land by registration. Both the conclusiveness of register in English law and the constitutive effect of register in Chinese law may serve as a general evidence for an abstractionist rule with respect to registered disposition of property rights to immovables, for the retroactive rectification of register is impossible under such system, thus making automatic reversioning of title impossible even if the underlying contract was set aside. Moreover, the scope of application of the unjust enrichment clause in Chinese law may serve as a clue to prove the rationality of interpreting Chinese law of transfers involving a flawed underlying basis to be abstract rather than causal.

#### **5.1 English Law**

### 5.1.1 Illegality: The General Rule

Illegality may happen in both the making stage and the performing stage of a contract. While the latter does not normally render a contract void or unenforceable, the former does, and strictly speaking only the former can be described as an ‘illegal contract’, by its narrow sense of ‘involving the commission of a legal wrong or being made with the purpose of the commission of such a wrong.’<sup>341</sup> It is suggested that in English law, ‘illegal contracts’ are sub-species of void contracts; an obligation being illegal simply means such obligation has no legal effect to bind the counter-party, as a result of which such obligation is void. Strangely however, we can see in some judgments it was said that ‘illegality renders a contract unenforceable rather than void, if by void is meant that the agreement was never made.’<sup>342</sup> A crucial reason of this being said is that the Deputy Judge of the High Court wanted to explain why property can pass under an illegal contract: ‘if the contract was truly void, in the sense that it is to be treated as never having existed, it is difficult to see how that could occur.’<sup>343</sup> Yet this is a fallacy; we do not need to extort the relation between illegality and unenforceability due to such consideration, because as we have seen in previous chapters, given that a separate stage of conveyance (together with the intent to convey) could be found in English law regarding property transfers, such separationist idea can well explain why property can pass under an illegal contract without the need to describe the underlying illegal contract being ‘valid but merely unenforceable’, as long as the conveyance is valid. Indeed, such fallacy was also

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<sup>341</sup> Hugh Beale and Andrew Burrows, *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 16-008.

<sup>342</sup> *Paros Plc v Worldlink Group Plc* [2012] EWHC 394 (Comm) [80] (Hirst QC).

<sup>343</sup> *Ibid.*

commented in *Chitty on Contracts* that ‘[a]lthough this results in an illegal contract having some legal consequences, this in no way constitutes enforcement.’<sup>344</sup> In addition, admittedly it is not always clear to determine the nature of mandatory requirements in various statutory provisions, in the sense whether a contract which fails to comply with such requirement would render the contract void or not.<sup>345</sup> The answer to such vagueness in English law is: (i) where the statutory provision in question prohibits both parties from concluding a contract in certain way, illegality always renders the contract void, and (ii) where the statutory provision in question merely prohibits one party from concluding a contract in certain way, a ‘presumption’<sup>346</sup> can still be found in English law that illegality normally renders the contract void too, regardless of the fact that the statutory provision does not expressly prohibit the contract, and of the fact that a criminal or administrative sanction follows due to violation of such provision.<sup>347</sup> Once the prerequisite, ie, illegal contracts are sub-species of void contracts (rather than overlaps void contracts) is recognised, it is not difficult to find from cases analysed below that the validity of

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<sup>344</sup> Hugh Beale and Andrew Burrows, *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 16-016. In addition, just because such illegal contract or contractual term may be ‘enforced’ by someone who is not complicit in the wrongdoing or by someone lacking knowledge of such illegality does not mean the contract or the contractual obligation turns to be a valid one; it is still a void one due to illegality, which is the cause of voidness. Cf Peter Jaffey, *The Nature and Scope of Restitution: Vitiating Transfers, Imputed Contracts and Disgorgement* (Hart Publishing 2000) 216, 218.

<sup>345</sup> There is no statutory provision in English law explicitly confirming or denying whether illegality in the making of a contract renders the contract void. By contrast, in other common law jurisdictions like New Zealand, it was provided that ‘every illegal contract shall be of no effect and no person shall become entitled to any property under a disposition made by or pursuant to any such contract’: *Illegal Contracts Act 1970 (NZ)*, s 6(1).

<sup>346</sup> This is a loose but vivid description used by Richard Christou, *Sale and Supply of Goods and Services* (3rd edn, Sweet & Maxwell 2015) para 6.8.3, referring to ‘the starting point’ as a matter of *law* instead of the narrow usage of ‘presumption’ as a matter of *fact*, ie a tool to prove secondary facts by having primary facts.

<sup>347</sup> *Cope v Rowlands* (1836) 2 M & W 149, 150 ER 707; *Cornelius v Phillips* [1918] AC 199, 211 (Viscount Haldane); *Re Mahmoud and Ispahani* [1921] 2 KB 716; *Archbalds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374; *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1988] QB 216, 273–74 (Kerr LJ).

conveyance is not infected by its underlying contractual obligation being *void and null* due to illegality. This is of vital importance, because had various contracts tainted by illegality discussed in this chapter were otherwise merely unenforceable not void, then the conveyance would have been justified by the executed, existing underlying contract, making these cases much harder to prove abstraction, ie, the ‘anti-mirror’ effect, given that the contract side of the ‘mirror’ is not flawed in the first place.

In chapter 4 we have already seen that one of the most popularly alleged anti-abstractionist authorities is *Car and Universal Finance Co Ltd v Caldwell*, decided by Lord Denning in 1963 sitting as an additional judge of the Queen’s Bench Division.<sup>348</sup> Interestingly, five years before the decision of *Caldwell* was delivered, in the Privy Council, his Lordship decided another case of the same issue with an abstractionist approach. This is *Singh v Ali*.<sup>349</sup> The claimant asked the defendant if he could help circumvent certain government requirements for haulage permit which prevented the claimant from operating a business with a lorry. The defendant agreed. He purchased a lorry and registered it under his own name, and then transferred title to the lorry to the plaintiff secretly by delivery. When the two parties fell out, the defendant dispossessed the lorry from the plaintiff’s place. The claimant brought detinue against the defendant, which was successful in the Malaya Supreme Court and the Privy Council, where it was held that although the underlying contract between the claimant and the defendant was

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<sup>348</sup> Although this case went on appeal, Lord Denning’s reasoning was not negated.

<sup>349</sup> [1960] AC 167, followed by *Kingsley v Sterling Industrial Securities Ltd* [1967] 2 QB 747. See also *Aratra Potato Co Ltd v Taylor Joynson Garrett* [1995] 4 All ER 695 (Note although the position regarding the legality of the solicitor contract in Aratra was overruled by *Thai Trading Co v Taylor* [1998] QB 781, it did not change the position that property passes under an illegal thus void contract.) In addition, Lord Denning gave a similar abstractionist decision in *Belvoir Finance v Stapleton* [1971] 1 QB 210. There, the illegality issue concerns with Hire-Purchase and Credit Sale Agreements (Control) Order 1964, art 1(1), sch 2, pt 1, para 3(1).

illegal and void due to deliberately circumventing administrative prohibitions,<sup>350</sup> title to the lorry was nevertheless passed via delivery ‘despite of the illegality of the contract’.<sup>351</sup> Possible administrative punitive consequences on the part of the claimant have nothing to do with the property right validly acquired by the defendant, which cannot be seen as never having been passed to him, or be confiscated by the Court simply due to illegality.<sup>352</sup>

In fact, the legal proposition that ‘title passes and does not retrospectively revert under an illegal contract’ has already been established over a century earlier before *Singh v Ali*, whether title being normal chattels, money or land,<sup>353</sup> though the facts in those cases does not closely match the present discussion. In *Ayerst v Jenkins*,<sup>354</sup> for example, the transaction in question was a transfer of shares, rather than transfer of title to tangible property. A widower created a settlement to transfer some shares to a person, who held title to shares on trust for the benefit of his deceased wife’s sister two days before a ‘fictitious marriage’ between the widower and the wife’s sister. Such marriage based on

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<sup>350</sup> Being the Registration of Motor Vehicles Regulations 1945 and the Motor Vehicles Commercial Use (Amendment) Regulations 1948: *Singh v Ali* [1960] AC 167, 175.

<sup>351</sup> *Singh v Ali* [1960] AC 167, 177. It should be noted that the defendant’s argument in the appeal was that the contract is illegal, thus void, and thus it cannot pass property. The reason why Lord Denning did not explicitly confirm the defendant’s position that such illegal contract is *void* is not because he did not agree with such premise. His Lordship did agree, but such illegality and voidness had nothing to do with the title in question which has been transferred to the plaintiff.

<sup>352</sup> *Chief Constable of West Midlands v White* (1993) 157 JP 222. Indeed, there seems to be no further policy reason why title passes under an illegal contract ‘merit special treatment’: Nelson Enonchong, ‘Title Claims and Illegal Transactions’ (1995) 111 LQR 135, 140. However, this in turn demonstrates the very rationale why conveyance is uninfected despite an illegal thus void underlying contract is just that ‘property passes by a valid conveyance alone’, which was described as ‘independent proprietary rights’ by Paula Giliker, ‘Illegality’ in Steve Hedley (ed), *The Law of Restitution* (Butterworths 2002) 322.

<sup>353</sup> Eg, *Feret v Hill* (1854) 15 CB 207, 139 ER 400 (title to land); *Gordon v Chief Commissioner of Metropolitan Police* [1910] 2 KB 1080 (title to money). See also *Scarfe v Morgan* (1838) 4 M & W 270, 150 ER 1430; *Taylor v Chester* (1868-69) LR 4 QB 309; *Elder v Kelly* [1919] 2 KB 179.

<sup>354</sup> (1873) LR 16 Eq 275.

cohabitation was void due to prohibition by both Act of Parliament and public policy. A couple of years later, the husband died and the lady had another marriage with someone else, the plaintiff, who was the legal personal representative of the deceased husband, brought a suit to set aside the settlement, as being founded on a bad and illegal consideration. However, the plaintiff's request for re-transfer of title to the shares from a surviving trustee was refused by Lord Selborne, who emphasised that the crucial criterion for old authorities that no property may pass pursuant to an immoral thus illegal covenant is limited to cases where the underlying obligation has remained executory not executed. Whereas for cases of 'a completed transfer of specific chattels',<sup>355</sup> there is no authority for the Court to give assistance to the plaintiff for his claim of setting aside the conveyance, whether in the form of outright transfer, or in the form of transfer under a trust. Indeed, the gist of *Ayerst* can be understood in such a way, which was also confirmed in *Tinsley v Milligan*<sup>356</sup> in the House of Lords two centuries later and again in *Patel v Mirza*<sup>357</sup> in the UK Supreme Court very recently.

### 5.1.2 Illegality: Identity of Defect

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<sup>355</sup> *Ayerst v Jenkins* (1873) LR 16 Eq 275, 283.

<sup>356</sup> In *Tinsley v Milligan* [1994] 1 AC 340, 355, Lord Goff understood the rule in *Ayerst* being that 'a court ... will not, at the instance of the settlor or his personal representative, set aside a settlement which has been made for an illegal consideration.' And Lord Jauncey, by citing *Ayerst*, said that 'it has ... for some years been recognised that a completely executed transfer of property or of an interest in property made in pursuance of an unlawful agreement is valid.' *Tinsley v Milligan* [1994] 1 AC 340, 355, 366. Note that this part of ratio in *Tinsley* was not overruled in *Patel v Mirza*. It is the reliance rule in *Tinsley* that was overruled in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 [110].

<sup>357</sup> *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 [110] (Lord Toulson): 'Unless a statute provides otherwise (expressly or by necessary implication), property can pass under a transaction which is illegal as a contract.' See also [189] (Lord Mance), [236] (Lord Sumption).

As always, there are some alleged ‘exceptions’ to such an abstractionist rule of illegality. It is argued here, however, that these are not genuine exceptions to the abstractionist position. One example is *Bowmakers Ltd v Barnet Instruments Ltd*.<sup>358</sup> The defendants intended to use three machine tools but could not afford to purchase it. As a result, the defendants entered into three hire-purchase agreements with the plaintiffs, according to which the plaintiffs bought the very three machine tools from one Smith, and let them to the defendants afterwards. Later on, the defendants converted two of the three machine tools into their own use. The plaintiffs therefore brought conversion against the defendants, which was successful in both the first instance and the appeal, regardless of the defendant’s plea of a defence of illegality which tainted the contract between the plaintiffs and one Smith because the maximum price for sale of new machine tools which they negotiated violated the Order of the Minister of Supply. Du Parcq LJ admitted that the three hiring agreements were all affected by illegality even though there was no direct illegality in the contract between the plaintiffs and Smith, because<sup>359</sup>

the hiring agreements did not in themselves transgress this order, but it was contented, and with much force, that any illegality which attached to the anterior contract of sale must in the circumstances of this case affect the hiring agreements.

Nonetheless, in the ‘broad and easy-flowing judgment’ which ‘states a general rule in general terms’,<sup>360</sup> du Parcq LJ confirmed title having passed despite the illegality in the contract, because<sup>361</sup>

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<sup>358</sup> [1945] KB 65.

<sup>359</sup> *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, 68.

<sup>360</sup> CJ Hamson, ‘Illegal Contracts and Limited Interests’ (1949) 10 CLJ 249, 249.

so far as their claim in conversion is concerned, they are not relying on the hiring agreements at all. On the contrary, they are willing to admit for this purpose that they cannot rely on them. They simply say that the machines were their property, and this, we think, cannot be denied.

It is absolutely correct that the plaintiffs did not need to build the validity of the transfer of title (to the new machine tools from one Smith) on the validity of the illegal agreements, because their title, or more precisely, the conveyance itself is a valid one. It should be noted that at the end of the judgment, *du Parc* LJ also mentioned that<sup>362</sup>

It must not be supposed that the general rule which we have stated is subject to no exception. Indeed, there is one obvious exception, namely, that class of cases in which the goods claimed are of such a kind *that it is unlawful to deal in them at all*, as for example, obscene books.

It is submitted that this alleged ‘exception’, however, is not a genuine one; it does not negate the principle of abstraction. The crucial difference between the exceptional scenario and scenarios discussed above is, that in the present scenario the invalidating rule of illegality rightly points to the very title of the subject-matter, whereas in the above scenarios the invalidating rule of illegality does not. Here, by saying that ‘it is unlawful to deal in obscene books at all’, it not only means that no contract (whether in the form of sale, exchange, or other transactions) can be made with respect to obscene books, but also means that no transfer of title (whether in the form of registration, deed, or delivery) can be made with respect to obscene books.<sup>363</sup> Both the validity of contract and the validity of

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<sup>361</sup> *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, 69–70.

<sup>362</sup> *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, 72 (emphasis added).

<sup>363</sup> One might argue *Costello v Chief Constable of Derbyshire Constabulary* [2001] 3 All ER 150 could be regarded as a counter-example in that it is possible to pass title to a stolen car. Yet it is argued that *Costello* is only relevant to the relativity of title, and has nothing to do with the present topic. This is because the judgment in *Costello* did not say title may pass under an illegal contract even if it is unlawful to pass the title at all, rather, it only said that the court will grant an equitable relief in the form of a mandatory order requiring the very thing to be delivered up back to the

conveyance, if any, were tainted due to violation to the invalidating rule of illegality. In other words, it is a typical example of ‘identity of defect’: the reason why the transfer of title is void is not because the underlying contract is void due to illegality, but because the conveyance *itself* is void due to such special illegality rule (which explicitly bars title from passing from one to another in the present scenario).

With such notion of identity of defect in mind, it is then easy to understand why there were cases where title failed to pass ‘by reason of’ an illegal contract which, strictly speaking, should not be the ‘reason’ at all. Take *Amar Singh v Kulubya*<sup>364</sup> as an example. In the 1950s, Uganda had a statutory ordinance prohibiting any sale or lease of the so-called ‘mailo’ lands from an African to a non-African unless such transaction was permitted by the Governor. However, without having obtained such permission, the plaintiff, an African, entered into and executed a contract of lease with the defendant, a non-African. Of course, such lease contract was void due to illegality. Later on, before the term of lease expired, the plaintiff brought trespass against the defendant, and asked for recovery of possession to the land in question. The Privy Council confirmed the lease contract being void due to illegality, and supported the plaintiff’s claim of trespass without giving much explanation. Conventional explanation can be found in major textbooks that, for instance, the plaintiff’s ‘claim was based *not upon* the agreement ... but on the independent and *untainted* ground of his registered ownership.’<sup>365</sup> Yet how to

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person legally entitled to possession. Lightman J distinguished *Bowmaker* in para [34] for this very reason. Also, Costello in that case was a mere possessor, not a buyer, and the subject-matter was a stolen car, not something like an illegal drug or gun (which it is unlawful to deal in them at all).

<sup>364</sup> [1964] AC 142.

<sup>365</sup> MP Furmston, *Cheshire, Fifoot and Furmston’s Law of Contract* (16th edn, OUP 2012) 484.

understand such explanation? Just because the claim was not based on the agreement does not mean that the claim must be based on the ‘registered ownership’: conceptually speaking, in the present scenario it is the *leasehold* not the *leasehold agreement* which counts as an encumbrance to the freehold title. If we apply the identity of defect model into *Amar Singh v Kulubya*, then it is clear to understand the reason. Because the invalidating rule of illegality in the present case rightly *pointed to* the transfer of the very title (or to the grant of leasehold out of such title) to the very subject-matter, which resembles more to the exceptional case mentioned in *Bowmakers v Barnet*, rather than *Singh v Ali* and alike cases, thus the leasehold in question is barred from being carved out from the freehold title to the ‘mailo’ land to be granted to a non-African. Since the conveyance itself was illegal and thus void due to an identity of defect (being identical to the voidness of the contract) thanks to the Uganda statutory ordinance, surely the plaintiff did not need to build his claim on the void leasehold contract, but on the void conveyance (ie, the creation of leasehold) itself would be enough. As a result, it then makes sense for the plaintiff to contend that the ‘untainted’ registered freehold title remained in him, which was the basis for the action of trespass.

### 5.1.3 A Recent *Patel v Mirza* Revolution?

We saw in section 5.1.1 above that ‘illegal contract’ is generally seen as a sub-category of ‘void contract’. However, a recent ‘earthquake’ named after *Patel v Mirza*<sup>366</sup> happened in the area of restitution for unjust enrichment in 2016 is said to have the potential of not

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<sup>366</sup> [2016] UKSC 42, [2017] AC 467. The decision of the Supreme Court raised so much academic attention that a collection specifically on this case was recently published: Sarah Green and Alan Bogg, *Illegality after Patel v Mirza* (Hart Publishing 2018).

only completely changing the landscape of unjust enrichment, but also ‘laying down a new approach to illegality across civil law. So the new approach is applicable to the enforcement of a contract [claim]’<sup>367</sup> To understand whether such potential would affect the relationship between ‘illegal contract’ and ‘void contract’, a very brief introduction of this case is necessary.

Mr Patel transferred £620,000 to Mr Mirza in the mutual belief that the price of shares of Royal Bank of Scotland would change after an expected government announcement (an insider information Mr Mirza told Mr Patel), so that they can use the money to buy and sell the shares to make an illegal profit (an offence under the Criminal Justice Act 1993, s 52). However, the announcement was never made and Patel sued Mirza in unjust enrichment to recover the money. It was finally held by the Supreme Court that Patel should succeed. Notably, prior to this decision, Patel would probably have lost because of the operation of the illegality defence, because (i) Patel was in *pari delicto*, (ii) his act did not constitute a withdrawal from the illegal design, and (iii) he had to rely on the illegal contract for the commission of a crime to support his claim for unjust enrichment. However, it was held by the majority of the Supreme Court that the traditional rule-based exceptions to the illegality defence should be replaced by a new ‘range of factors’ approach, namely, to consider whether the denial of the restitutionary claim was consistent with (a) the underlying purpose of the transgressed prohibition, (b) any other relevant public policy, and (c) proportionality.<sup>368</sup>

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<sup>367</sup> Andrew Burrows, ‘A New Dawn for the Law of Illegality’ in Sarah Green and Alan Bogg, *Illegality after Patel v Mirza* (Hart Publishing 2018) 34.

<sup>368</sup> *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 [120] (Lord Toulson).

When it comes to the possible changes made in *Patel v Mirza* regarding the impact of illegality on contract, it was commented by Professor Häcker that, since the Justices of the Supreme Court have used ‘void’ and ‘unenforceable’ interchangeably for a long time, and since Lord Sumption in *Patel v Mirza* recognised restitution for benefit transferred under contracts both void and unenforceable for illegality,<sup>369</sup> it could be expected from a civilian and comparative angle that the ‘range of factors’ approach in *Patel v Mirza* would make English judges take legislative purpose and policy into consideration when deciding on the validity of illegal contracts in the future with discretion.<sup>370</sup> If this is correct, then ‘illegal contract’ would no longer be automatically a sub-category of ‘void contract’, but might instead be void, unenforceable, voidable, or even perfectly valid based on policy considerations.

Häcker’s comment is indeed a signpost reflecting the possible way forward for English courts to resort to policy considerations in deciding on the validity of illegal contracts flexibly. Nonetheless, it cannot make *Patel v Mirza* alone a strong authority for such position for two reasons. First, Lord Toulson did not apply the three-fold ‘range of factors’ test to the issue of the validity of the contract in that case at all. Strictly speaking, the ratio decidendi of this case only concerns with the issue ‘whether restitution for unjust enrichment received under an illegal contract should be *awarded* based on the range of factors approach’ rather than the issue ‘whether an illegal contract is not necessarily *void* but could be seen as merely *unenforceable* based on the range of factors approach.’ Second and more importantly, it can be inferred that their Lordships assumed that the

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<sup>369</sup> *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 [247], [248].

<sup>370</sup> Birke Häcker, ‘Illegality and Immorality from a Civilian Angle’ in Sarah Green and Alan Bogg, *Illegality after Patel v Mirza* (Hart Publishing 2018) 335–37, 340–49.

contract in question was *void*, the ratio decidendi therefore only concerning restitution of benefit transferred under a *void* contract. Specifically, if their Lordships assumed that the insider dealing contract was valid not void, then this case would have been solved quite easily simply by citing statutory provisions for frustration instead of analysing complex common law rules of restitution for illegal payment. Because the announcement of the RBS never came out, the insider dealing contract aimed at taking advantage of the expected movement of shares has become impossible of performance, the Law Reform (Frustrated Contracts) Act 1943 therefore applied, displacing the common law rules of unjust enrichment.<sup>371</sup> This leads to a fairly simple result, ie, the money paid to Mr Mirza in pursuance of the insider dealing contract before the time of discharge should be recoverable.<sup>372</sup> The reason why such 1943 Act was not used in *Patel v Mirza* can only be that their Lordships assumed that the insider dealing contract in question was *void* for illegality, so that there was strictly speaking no contract at all, not a ‘frustrated contract’. In sum, without revolutionary judgments in the future directly on the relationship between illegal contracts and void contracts, the decision in *Patel v Mirza* alone cannot be understood as a strong authority challenging the current starting point (ie, illegal contracts are generally void contracts), thereby weakening the observations on illegality and abstraction in sections 5.1.1 and 5.1.2 above.

#### 5.1.4 Informality

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<sup>371</sup> Law Reform (Frustrated Contracts) Act 1943, ss 1(1), 2(5); Andrew Burrows, ‘A Restatement of the English Law of Unjust Enrichment’ (OUP 2012) 92, 152; ‘A Restatement of the English Law of Contract’ (OUP 2016) 168.

<sup>372</sup> Law Reform (Frustrated Contracts) Act 1943, s 1(2).

Compared to illegality, English law normally treat non-compliance with formalities as a separate category with the same vitiating effect,<sup>373</sup> though not all kinds of contract involving informality leads to voidness; it depends on what the rule of formality is: some affect validity,<sup>374</sup> some affect enforceability,<sup>375</sup> some affect neither despite a criminal sanction,<sup>376</sup> and some only affect evidence not substance.<sup>377</sup> Like contracts being void due to illegality discussed above, contracts being void for want of formality requirements cannot infect the validity of conveyance pursuant to such contracts either. One example is *Tootal Clothing Ltd v Guinea Properties Management Ltd*.<sup>378</sup> The plaintiff, Tootal (the tenant), negotiated with the defendant, Guinea Properties (the landlord) for a lease of commercial premises, and they finally agreed on three main terms, namely, (i) that Tootal were to carry out shop-fitting works to the premises after the grant of lease from Guinea Properties, (ii) that Tootal was to have a rent-free period of three months before the 25-years leasehold, within which it was expected to carry out the shop-fitting works, and (iii) on the satisfactory completion of the shop-fitting works Guinea Properties would pay Tootal £30,000 towards the cost of the works. Instead of having only one document to sign, they had a couple of them in separate documents. They signed two of them stipulating the previous two main points of the three, but leaving the £30,000 term agreed without being in the form of writing and being incorporated into the lease agreement as a

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<sup>373</sup> See eg, Law Commission, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (Law Com No 154, 1998) para 1.7; Law Commission, *The Illegality Defence: A Consultative Report* (Law Com No 189, 2009) para 4.5.

<sup>374</sup> Eg, Law of Property (Miscellaneous Provisions) Act 1989, s 2.

<sup>375</sup> Eg, Law of Property Act 1925, s 40.

<sup>376</sup> Eg, Money-Lenders Act 1900 (63 & 64 Vict c 51), s 2(2).

<sup>377</sup> Eg, Law of Property Act 1925, s 53(1)(b).

<sup>378</sup> (1992) 64 P & CR 452. Followed by *Lotteryking Ltd v AMEC Properties Ltd* [1995] 2 EGLR 13; *Mirza v Mirza* [2009] EWHC 3, [2009] 2 FLR 115; *North Eastern Properties Ltd v Coleman* [2010] EWCA Civ 277 [2010] 1 WLR 2715.

single one. For this reason, the defedant refused to pay the money when the plaintiff finished the shop-fitting works, for which the plaintiff commenced proceedings as the tenant of the premise in question.

In the Court of Appeal, Scott LJ recognised the informality issue, because the way they entered into the contract of lease did violate the formality requirements set out in the Law of Property (Miscellaneous Provisions) Act 1989, section 2, which provides:

(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

(4) Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.

Obviously, the dealing between Tootal and Guinea Properties is a land contract, with the term regarding the £30,000 being an intrinsic part which in fact failed to be incorporated and took the form of writing. While accepting such non-compliance with statutory requiremnts on formality, Scott LJ nevetheless allowed Tootal's appeal, saying that:<sup>379</sup>

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<sup>379</sup> *Tootal Clothing Ltd v Guinea Properties Management Ltd* (1992) 64 P & CR 452, 455.

section 2 is of relevance only to executory contracts. It has no relevance to contracts which have been completed. ... Once they have done so, it becomes irrelevant that the contract they have completed may not have been in accordance with section 2. ... [Since] the lease agreement thereupon ceased to be an executory contract, the lease agreement [being] unenforceable became irrelevant.

As a result, despite the flawed contract for disposition of leasehold for want of formality requirements, the execution of such contract, ie the grant of lease was nevertheless valid, and because Tootal had the lease by such conveyance and finished the shop-fitting works, he shall be entitled to the payment of £30,000.

It could be inferred from the judgement that, suppose the contract were still an executory one, with all those facts on non-compliance with formalities unchanged, the grant of lease would not have been void because section 2 of the 1989 Act is a relevant provision barring the performance (by conveyance) from being sued for under the contract. The fact that the plaintiff won the appeal and got money under such contract does *not* mean that the grant of lease was also done pursuant to such contract *with a valid underlying obligation for granting such lease*. In other words, just because there is a valid collateral obligation (eg, for payment in the present case) in the contract does not mean there is also a valid underlying obligation for title transfer in the contract as well, though the conveyance, if it has been done with all requirements for a valid conveyance having been met, is valid and is not negated by the informality as to validity of the underlying contract.

### 5.1.5 Incapacity

Examples could also be found in cases involving incapacity, where property could be passed through a valid conveyance by delivery despite that the underlying contractual obligation was void due to lack of capacity by either individuals and entities.

As for incapacity of a natural legal person, an abstractionist example is *Stocks v Wilson*.<sup>380</sup> The defendant, a minor, bought from the plaintiff certain furniture (being non-necessaries) by fraudulently representing himself being of full age. The defendant promised that he would pay the price at a future date, so the plaintiff delivered the goods in question before getting paid. Later on, the defendant sold part of the goods for some cash, and pledged the other for more cash. However, he could not pay the plaintiff on the day for payment, and worse still, he went bankrupt. In fear of not being fully paid by bankruptcy distribution, the plaintiff brought an action for the unpaid value. Her counsel raised four grounds, two of which, being (i) the contractual right to the price for necessaries and (ii) damages for the tort of deceit were rejected by the Court. The most notable point was the third alternative ground raised by the plaintiff's counsel, contending that the defendant was liable for conversion. Since the crucial point for successfully maintaining conversion was the title to the furniture in question, the plaintiff challenged two things. The first was the validity of conveyance on itself, which was rejected by Lush J.<sup>381</sup>

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<sup>380</sup> [1913] 2 KB 235. See also *Pearce v Brain* [1929] 2 KB 310, where the Court also confirmed that it is a wrong proposition that no property passed under a contract of exchange for non-necessaries involving a minor which violates the Infants Relief Act, 1874. However, this case is not a pure abstractionist case, because it was also said there that if such contract amounts to a total failure of consideration, then no property passes.

<sup>381</sup> *Stocks v Wilson* [1913] 2 KB 235, 243.

as the defendant had given the plaintiff a licence to seize, the bill of sale was void under the Bills of Sale Act, 1882, because a bill of sale by virtue of the Bills of Sale Acts includes a licence to seize, and the Act of 1882 avoids all bills of sale given to secure the payment of money if they are not in the statutory form. I have already held ... that this contention is unsound and that the bill of sale was not void. There was no assurance of chattels given by the defendant, and no assurance to secure the payment of money. There was only the one assurance, namely by the vendor, the plaintiff, which was not to secure the payment of money, and which therefore was governed by the Act of 1878 and not by the Act of 1882. That bill of sale, the transfer of the chattels to the defendant, could not, I think, be made void on the ground suggested; all that could be avoided would be the licence to seize, and it does not seem to me to be possible to avoid part of the instrument because that part was not in the statutory form.

Having failed to challenge the validity of conveyance, the plaintiff tried to challenge the validity of the contract of sale, which should be void due to a statutory provision barring all contracts by an infant except for necessities.<sup>382</sup> In response, Lush J recognised the voidness of the contract in question, but thought that this has nothing to do with the validity of conveyance:

The fact that the contract is no longer voidable but void affects the liability on the contract, but does not touch the liability which I am discussing. I must refer in passing to another suggestion which was made in the course of the argument, namely, that since that Act an action of detinue or conversion would lie. I thought at the time that there might be some foundation for this suggestion and ... I am satisfied that that view is wrong and that the property passed by the delivery.

As a result, such alternative contention was rejected by the Court, and it could be said that 'notwithstanding the Infants Relief Act, 1874, the delivery of the goods to the defendant with intent to pass the property therein operated to vest the property in him,

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<sup>382</sup> Infants Relief Act 1874, s 1: 'All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void.'

and that he was not liable for conversion of the goods.’<sup>383</sup> Fortunately, the plaintiff’s counsel raised another ground, being equitable rescission of the contract of sale was allowed by the Court, thus the defendant was held liable for pay the value of the furniture.<sup>384</sup> This again demonstrate the Court’s rejection on the conversion issue that the transfer of title to the furniture in question was held valid regardless of a underlying void contract due to the transferee’s contractual incapacity; the plaintiff won the case by successfully maintaining a personal claim rather than a proprietary claim.

As for incapacity of an artificial legal person, the example is *Ayers v South Australian Banking Co.*<sup>385</sup> The plaintiff was the South Australian Banking Company incorporated by Charter, because of which the plaintiff had no capacity of advancing money on the security of merchandise. However, there was one borrower, Philip Levi & Co who successfully entered into a contract of loan with the plaintiff, according to which the plaintiff did lend money on merchandise. Of course, to provide security for the loan,

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<sup>383</sup> *Stocks v Wilson* [1913] 2 KB 235, 236. Although the Infants Relief Act 1874, s 1 was repealed and hence the underlying minor’s contract is not necessarily void but only unenforceable: *Minors’ Contracts Act 1987*, ss 1, 3, 4. Such a change regarding the validity of the contract did not reverse the abstract position regarding the validity of conveyance from the transferor to the minor established before 1987. Moreover, such a change on itself did not turn the abstractionist position to a causal one, because the purpose of the change had nothing to do with the passing of property issue. Cf Lars van Vliet, ‘The Transfer of Moveables in Scotland and England’ (2008) 12 *Edin L Rev* 173, 191.

<sup>384</sup> It might be bizarre for some modern lawyers to understand this case in the sense that this should have been simply a claim based on the defendant’s unjust enrichment, the unjust factor being failure of consideration. The reason why the plaintiff’s counsel did not simply raise a claim based on unjust enrichment but had to rely on equitable rescission was because ‘unjust enrichment’ had not yet judicially been seen as an independent head of liability in England by that time. Rather, it was treated as an implied contract, being a species of contracts. To successfully maintain such claim therefore, the ‘fictitious contract’ must be valid while the ‘contract’ in the present case was void due to incapacity. Such historical fallacy can be seen as well just one year later in the House of Lords in *Sinclair v Brougham* [1914] AC 398, where a claim for recover of money paid under an ultra vires thus void contract was rejected following such ‘implied in law contract’ logic (see also *Cowern v Nield* [1912] 2 KB 419). It was not until 1996 that unjust enrichment has been judicially recognised as an independent causative event of obligation in English law: *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 710 (Lord Browne-Wilkinson).

<sup>385</sup> (1869–71) LR 3 PC 548.

Philip Levi & Co granted a pledge the wool of the firm's next clip to be shorn, though there was no change of possession for such conveyance. Later on, Philip Levi & Co went insolvent, thus the trustee obtained possession of the very wool and refused to give it up to the plaintiff who, unsurprisingly, brought trover against the trustee. Again, the crucial issue in this case was whether the plaintiff had the right of pledge, the effect of which was a lien empowering the plaintiff to bring trover against wrongful possessors. In the Privy Council, the plaintiff won the case for two reasons. First, the somewhat strange conveyance of granting a pledge by way of not giving possession to the pledgee was nonetheless valid thanks to South Australian Act No 4 of 1855–56, which was an 'Act to give a preferable lien on Wool, from season to season, and to make Mortgages on Sheep, Cattle, and Horses valid without delivery to the Mortgagee'. Second, as the defendant's counsel argued, that the incapacity problem from the prohibiting clause in the plaintiff's Charter rendered all those agreements void, it was nevertheless irrelevant to the present case; as Mellish LJ pointed out,

the only point which it appears to their Lordships is necessary to be determined in the present case is this, that whatever effect such a clause may have, it does not prevent property passing ... under a Conveyance ... which, under the ordinary circumstances of law, would pass it. The only defence which can be set up here ... is under the plea of not possessed, that the right of property and the right of possession never passed to the Plaintiffs. Their Lordships are of opinion, that whatever other effect it has, it cannot have the effect of preventing the property passing.

From the above two cases an abstractionist conclusion can be drawn that, the key to determine the possibility of reversion of title under a contract involving incapacity is the *object* which the invalidating rule of incapacity points to. If such invalidating rule of incapacity points to the transfer of title to the very subject-matter (similar to cases of

illegality above), then such rule is relevant for determining both the validity of conveyance and the validity of contract; it is a matter of identity of defect. If it only points to one's ability to enter into a specific kind of contract alone (as shown in the above two cases), then such rule does not negate the conveyance under such contract, so long as all those requirements for conveyance have been met.

## 5.2 Chinese Law

### 5.2.1 Invalidating Factors Other Than Impaired Consent

Unlike English law, in Chinese law it is difficult to find rules confirming either abstraction or causality by rules for invalidating factors other than impaired consent, though legislative provisions on incapacity may serve as an evidence for abstraction.

A juridical act<sup>386</sup> may be void due to illegality. Specifically, a dispositive juridical act may be void due to three kinds of illegal reasons, namely (i) those violating the law, (ii) those against public interest,<sup>387</sup> and (iii) those with an illegal purpose yet under colour of a legal form.<sup>388</sup> A obligatory (contractual) juridical act may be void due to three kinds of illegal reasons as well, namely, (i) those violating mandatory provisions of laws<sup>389</sup> and

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<sup>386</sup> For a detailed discussion, see chapter 1 above.

<sup>387</sup> Ie, the so-called 'public order and good customs' (公序良俗).

<sup>388</sup> General Provisions of Civil Law 1986 (China), art 58(5), now General Provisions of Civil Law 2017 (China), art 153.

<sup>389</sup> The so-called 'mandatory provisions' (强制性规范) in law can be further divided into mandatory provisions on effectiveness (效力性强制性规范) and mandatory provisions on administration (管理性强制性规范), and only the former has the effect of vitiating a contract, whereas the latter does not: *Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law* (Supreme Court Interpretation No 5, 2009) art 14.

administrative regulations, (ii) those against public interest, and (iii) those with an illegal purpose yet under colour of a legal form.<sup>390</sup> As grounds for a dispositive juridical act and an obligatory juridical act are roughly the same, unsurprisingly it is of substantial difficulty to find a case showing an abstract approach or a causal approach, because the probability of voidness of the two juridical acts due to identity of defect is hypothetically very high, making it impossible to tell from these cases whether the void obligatory juridical act is the cause negating the dispositive juridical act or not. The situation is more or less the same with respect to contract being void for non-compliance with formality requirements.

When it comes to invalidating rules of incapacity, there is a nuanced difference compared to invalidating rules on illegality and informality. In Chinese law, the concept 'minor' is further divided into two sub-categories, namely, those with no civil capacity (below the age of 8) and those with limited civil capacity (from the age of 8 to the age of 18).<sup>391</sup> Based on this concept there are two provisions relevant to the present topic. On the one hand, in the Judicial Interpretation for the General Provisions of Civil Law 1986 it was articulated that a pure-profit making juridical act (such as accepting a sum of money) done by a minor, whether with no or limited civil capacity, is valid ('Rule One').<sup>392</sup> On the other, however, in the Contract Law 1999 it was articulated that such

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<sup>390</sup> Contract Law 1999 (China), art 52(3)–(5).

<sup>391</sup> General Provisions of Civil Law 1986 (China), art 12, though strictly speaking for individuals above 16 but under 18 (being of full age), some of them may be treated as if they were of full age under certain circumstances: General Provisions of Civil Law 1986 (China), art 11. Now the minimum threshold has been reduced from the age of 10 to the age of 8 by the General Provisions of Civil Law 2017 (China), art 19, with the exceptional maximum age being 16 unchanged: General Provisions of Civil Law 2017 (China), art 18.

<sup>392</sup> *Opinions on Several Issues concerning the Implementation of the General Provisions of Civil Law* (Supreme Court Interpretation No 6, 1988) art 6. Arguably, the newly enacted General Provisions

exceptional rule for the validity of entering into a pure profit-making contract by a minor was only limited to those with limited civil liability rather than those with no civil liability ('Rule Two'):<sup>393</sup>

A contract concluded by a person with limited civil capacity of conduct shall be effective after being ratified afterwards by the person's statutory agent, but a pure profit-making contract ... need not be ratified by the person's statutory agent.

Then a clue for abstraction arises. Suppose a minor at his age of eight accepted a conditional gift contract<sup>394</sup> offered from an adult, promising that if he passes the yearly examination in his primary school, the adult will give him a PlayStation as a gift. As this is a void contract due to the minor's age being under 8 (according to Rule Two), the minor cannot sue for performance of such conveyance of ownership to the PlayStation even if he successfully meets the condition. Yet if the adult has transferred ownership to the PlayStation to the minor, title passes to the minor by a valid juridical act of conveyance, and does not revert automatically (according to Rule One) despite the fact that the underlying conditional gift contract is a void one (according to Rule Two).

## 5.2.2 Clue in Unjustified Enrichment

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of Civil Law 2017 (China), art 144 did not explicitly accepted the validity of a pure profit-making juridical act by a minor with no civil capacity (compared to one with limited civil liability: General Provisions of Civil Law 2017 (China), art 145). Nevertheless, such provision should not be regarded as the repeal of art 6 of the judicial interpretation above, meaning that a pure profit-making juridical act by a minor with no civil capacity is still valid under the current law: CHEN Su (ed), *民法总则评注 [Commentary of the General Principles of the Civil Code] vol II* (Law Press 2017) 1036.

<sup>393</sup> Contract Law 1999 (China), art 47.

<sup>394</sup> Unlike English law, the term 'gift contract' makes sense in Chinese law: Contract Law 1999 (China), art 185.

Another clue for abstraction can be found in the scope of application of the unjustified enrichment provision<sup>395</sup> to contract cases. Unlike the law of unjust enrichment in English law, the law of unjustified enrichment in Chinese law serves as a residual device because the Contract Law 1999 already has its own rules for restoring the property status back to the status quo, one of which is article 58, the meaning of which has been fully discussed in the previous chapter. Then the question is: what kind of residual role does the unjustified enrichment take? The short answer is that the main fields in judicial practice are two with similarity, namely, mistaken transfer of ownership to money and to movables.

In a mistaken payment case in Beijing, the claimant went to a branch of a bank to have his lost card re-issued. He thought he had to pay 100 RMB according to a clause of the bank for card issuing, though the clause in question was not a valid one. He nevertheless paid and the bank accepted such payment. He therefore brought a claim for money paid with interest. The Beijing First Intermediate Court held that the basis of his claim was unjustified enrichment because there was no contract as the basis for the bank to be enriched by acquiring ownership to the 100 RMB note in question at the expense of the claimant. Article 92 of the General Provisions of Civil Law 1986 applied and the

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<sup>395</sup> General Provisions of Civil Law 1986 (China), art 92: 'If one acquires an interest and without a lawful basis at the expense of another, the unjustified enrichment shall be returned to the person who suffered the loss.' Now the governing rule is General Provisions of Civil Law 2017 (China), art 122. Nonetheless, it should be noted that unjustified enrichment is not always the result where the conveyance is valid while the contract is void in Chinese law; it is subject to specific rules if any on the contrary. Take transfers of stocks of public listed companies as an example. Securities Law 2006 (China), art 120 provides that 'any trading result of a transaction, which has been conducted in accordance with the trading rules as formulated according to law, shall not be altered.' This means even if the parties executed the transfer based on a mistakenly agreed price of 0.01 RMB per share which should have been 0.001 RMB per share, no relief of unjustified enrichment was awarded by the trial judge.

claimant won the case.<sup>396</sup> Neither article 58 of the Contract Law 1999<sup>397</sup> nor article 117 of the General Provisions of Civil Law 1986<sup>398</sup> was cited in the case. This means the consequence of mistaken payment in Chinese law is a personal remedy based on unjustified enrichment rather than a proprietary remedy based on vindication, because ownership to money passes despite the non-existence of an underlying contractual obligation to pay.

In a mistaken transfer case, a driver employed by the claimant mistakenly delivered boxes of beverages to the defendant, who was in fact not the designated recipient merchant. After the defendant accepted such delivery, the claimant realised it and hence brought a claim against the defendant. The Court held that the defendant had acquired ownership to these beverages in question, though there was no contract being the basis for such acquisition, rendering it to be an unjustified enrichment. As these goods were still in the possession of the defendant, restitution in kind should be the appropriate remedy for the claimant.<sup>399</sup> Again, neither article 58 of the Contract Law 1999 nor article 34 of the Property Law 2007 was cited in the case. This means the consequence of

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<sup>396</sup> *Yu Shanlan v ICBC Xuanwu Sub-branch and Beijing Branch* 喻山澜诉工行宣武支行、工行北京分行不当得利纠纷案 (SPC Gazette, Issue 6, 2005). See also *China Construction Bank Shilin Sub-branch v Yang Fubin* 中国建设银行石林县支行诉杨富斌不当得利纠纷案 (SPC Gazette, Issue 6, 2003).

<sup>397</sup> Ie, the vague clause discussed in detail in chapter 4 above, stating that ‘after a contract becomes invalid or is rescinded, any property obtained under the contract shall be returned. If it is impossible or unnecessary to return the property, compensation shall be made at an estimated price ...’ though it is not clear whether the puzzling phrase ‘return the property’ denotes personal restitution based on unjustified enrichment or proprietary restitution based on vindication.

<sup>398</sup> Ie, the vindication clause, stating that the owner can ask the non-authorised possessor to hand over possession to movables or immovables in question back to the owner. It could be roughly seen as the predecessor of article 34 of the Property Law 2007 for cases decided before 2007.

<sup>399</sup> *Fujian Nan'an Delian Logistic Co Ltd v Zhuo Taidi* 福建省南安市德联物流有限公司诉卓太饼不当得利纠纷案 (Mei Civil First No 104, 2011).

mistaken transfer in Chinese law is a personal remedy based on unjustified enrichment rather than a proprietary remedy based on vindication, because ownership to goods passes despite the non-existence of an underlying contractual obligation to convey.

By contrast, when it comes to cases involving an avoided contract (as opposed to no-contract cases above), judges varied. While some still thought it appropriate to apply the unjustified provision to such cases,<sup>400</sup> others refused to apply such provision to determine the consequences of property transfers under the avoided contract.<sup>401</sup> Writers of textbooks on the law of obligations also held different view on this issue.<sup>402</sup> It is submitted that: given that the unjustified enrichment provision applies to property transfer cases involving no underlying contract, as shown in cases discussed above, such provision should apply to property transfer cases involving an avoided underlying contract. This is because the effect of avoiding a contract is that the contract is void and null *ab initio*, which, by definition, has no real difference with the situation where there is no contract at all; there seems to be no justification for any such differentiation. Once we accept this proposition, it follows that property transferred under an avoided underlying contract amounts to an unjustified enrichment of the transferee, just like property

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<sup>400</sup> *Guangxi Beisheng Group Ltd v Beihai Weihao Real Estate Development Co* 广西北生集团有限责任公司与北海市威豪房地产开发公司、广西壮族自治区畜产进出口北海公司土地使用权转让合同纠纷案 (SPC Gazette, Issue 9, 2006); *Northeast Securities Plc v Huang Xianpeng* 东北证券股份有限公司诉黄暹鹏、深圳市鹏润达置业集团有限公司不当得利纠纷再审案 (Guangdong Civil Retrial No 5, 2011).

<sup>401</sup> *Wang Pu v Yuan Qin and others* 王璞诉苑勤、新疆拜城音西铁热克煤业有限公司不当得利纠纷上诉案 (Xinjiang Civil II Final No 58, 2014); *Guangtai Construction Group Ltd v Yu Pihu* 余丕虎与广泰建设集团有限公司建设工程分包合同纠纷二审案 (Wenzhou Civil Final No 293, 2015).

<sup>402</sup> For instance, in YANG Lixin, *债法总论 [General Introduction to Obligational Law]* (Law Press 2011) 135, it was argued that the unjustified enrichment provision should apply, whereas in CUI Jianyuan, *债法总论 [General Provisions of Obligations]* (Law Press 2013) 306, it was argued that the unjustified enrichment provision should not apply.

transferred under an illegal and void underlying contract. Since unjustified enrichment is a causative event of obligation, no proprietary claim-right can be triggered by it. What the transferor has is a personal right to ask for re-conveyance from the transferee with the help of the court order. This means relatively speaking, the principle of abstraction not the principle of causality is the more reasonable and more coherent conclusion that can be drawn from the clue based on interpreting the application scope of the unjustified enrichment provision in Chinese law.

### **5.3 Abstraction and Land/Immovable Registration Legislation**

After having dealt with the relation between abstraction and underlying basis involving several kinds of invalidating factors, this sub-section handles a special issue: the effect of land/immovable registration legislation to the operation of the principle of abstraction. One might feel so far as registered title to land (the English term)/immovables (the Chinese term) is concerned, whether the system of land registration itself bars the possibility to avoid a conveyance whatsoever regardless of the underlying contract is rescinded or nullified, therefore making the principle of causality impossible to exist? One might feel just the opposite way, ie, if rectification, especially retroactive rectification is possible under a system in which registration is constitutive and conclusive of title to land, whether the impact of rectification may present a challenge to abstractionism? It will be seen that neither of these feelings is accurate, and the reason why such strong registration system blocks its coexistence with the principle of causality (therefore the principle of abstraction, its opposition must follow to be existent) is not simply because of its strong attribute of conclusiveness, but because of the ‘rectifiable

mistakes' recognised in the statute do not cover mistakes due to a flawed underlying basis of conveyance.

### 5.3.1 English Law

#### A. *Conclusiveness and rectification*

The concept of conclusiveness, recognised by the Law Commission as 'one of the fundamental principles of registered conveyancing, is that it is registration that vests the legal estate in the registered proprietor.'<sup>403</sup> It is present in section 58 of the Land Registration Act 2002,<sup>404</sup> which provides:

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<sup>403</sup> Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 9.4. Note that English law does not have a unified registration system, but three throughout the history, namely, registration of deeds, land charges registration and registration of title. Apart from registration of deeds which was abolished in 1969 (Law of Property Act 1969, s 16, cf Law of Property Act 1925, s 11), the other two systems, ie land charges registration and registration of title are still running in a mutually exclusive way. So far as creation and transfer of freehold or leasehold title to land is concerned, registration of title is the only one being relevant (Land Registration Act 2002, ss 4, 27), as the land charges registration mainly just applies to equitable and statutory interests (Land Charges Act 1972, s 2). As their names indicate, registration of title differs in that it focuses specifically on title itself rather than instruments which affects the title conveyance. As a result, a purchaser can rely on the entries on the register in the system of registration of title while generally he has to inspect the title deeds and the land in order to discover any interests binding him in the system of land charges registration, subject to exceptions, eg, interests which are registrable but not registered will be void if he gives value. Therefore, to clarify, 'registration' and 'conclusiveness' mentioned in this chapter only refers to registration of title, not land charges registration.

<sup>404</sup> Its predecessor was Land Registration Act 1925, s 69(1), which was believed by Slade LJ in *Argyle Building Society v Hammond* (1984) 49 P & CR 148, 156 as a statutory magic with the effect of vesting title by registration even where the conveyance is a forged one.

If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration.

Subsection (1) does not apply where the entry is made in pursuance of a registrable disposition in relation to which some other registration requirement remains to be met.

This means registration alone, not anything else (eg the underlying contract) in the whole process of transaction is the reason why title passes to the transferee, as long as all those requirements for a valid registration are met. Moreover, section 26 provides that if such transferee is to transfer the title on to a third party, such disposition is valid only subject to any limitation by operation of law or any limitation reflected by an entry in the register.<sup>405</sup> It naturally follows (i) that a valid entry in the register is the only constituent element of a conveyance (registration being therefore ‘constitutive of title’), and (ii) that the valid entry itself suffices to render the very title transferred on to a third party; such subsequent transfer will not be void or voidable due to flaws outside the entry, for example a flaw in the underlying contract for the previous transfer (registration being therefore ‘conclusive of title’).

Conclusiveness certainly does not mean that the particular entry on the register cannot be challenged whatsoever; where some kinds of error are involved, the registrar has the power (and is obliged in case of a court order) to correct the mistake,<sup>406</sup> which

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<sup>405</sup> Land Registration Act 2002, s 26. These two provisions prove the land registration to be a closed system of ‘title by registration’ in the sense that ‘the basis of title should be the register’, which is a crucial object for reform: Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: A Consultative Document* (Law Com No 254, 1998) para 10.43.

<sup>406</sup> Land Registration Act 2002, sch 4 paras 2(1)(a), 5(a).

prejudicially affects the title of a registered proprietor.<sup>407</sup> This is ‘rectification’, a sub-specie of the concept ‘alteration’ for the purpose of the Land Registration Act 2002,<sup>408</sup> Hypothetically, an extreme conclusive system of land registration without any possibility of rectification would turn the debate of abstraction and causality completely in vain, because one might argue that such a system of ‘title by registration’ overly emphasised the role of registration, making not only the underlying contractual basis irrelevant to the title-holding, but also making the conveyance itself irrelevant to the title-holding. The key to determine whether abstraction or causality coexist with such system of land registration therefore lies not in the attribute of conclusiveness, but in the meaning of rectification.<sup>409</sup> Specifically, two questions are to be answered. First, whether those rectifiable ‘mistakes’ include those emerged in the underlying basis of the transfer, rather than in the process of the transfer itself? Second, whether such rectification could be done with a retroactive effect? If one wants to keep the possibility of causality existing in such a constitutive and conclusive registration system, answers for these two questions above

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<sup>407</sup> These two elements constitute the definition of rectification under the 2002 Act: Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 10.6.

<sup>408</sup> the meaning of which is narrower than in the Land Registration Act 1925 (cf Land Registration Act 1925, s 82). Under the current law, other categories of alteration, namely (i) bringing registration up to date, (ii) giving effect to interests excepted from the effect of registration, and (iii) removing a superfluous entry (Land Registration Act 2002, sch 4 paras 2, 5) are described by Roger Smith as ‘administrative alteration’, implying his somewhat radical proposition that only rectification not administrative alteration may ‘significantly reduce the reliability of the register ... [which] means that the register ceases to be conclusive.’ Roger Smith, *Property Law* (8th edn, Pearson 2014) 276.

<sup>409</sup> It was suggested in Elizabeth Cooke that another kind of (non-rectification) alteration, ie ‘bringing register up to date’ in Land Registration Act 2002, sch 4 paras 2 and 5 might instead be the proper respond to the scenario of rescission of a voidable transaction: Elizabeth Cooke, ‘Land Registration: Void and Voidable Titles – A Discussion of the Scottish Law Commission’s Paper’ (2004) Conv 482, 483 fn 8. Nevertheless, this entry by its name ‘up to date’ literally does not contain the idea of retroactive reversioning of title; such doctrine in *Load v Green* and *Car & Universal Finance Co Ltd v Caldwell* does not apply in cases with respect to registered title to land: Charles Mitchell and others (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) para 40-20 fn 68.

must be both in the affirmative. However, as discussed immediately below, neither of these two can be answer in the affirmative.<sup>410</sup>

### *B. Mistake and retrospectivity*

As regards the first question, it is fair to say that the meaning of mistake varies from context to context, yet unfortunately the 2002 Act itself did not explicitly give a clear definition to such an ‘amorphous concept’<sup>411</sup>, rendering grounds for rectification rather vague.<sup>412</sup> However, it is equally fair to believe that the principle of causality cannot be inferred from such vagueness, as was confirmed by the Law Commission that<sup>413</sup>

Rectification is confined to cases where a mistake is to be corrected. ... It will not therefore cover cases ... where the register was originally correct, but subsequent events have made it incorrect. In such cases the court will no longer have any discretion (albeit one that has seldom been exercised) whether or not to give effect to the right so established.

In footnote 23 of this quoted paragraph above it was further clarified that this particular situation refers to ‘where A was registered as proprietor, but B subsequently obtains an

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<sup>410</sup> The following paragraphs only focus on what the law is under the ‘title by registration’ system. For the debate on what the law should be, particularly in three-party situations, ie, the rectification-indemnity contest between the innocent original owner and the innocent third party registered proprietary, see Emma Lees, ‘Title by Registration: Rectification, Indemnity and Mistake and the Land Registration Act 2002’ (2013) 76 MLR 62. Cf Amy Goymour, ‘Mistaken Registrations of Land Exploding the Myth of “Title by Registration”’ [2013] CLJ 617.

<sup>411</sup> Simon Cooper, ‘Regulating Fallibility in Registered Land Titles’ [2013] CLJ 341.

<sup>412</sup> Apart from cases of first registration and transfer of property rights by operation of law (being irrelevant to the present topic), prevailing examples include: original and subsequent dispositions involving forgery, selling of land already sold, creation of encumbrance in error, deleting an entry in error: Charles Harpum and others, *Megarry & Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 7-133. Notably, all of these examples remained at the level of double-checking the validity of conveyance; none of these went further to touch the underlying basis of the conveyance.

<sup>413</sup> Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 10.7 (footnotes omitted).

order setting aside the transfer to A on the grounds that A procured it by fraud on B.’ By such example the Law Commission shed light on the meaning of the register being ‘originally correct but subsequently incorrect’: it is clear that ‘a valid conveyance (by registered disposition) involving a voidable underlying contract which is later on rescinded’ as a whole shall not be seen as rectifiable ‘mistake’ for the purpose of the 2002 Act. This must be the explanation, for what was vitiated due to the ‘fraud’ in the example must be the underlying contract; it cannot be the conveyance. This is because if the conveyance was vitiated by fraud, such purported disposition is void *ab initio*: then it makes no sense to describe such registered disposition as an ‘originally correct’ one, because the entry made in the register simply does not reflect the true effect of such void conveyance. It can therefore be concluded that those rectifiable mistakes recognised by the Law Commission do not cover the case where the mistakes merely lie in the underlying contract; there is no rectifiable mistake in the entry arising under the registered conveyance involving such contract.<sup>414</sup> In other words, so far as the deed of conveyance is a valid one, there is no mistake for the purpose of the 2002 Act even if the underlying basis of conveyance is a void or voidable one. Hence it is impossible to deduce the existence of the principle of causality from the concept ‘mistake’ in the 2002 Act, albeit how vague it is.

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<sup>414</sup> Such proposition is also supported by *Ruoff & Roper*, the leading loose-leaf book for conveyancing practitioners, where the statutory meaning of mistake was explained that ‘the entry of a person as having acquired an estate or interest under what proves to be a voidable disposition is not a mistake. Unless it had been rescinded at the time of registration, the disposition would be valid and it would not be a mistake to enter the dispo as the proprietor.’ Darren Cavill and others, *Ruoff & Roper on the Law and Practice of Registered Conveyancing* (R 75: May, Sweet & Maxwell 2016) para 46.009. Of course, the exception is where the contract had been rescinded before or at the time of registration, because in this situation there was no valid conveyance at all, thus the register, if any, was not even ‘originally correct’, thus falling within the concept of mistake for rectification. (Cf *Baxter v Mannion* [2011] EWCA Civ 120, [2011] 1 WLR 1594 [31] (Jacob LJ), though this is a case of adverse possession rather than rescinded contract, thus making such doubt on *Ruoff & Roper* being merely an obiter.)

As regards the second question, there are some authorities having answered it in the negative, among which the most famous one is *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd*.<sup>415</sup> Title to a plot of land in question was registered under the claimant's name (Malory BVI) from 1993. Three years later a company having roughly the same name as the claimant (except the domicile being in the UK not BVI) was dishonestly set up, and successfully defrauded the Land Registry to have the register of the land in question changed, with a new land certificate under its name (Malory UK). Afterwards, Malory UK sold and 'executed' the conveyance of title to such land to the defendant Cheshire in 1999. Cheshire soon realised that the claimant had remained in actual occupation by fencing the land and blocking the windows for a couple of years, but Cheshire still entered the land and demolished a structure on it. Malory BVI sued for rectification and damages, both of which were maintained in the High Court Chancery Division. Cheshire appealed to the Court of Appeal, which generally dismissed the appeal, because the transfer of title to land from Malory UK to Cheshire was void, and Malory BVI, by possession of land, has a beneficial interest under a bare trust for rectification, along with a right also based on possession to bring trespass for damages. However, the Court of Appeal removed a provision in the trial judge's order for rectification with a retrospective effect.

Admittedly, the fundamental question in *Malory v Cheshire* is how to treat a forged conveyance rather than how to treat a conveyance, the underlying obligation of which involves fraud, hence the result of the case as a whole cannot serve as an authority for either abstraction or causality. Nevertheless, the point whether rectification can be

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<sup>415</sup> [2002] EWCA Civ 151, [2002] Ch 216.

retrospective decided in this case is of high relevance to the present discussion. After having considered precedents<sup>416</sup> against the power of retrospective rectification, Arden LJ states:<sup>417</sup>

Indeed, the amendment to section 83 made by the Land Registration Act 1997 (being so far as material the insertion of subsection (1)(b), above) indicates that rectification was not intended to be retrospective. If there is an overriding interest, registration is subject to it and there is no need for retrospective rectification. If there is not, it amounts to rewriting history. ... If rectification can be ordered on a retrospective basis, the court should have regard to the policy of the Act, which is to give the registered proprietor the status of absolute owner.

Although Arden LJ's explanation on anti-retrospectivity was on the construction of rectification provisions in the 1925 Act, it applies to the construction of current law as well, because it seems that the legislative intent was not changed to a pro-retrospectivity one in the 2002 Act, with 'no big substantive changes'.<sup>418</sup> Quite the opposite, as can be indicated by the Law Commission's emphasis of conclusiveness mentioned above, the 2002 Act has made it even clearer on its anti-retrospectivity position. It is a general consensus among practitioners,<sup>419</sup> also confirmed by the Court of Appeal,<sup>420</sup> that rectification cannot be retrospective under any circumstance under the 2002 Act based on the understanding of the phrase 'for the future' in Sch 4, para 8 of such Act, which

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<sup>416</sup> *Freer v Unwins Ltd* [1976] Ch 288, 292; *Clark v Chief Land Registrar* [1993] Ch 294, 315.

<sup>417</sup> *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216 [41], [44]. Cf [86] (Clarke LJ) where it was suggested that Arden LJ's view on this point may merely be obiter. See also Duncan Sheehan, 'Rights to Rectify the Land Register as Interests in Land' (2003) 119 LQR 31.

<sup>418</sup> Elizabeth Cooke, 'Legislative Comment' [2002] Conv 11, 30.

<sup>419</sup> See eg, Charles Harpum, 'Registered Land — A Law Unto Itself?' in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis 2003) 201; Alexander Hill-Smith, 'Forgery and Land Registration: the decision in *Malory Investments v Cheshire Homes*' [2009] Conv 127, 132.

<sup>420</sup> *MacLeod v Gold Harp Properties Ltd* [2014] EWCA Civ 1084, [2015] 1 WLR 1249.

explicitly limits the power to alter the register to be ‘changing for the future the priority of any interest affecting the registered estate or charge concerned.’ Indeed, if rectification of a register based on a forged and thus *void* conveyance (as was decided in *Malory*) cannot be retroactive, then a fortiori a register based on a *valid* conveyance (of which only the underlying basis is void) could not be retroactively rectified either.

Notably, *Malory* was not followed in a recent Court of Appeal decision *Swift Ist Ltd v Chief Land Registrar*.<sup>421</sup> However, it is not the retrospectivity issue here but the beneficial ownership issue (ie, whether a forged conveyance makes the newly registered proprietor a ‘bare legal estate’ with the beneficial interest remained in the previously registered proprietor) in *Malory* that was challenged in *Swift*<sup>422</sup> for being decided *per incuriam*.

The above discussion means even if the first question were answered in the affirmative (though it is answered in the negative as discussed above), ie an entry based on a registered conveyancing involving a subsequently rescinded contractual obligation is a mistake for rectification, such rectification cannot be retroactive. Since it is impossible to correct the mistake retroactively, the very title transfer must be a valid one despite the rescinded contract, leaving the transferor only a right to ask for rectification to having the very title re-conveyed to him from the transferee. Therefore, it can be concluded that there is no doubt to confirm the principle, or at least the notion of abstraction rather than

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<sup>421</sup> [2015] EWCA Civ 330, [2015] Ch 602.

<sup>422</sup> *Swift Ist Ltd v Chief Land Registrar* [2015] EWCA Civ 330, [2015] Ch 602 [34]–[45].

causality as embodied in statutory provisions in which title conveyancing by registration is constitutive and conclusive of title to land.

### 5.3.2 Chinese Law

As mentioned in chapter 2, generally the transfer of property rights to immovables in Chinese law needs to be done by registration, subject to very limited exceptions for certain types of lesser property rights. Similar to English law, Chinese law also has a set of rules establishing the constitutive effect of such registration. The starting point consists of two provisions in the Property Law 2007. Article 14 provides that:

the creation, change, transfer or elimination of the real right of a real property shall, in case it shall be registered as required by law, become effective since the date when it is recorded in the real property register.

In addition, article 16 provides that ‘the real property register is the basis for determining the belonging and contents of a real property.’ The idea of these two provisions, as explained by the legislative interpretation, is to increase the degree of authority of the register and to protect the safety of transactions in accordance with the notion of publicity and public faith. This means the land register is the basis for holding and transferring property rights to immovables, and should be the *only* basis for determining to whom a property right belongs. Hence apart from the constitutive effect, the effect of conclusiveness, albeit not explicitly mentioned, can be inferred from these two provisions as well.

Since practically speaking, mistakes are inevitable on the register, the effect of conclusiveness is of course not entirely absolute in Chinese law just as the position in English law. In response, article 19 provides that:<sup>423</sup>

Any right holder or interested party that believes that any item recorded in the real property registry is *wrong* may apply for correcting the registration. ... Where the right holder recorded in the real property registry does not agree to the change, the interested party may apply for dissidence registration. If ... the applicant fails to bring an action within 15 days since the date of dissidence registration, the dissidence registration shall cease to be effective. If the dissidence registration is inappropriate and causes damages to the right holder, the holder may request the applicant to make compensation for damages.

The situation of register being ‘wrong’ was defined by the Judicial Interpretation on Property Law in 2016 to be the situation ‘where a party has evidence that the information recorded in a register of immovable property is inconsistent with the true status of a right’.<sup>424</sup> The real question is, similar to the discussion on English law of mistaken register, whether such ‘wrong’ (adjective) in Chinese law include situation where the underlying basis of the transfer is set aside so that the conveyance appeared on the register can be automatically rectified? And even if such situation amounts to ‘wrong’ (adjective) for the purpose of the 2007 law, whether the rectification can be a retroactive one, making automatic re-vesting of title possible? Unfortunately, the legislation provides no clear answer.

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<sup>423</sup> Property Law 2007 (China), art 19 (emphasis added). For the right of indemnity as a result of such mistaken registration, see Property Law 2007 (China), art 21, but this is irrelevant to the present discussion.

<sup>424</sup> *Interpretation I of the Supreme People’s Court on Several Issues concerning the Application of the Property Law* (Supreme Court Interpretation No 5, 2016) art 2.

In judicial practice, there are authorities confirming no automatic re-vesting of title. In an appeal case in Shanghai, for example, the defendant's agent sold the defendant's flat to a third party and completed the registered disposition without the consent of the defendant. The third-party purchaser then sold the ownership on to the claimant, who was registered as the proprietor of the flat. When the claimant realised that the defendant took possession of the flat, he brought vindication against the defendant. The claim was successful in the first instance, but failed in the appeal by the First Intermediate Court of Shanghai. While acknowledging that the transfer of the defendant's ownership between the defendant's agent and the third party purchaser was an ultra vires disposition due to lack of the defendant's consent, notably, the appeal Court nevertheless described the claimant as the 'owner', and the defendant as the 'possessor'.<sup>425</sup> It can therefore be inferred from the Court's wording that given the claimant was after all registered as the proprietor, the defendant could not be restored to the status of the registered owner automatically before he applies for rectification. Similarly, in another appeal case in Shandong province, the claimant's brother signed a contract of sale of the claimant's flat with the defendant without the claimant's authorisation. The brother performed the contract by a change of entry under the defendant's name in the register with a forged signature. The defendant, therefore, took possession of the flat, as a result of which the claimant brought an action for the return of possession of the flat. While acknowledging both the contract and the registered disposition in question was void due to an ultra vires disposition, the Court nevertheless dismissed the claim of regain possession of the flat in question, because the claimant did not regain ownership of the flat until the register was

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<sup>425</sup> *Lian Chengxian v Zang Shulin* 连成贤诉臧树林排除妨害纠纷案 (SPC Gazette 2015 No 10).

rectified.<sup>426</sup> It can be inferred from the judgment that: since in cases where the conveyance is void due to forgery but the ownership was registered under the wrong person's name, the 'true owner' cannot ask for the return of possession because of lacking ownership unless such register is rectified, then a fortiori in same cases where the conveyance is valid with a mere avoided underlying contract, the automatic reversioning of title is impossible either. What the 'true owner' has to wait for before being awarded the relief of ejectment, is the execution of the judgment by a re-conveyance from the 'wrongful possessor' back to him, which means there is no retrospectivity of rectification under article 19.

Moreover, after checking 115 published civil cases<sup>427</sup> citing the rectification of wrong register clause, ie, article 19 of the Property Law 2007, among all kinds of rectifiable mistakes recognised before the Court, none of them is where the underlying contract was avoided subsequently due to fraud or illegality while the conveyance was completed with all other requirements having been met. From this it can be inferred that the scope of rectifiable errors in article 19 does not cover the aforementioned situation in the first place, not to speak of the causal issue of automatic reversioning of title by avoiding the contract, ie, whether such rectification can be a retroactive one or not. On the other hand, however, this means there is no case explicitly recognising the abstractionist position either, ie, where the contract is void but the conveyance is valid by registered disposition, the transferor cannot get back possession to the immovable in question until

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<sup>426</sup> *Wang Gang v Li Xiuhe and others* 王刚诉李秀和等房屋买卖合同纠纷案 (Linyi Commercial Final No 261, 2015).

<sup>427</sup> <[www.pkulaw.cn/CLink\\_form.aspx?Gid=89386&Tiao=19&km=pfnl&subkm=0&db=pfnl](http://www.pkulaw.cn/CLink_form.aspx?Gid=89386&Tiao=19&km=pfnl&subkm=0&db=pfnl)> accessed 15 Jan 2017.

he obtains a judgment for rectification. Therefore, although the principle of causality cannot be deduced from these legislative provisions on rectification of immovable registration, the principle of abstraction cannot be deduced *only* based on these provisions on constitutive and conclusive effect either, though an abstract way of understanding the effect of these provisions sounds more reasonable than a casual way of understanding.

#### **5.4 Summary for Chapters 4 and 5**

Chapter 4 shows to what extent does English law has a seemingly non-uniform abstraction principle. Although the answer whether transfers of ownership is abstract or causal is not clear enough in Chinese law, at least the answer could be interpreted to be either abstract or causal but could not straddle abstraction and causality. In English law, by contrast, the answer seems to straddle so depending on particular invalidating factors that we are talking about, though in reality, English law does not straddle between causality and abstraction either. As for spontaneous mistakes, English law is abstract; as for fraudulently induced mistakes, English law at first blush is causal, but can be interpreted in an abstractionist way, and hence further proves the possibility of abstraction in ‘intent alone’ transfers. Chapter 5 deals with the question whether the principle of abstraction exists in English and Chinese law with regard to transfers involving other invalidating factors, such as where the underlying obligation is void due to illegality, incapacity, and informality as to validity. As regards English law, the position is abstract in the sense that the underlying basis being void due to such kinds of invalidating factors does not *ipso facto* render the conveyance void. As regards Chinese law, it is argued that abstraction can be inferred both from rules on invalidating factors

and clues in unjustified enrichment. Finally, the land registration system being constitutive and conclusive of title together with rules on rectification do not present a challenge to abstractionism in both jurisdictions. As for what the law should be, ie, whether it would be ‘unfair’ for the transferor if there is a mere personal right based on unjustified enrichment rather than vindication based on property, this is beyond the scope of inquiry of chapters 4 and 5, and will be dealt with in chapter 8.

## CHAPTER 6 EFFECTIVE CAUSALITY IN TRUSTS

The previous two chapters have discussed the operation of the principle of abstraction on the footing of authorities mainly at common law. This chapter aims to explore a special feature in English law that although the property transfer system is notionally abstract, the consequence of a valid conveyance involving a flawed underlying basis is not always simply a personal right triggered by unjust enrichment. Rather, the consequence sometimes might be a right beyond *in personam* under a constructive trust in equity to reverse unjust enrichment — this is the very basic scenario we will discuss from time to time in the following paragraphs.

As will be explained in the first section of this chapter, although this does not conceptually change the abstract nature of the English system, it makes the English system effectively causal in the sense of proprietary attributes of trusts based on tracing, following, and immunity from execution and insolvency being available, though the notion that a constructive trust has the same effect on insolvency priority as a consensual trust is questionable. Based on the conclusion that there are proprietary attributes in such trust, a further question is why and when such trust arises. As will be discussed in the second section of this chapter, some of these incidents recognise an immediate trust model while others grant a trust arising out of contractual rescission (‘power model I’), among which a coherent doctrine is difficult to find. In addition, by accepting the rationality of the ‘power model II’, English law can be understood as both notionally and effectively abstract in equity too just like it can be understood at common law. Finally,

the now-abolished third model, ie, the remedial constructive trust model will be covered as well.

A preliminary issue should be clarified at the beginning. By the well-known, dominant classification of trusts in English law, trusts can be divided into four species: express, implied, resulting, and constructive.<sup>428</sup> However, to make the classification of trusts purer and simpler, the chapter instead adopts a dichotomy of (i) consensual trusts, referring to all kinds of trusts created by the settlor's 'declaration of trust' (whether in the form of express words or implied facts, whether proven by evidence or by presumption), and (ii) constructive trusts, referring to all kinds of trusts created not by declaration, but by operation of law.<sup>429</sup> Names of these two species may vary, but the idea are the same, derived from the judgment of Lord Nottingham in *Cook v Fountain*.<sup>430</sup> Looking at the dominant classification, an 'implied' trust could be based on implication of facts, which is consensual due to the existence of a declaration of trust, and could be based on

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<sup>428</sup> FW Maitland, *Equity: A Course of Lectures* (2nd edn revised by John Brunyate, CUP 1936) 53, which (first edition published in 1909) was described as 'conventional' and 'common' by George P Costigan, 'The Classification of Trusts as Express, Resulting, and Constructive' (1914) 27 Harvard LR 437. This was also followed in traditional textbooks, eg, Philip H Pettit, *Equity and the Law of Trusts* (12th edn, OUP 2012) 68.

<sup>429</sup> Perhaps the 'consensual-constructive' contrast is not strictly-speaking perfect either, because the logical opposition of 'consensual' is 'non-consensual' not 'constructive'. Also, it could reasonably be argued that the 'consensual-constructive' contrast is not collectively exhaustive, because it leaves no room for trusts created by statute (eg Administration of Estates Act 1925, s 33 and Insolvency Act 1986, s 306), which, despite lacking certainty of object, may well be counted as 'trusts': *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694, 707–08 (Viscount Radcliffe); *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167, 177–78 (Lord Diplock). However, trusts created by statute are outside the scope of enquiry of this thesis, therefore, the term 'constructive trusts' is still adopted in this thesis to describe the opposition of all kinds of consensual trusts, in order to reduce further complexity by introducing another new terminology.

<sup>430</sup> 'All trusts are either, first, express trusts, which are raised and created by act of the parties, or implied trusts, which are raised or created by act or construction of law.' *Cook v Fountain* (1676) 3 Swan 585, 591; 36 ER 984, 987. His Lordship's word 'express' has the same meaning with the word 'consensual' adopted here, and his Lordship's word 'implied' has the same meaning with the word 'constructive' here.

implication of law, which is constructive due to inexistence of a declaration of trust. Similarly, a 'resulting' trust, due to the word 'resulting' only indicating the *moving direction* of beneficial interest rather than the *reason* why such interest arises, could be either consensual, such as presumed resulting trust, or constructive, such as automatic resulting trust.<sup>431</sup> As a result, where 'constructive trust' is mentioned in this thesis, it covers those overlapping concepts such as constructive trusts, trusts implied in law, and automatic resulting trusts, and where 'consensual trust' is mentioned in this thesis, it covers those overlapping concepts such as express trusts, trusts implied in fact, and presumed resulting trusts.

## 6.1 'Proprietary Rights' in Equity

### 6.1.1 Rights under a Constructive Trust

Before we analyse in detail why and when a trust could arise by operation of law for the transferor where he was involved in an impaired consent transfer, assuming for now that there are indeed such trusts arising for the benefit of this kind of transferors, a preliminary question is how this relates to the abstraction-causality debate. Under the operation of the abstract system, the transferor in an impaired consent transfer loses the legal title to the property<sup>432</sup> upon the completion of conveyance with mere personal rights

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<sup>431</sup> Cf Sir Nicolas Browne-Wilkinson, *Constructive Trusts and Unjust Enrichment* (The Holdsworth Club, University of Birmingham 1991), reminding us that 'resulting trusts and constructive trusts are two different animals.' This is because his conceptual premise, which is not the premise of this chapter, is that all resulting trusts, *including automatic resulting trusts*, are based on presumed intent rather than operation of law.

<sup>432</sup> Strictly speaking, a right held on trust is not necessarily a legal title; it could be a personal right such as a debt, or an equitable interest (the beneficiary's right under a trust) in the case of a sub-

against the transferee irrespective of whether it was based on unjust enrichment or wrongs. The intervention of equity by means of a trust can to a large extent, though not in all cases, make the transferor significantly better off in a number of ways under the current English law,<sup>433</sup> namely, (i) tracing, following and third-party liability,<sup>434</sup> (ii) no bar of limitation,<sup>435</sup> and (iii) immunity from execution and insolvency.<sup>436</sup> As a result, even though the transferor still does not have a ‘property right’, as the right transferred is not re-vested to him at common law, he in fact enjoys a ‘proprietary’, or at least something more than a mere ‘personal’ remedy in equity.

However, the aforementioned three benefits the transferor could enjoy by having a right under a trust are based on scenarios involving consensual trust, the next question is whether the same apply to constructive trusts too. Specifically, assuming there is a *constructive* trust triggered to reverse the transferee’s unjust enrichment under the operation of the English abstract system, whether the right under such *constructive* trust awarded to the transferor can also make the transferor better off just like a beneficiary under a consensual trust discussed above. The reason is plain: if the answer is in the negative, then to arm the transferor with the device of a constructive trust cannot make

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trust. For the purpose of the present scenario, however, the discussion is confined to impaired consent transfers of legal title to property rather than the latter two kinds of rights.

<sup>433</sup> Eg, the simple/compound interest division used to be a benefit for beneficiaries under trust compared to unsecured creditors, but *Sempre Metals Ltd v IRC* [2007] UKHL 34, [2008] 1 AC 561 changed the law by confirming that compound interest can be awarded to a mere personal claim as well, though notably *Sempre Metals* has recently been overruled by *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39, [2018] 3 WLR 652.

<sup>434</sup> *Barnes v Addy* (1873–74) LR 9 Ch App 244; *Re Hallett’s Estate* (1880) 13 Ch D 696; *Re Oatway* [1903] 2 Ch 356; *Boscawen v Bajwa* [1996] 1 WLR 328. For the relationship between following and subsequent claims arising from it, see Lionel D Smith, *The Law of Tracing* (OUP 1997) 10–11

<sup>435</sup> Limitation Act 1980, s 21(1), cf Limitation Act 1980, s 21(3).

<sup>436</sup> *Farr v Newman* (1792) 4 TR 621, 100 ER 1209; *Caillaud v Estwick* (1794) 2 Anst 381, 145 ER 909; Insolvency Act 1986, s 283(1), (3)(a).

the transferor better off in any sense, and thus it does not change anything on the English abstract system even from an effective perspective. To answer this question, first of all, it is wrong to say that the answer is simply in the affirmative because constructive trusts are just the same as consensual trusts. This is because, as pointed out by Professor Swadling, the constructive trust should not be seen as a genuine trust, and the content under the mask of ‘constructive trust’ is in essence ‘nothing more than two types of court order: (i) that the defendant pay a sum of money to the claimant; and (ii) that the defendant convey a particular right to the claimant.’<sup>437</sup> Nonetheless, it is equally wrong to believe, just because constructive trust is a fiction, it means all that apply to consensual trusts must not apply to constructive trusts without special justification or policy concerns. An examination of the aforementioned three main aspects is therefore necessary to see if there is any proprietary effect in the constructive trust.

As regards whether the point (i) tracing, following and third-party liabilities applies to the case of constructive trust, there is no direct answer in either common law or statutes. When it comes to the issue of tracing and following, the answer could be inferred to be in the affirmative from the Courts’ inclination to find constructive trust to help trace into any unauthorised substitution where common law tracing<sup>438</sup> does not apply in particular cases. For instance, Lord Templeman in *AG for Hong Kong v Reid* relied on constructive trust as a basis for tracing from the original form of profit (the bribe) into the new form of profit (the title to land in New Zealand),<sup>439</sup> which means the legal premise

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<sup>437</sup> William Swadling, ‘The Fiction of the Constructive Trust’ (2011) CLP 399.

<sup>438</sup> *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721.

<sup>439</sup> *Attorney General of Hong Kong v Reid* [1994] 1 AC 324.

his Lordship assumed is that tracing applies to property held on constructive trust. By contrast, when it comes to the issue of third-party liabilities of dishonest assistance and knowing receipt, the answer might be inferred to be in the negative from the nature of these liabilities. As for dishonest assistance, while the constituent element of the ‘primary wrong’ is not confined to breach of trust, there must be some primary wrong ‘breach of fiduciary obligations undertaken by the trustee’,<sup>440</sup> or in a broader sense,<sup>441</sup> ‘breach of equitable duties’.<sup>442</sup> However, problems arise in the case of constructive trust: since the trustee under such trust is not ‘subject to all the fiduciary obligations and disabilities of an express trustee’<sup>443</sup>, and the constructive trustee’s mere obligations to pay back money or re-convey title is not a primary but secondary (remedial) in the form of court order to make restitution for wrongs, such duty is impossible to be ‘breached’. Since duties under constructive trust cannot be breached, it follows that dishonest assistance cannot apply to constructive trust due to lack of constituent element. As for knowing receipt, similarly, the crucial point here is whether there is an equitable duty possible to be breached in the first place, and this depends on how we look at the nature of knowing receipt. If we treat the constructive trust (here assuming there is) triggered by breach of an express trust as a genuine trust, with ‘custodial duties which are the same as some of the duties which are voluntarily assumed by express trustees’<sup>444</sup>, or ‘duty to preserve trust property’<sup>445</sup>, or

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<sup>440</sup> *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 387 (Lord Nicholls).

<sup>441</sup> Because ‘not every breach of duty by a fiduciary is a breach of fiduciary duty’: *Bristol & West Building Society v Mothew* [1998] Ch 1, 16 (Millet LJ). For instance, breach of the duty to exercise reasonable care when investing the trust fund is a breach of non-fiduciary equitable duty.

<sup>442</sup> Paul S Davies, *Accessory Liability* (Hart Publishing 2015) 97; John McGhee (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell 2016) para 30-078.

<sup>443</sup> *Lonrho Plc v Fayed* (No 2) [1992] 1 WLR 1, 12 (Millet J).

<sup>444</sup> Charles Mitchell and Stephen Watterson, ‘Remedies for Knowing Receipt’ in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 130.

‘basic trust duties to preserve the trust assets’<sup>446</sup>, then a sub-recipient of the subject-matter held by the knowing recipient (being the constructive trustee following such analysis) may well be liable as a constructive trustee, thus the liability of knowing receipt may well be imposed to those act ‘in breach of constructive trust’. However, if we adopt the opposite views that under the liability of knowing receipt, there is no such duty of trusteeship akin to a genuine trustee, but merely a wrongs-based liability assimilated with inconsistent dealing without the mask of ‘being liable as (if) a constructive trustee’,<sup>447</sup> then it is meaningless to talk about knowing receipt in cases of constructive trust. This is because, where the knowing recipient of the trust fund deals with it in a way which he knows or ought to have known is inconsistent with the terms of the trust on which they were originally held under the express trust, and makes another person, with the same state of mind, become a sub-recipient of the trust fund, then since the knowing recipient is not a constructive trustee in the first place, there can be no ‘breach of constructive trust’ on the part of the sub-recipient, but simply another wrongs-based liability for another inconsistent dealing.

As regards point (ii) no bar of limitation, though as mentioned in the previous sub-section above, the 1980 Act did not provide a clear answer on the issue of claims by beneficiaries under a constructive trust free from the bar of limitation period of six years,

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<sup>445</sup> Simon Gardner, ‘Moment of Truth for Knowing Receipt’ (2009) 125 LQR 20, 22.

<sup>446</sup> Robert Chambers, ‘The End of Knowing Receipt’ (2016) 2 Can JCL 1, 4.

<sup>447</sup> William Swadling, ‘The Nature of Knowing Receipt’ in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017), which adopted half of the arguments (wrong-based liability) but refused the other (unjust-enrichment-based liability) made by Lord Nicholls, ‘Knowing Receipt: The Need for a New Landmark’ in WR Cornish and others (eds), *Restitution: Past, Present and Future* (Hart Publishing 1998) and Peter Birks, ‘Receipt’ in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing 2002), though note that the *precise* wrongdoing here should be inconsistent dealing in the eyes of Swadling while it should be akin to dishonest participation in breach of trust in the eyes of Lord Nicholls.

cases did answer it in the negative. For instance, in *Soar v Ashwell*, Kay LJ stated that ‘there are certain cases of what are, strictly speaking, constructive trusts, in which the Statute of Limitations cannot be set up as a defence.’<sup>448</sup> In a recent case *Williams v Central Bank of Nigeria*, though a case concerning third-party knowing receipt and assistance liabilities, many of its ideas cover generally all those labelled ‘constructive trust’ in the sense that the ‘sole obligation of any practical significance is to restore the assets immediately.’<sup>449</sup> Since a constructive trustee cannot be seen as a true trustee in the sense that he is ‘liable as if he were’ a trustee because he ‘never assumes the position of a trustee’,<sup>450</sup> the claim for recovery of the subject-matter of the trust therefore does not fall within section 21(1) of the 1980 Act. The consequence is that such claim for recovery should either be barred (i) by the statute of limitations, as Lord Sumption decided, after six years from the date on which the right of action accrued according to section 21(3), or more precisely, be barred (ii) by equitable doctrine of laches.<sup>451</sup> This is because the claim is based on an equitable wrong other than breach of trust (given that the knowing recipient is not a genuine trustee at all), it follows that not only the special limitation rule

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<sup>448</sup> *Soar v Ashwell* [1893] 2 QB 390, 405.

<sup>449</sup> *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 [31] (Lord Sumption).

<sup>450</sup> *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 [64] (Lord Neuberger), citing *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, 409 (Millet LJ). Note that in *Paragon* Millet LJ said there are two classes of constructive trustees, and for the first class of constructive trustees who assumed the duties of a trustee, ‘the constructive trustee really is a trustee’. However, since the examples Millet LJ gave in support of such view were secret trusts (*McCormick v Grogan* (1869–70) LR 4 HL 82) and *Rochefoucauld v Boustead* trusts, and these should not be classified as constructive trusts but should be consensual trusts, it is reasonable to say that such first class of constructive trusts being genuine trusts does not exist. And it follows all constructive trusts are those where the ‘trustee’ never assumed duties of trusteeship and thus is not a genuine trustee, and the claim of recovery against him should therefore be barred from limitation periods.

<sup>451</sup> For the division of labour between the limitation act and laches involving breach of trust, see eg, William Swadling, ‘Limitation’ in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing 2002); Gary Watt, ‘Laches, Estoppel and Election’ in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing 2002).

in section 21(1) does not apply, the general limitation rule in section 21(3) does not apply either. Moreover, since the Limitation Act 1980 mainly deals with common law claims, there is no other statutory period in the 1980 Act governing a claim against equitable wrongs which may trigger a constructive trust, then we are thrown back on the doctrine of laches. Although the precise bar in *Williams v Central Bank of Nigeria* is questionable, what remains unquestionable is that a constructive trust, unlike a consensual trust, is unable to prevent the right in question from being a time-barred one.

As regards point (iii) immunity from execution and insolvency, there is no direct answer with reasoning but just a widespread assumption. So far as immunity from execution is concerned, we might infer from the consequence, ie, any of the express trustee's personal creditors 'taking the goods in execution would have himself been converted into a trustee'.<sup>452</sup> Such trustee must be a constructive trustee simply because of lacking the declaration of trust from either the execution officer or the creditor receiving the proceeds of sale of the trust property. Suppose such recipient creditor goes bankrupt as well later on while holding the proceeds in question, and his personal judgment creditor (say, 'sub-creditor') again takes the goods in execution. Then it seems reasonable that such sub-creditor should be liable to the beneficiary as a constructive trustee as well, otherwise the law would be highly inconsistent in the sense that while the beneficiary's claim can bind the trustee's creditor (where the location of the subject-matter changed for the first time), such claim cannot bind the trustee's sub-creditor (where the location of the subject-matter changed for a second time). This being so, in that the beneficiary's claim

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<sup>452</sup> *Foley v Burnell* (1783) 1 Bro CC 274, 278; 28 ER 1125, 1128.

can bind the sub-creditor, it naturally follows that a right under a constructive trust should be immune from execution of judgments just like the case of express trust.

Now here comes the final but the hardest issue: the immunity from insolvency, ie, whether constructive trusts fall within the meaning of s 283(3)(a) of the Insolvency Act 1986 just like consensual trusts? It is submitted that the answer could be in the negative although the answer seems to be firmly in the positive from the perspective of many judges.<sup>453</sup> Unlike provisions in other statutes defining ‘trust’, section 283 does not explicitly recognise the application of constructive trust,<sup>454</sup> nor does it explicitly deny it.<sup>455</sup> Section 436, a provision specifically for interpreting ‘expression used generally’ in the 1986 Act does not say anything either; nor did the parliamentary White Paper<sup>456</sup> mention it. However, another influential paper revealing the legislative background, the Cork Report, had a paragraph on this issue:<sup>457</sup>

The fundamental principle that the insolvent’s property does not include property held on trust by him for any other person is not confined to cases of express trusts, but extends also to cases of *implied* and *constructive* trust. This includes not only such obvious cases as *money held by a solicitor in a client’s account* and *the proceeds of sale of a client’s investments held by a stockbroker*, but also *money received by a person for a specific purpose and not applied for that purpose* at the date of the person’s bankruptcy.

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<sup>453</sup> *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105 (Goulding J); *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812 (Mummery LJ), see also dicta in *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272 (Ch), [2008] BCC 22 (Mann J).

<sup>454</sup> Eg, Law of Property Act 1925, s 53(2), which clearly states ‘[t]his section does not affect the creation or operation of resulting, implied or constructive trusts.’

<sup>455</sup> Eg, Trustee Act 1925, s 68(17), which clearly states ‘the expressions “trust” and “trustee” extend to implied and constructive trusts.’

<sup>456</sup> Department of Trade and Industry, *A Revised Framework for Insolvency Law* (White Paper, Cmnd 9175, 1984).

<sup>457</sup> Sir Kenneth Cork, *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558, 1982) para 1044 (emphasis added).

At first blush, it seems therefore apparent that constructive trusts are included in the ambit of s 283(3)(a). However, if we take a closer look again, we might find another story from the examples described as ‘constructive trust’ in the quote above. Notably, an interesting point in English law is that the scope of ‘constructive trust’ is somewhat fluid; trust lawyers sometimes apply the label ‘constructive’ to trusts which should not be classified as species of constructive trusts.<sup>458</sup> Did such loose talk happen again here in Cork Report? In other words, when the Cork Report mentioned constructive trust in the quote above, does it in reality denote any genuine constructive trust? Among the three examples in support of the statement that implied and constructive trusts should be immune from trustee’s insolvency, the first two (ie, money held by a solicitor in a client’s account and the proceeds of sale of a client’s investments held by a stockbroker) clearly denote implied (in fact) trusts rather than constructive trusts. Professional agents such as a solicitor or a stockbroker holding money of a client owes fiduciary duties to such client does not necessarily create a trust; it could be a simple agent-principal relationship, or on the contrary, a simple outright transfer.<sup>459</sup> Yet when there is a trust, it is based on a declaration of trust implied from parties’ intention, which is a matter of fact, as a result of

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<sup>458</sup> Eg, presumed resulting trusts were classified by some lawyers as constructive not consensual: Peter BH Birks, ‘Restitution and Resulting Trusts’ in Stephen Goldstein (ed), *Equity and Contemporary Legal Developments* (Jerusalem 1992); Robert Chambers, *Resulting Trusts* (Clarendon Press 1997) ch 1; *Air Jamaica v Charlton* [1999] 1 WLR 1399, 1412 (Lord Millett). Cf William Swadling, ‘A New Role for Resulting Trusts?’ (1996) 16 LS 110; ‘Explaining Resulting Trusts’ (2008) 124 LQR 72, *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 708–09 (Lord Browne-Wilkinson). Another example is that the trust in *Rochefoucauld v Boustead* [1897] 1 Ch 196 was classified by some lawyers as constructive not consensual: Simon Gardner, ‘Reliance-Based Constructive Trusts’ in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010); Ying Khai Liew, ‘Rochefoucauld v Boustead (1897)’ in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012). Cf William Swadling, ‘The Nature of the Trust in Rochefoucauld v Boustead’ in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010); JE Penner, *The Law of Trusts* (10th edn, OUP 2016) paras 6.9–6.10.

<sup>459</sup> *Godfrey v Furzo* (1733) 3 P Wms 185, 24 ER 1022; *Harris v Truman* (1882) 9 QBD 264.

which the trust the Cork Report referred to by these two examples could only be a consensual one rather than a constructive one.<sup>460</sup> The third scenario seems to denote the *Quistclose* trust,<sup>461</sup> the classification of which has always been problematic thus judicially labelled by Lord Millett as ‘improbable’ resulting trust due to ‘formidable difficulties in this analysis, which has little academic support.’<sup>462</sup> Then what kind of resulting trust it is?<sup>463</sup> While it might be arguable to classify such resulting trust into the category of presumed resulting trust,<sup>464</sup> it must be fallacious to classify it into the category of automatic ones, because the primary trust in *Quistclose*<sup>465</sup> which did not fail initially cannot fail subsequently simply due to the failure of achieving the goal of payment despite continuance of three certainties and non-violation of the rule against perpetuities. This means the *Quistclose* trust could be interpreted as a species of consensual trusts, but not constructive trusts. Overall, given the high uncertainty in the classification of the *Quistclose* trust, it alone cannot be regarded as a strong evidence demonstrating that

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<sup>460</sup> See Peter Watts (ed), *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) para 6-041, approved by Briggs J in *Pearson v Lehman Brothers Finance SA* [2010] EWHC 2914 (Ch).

<sup>461</sup> It was originated from *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, the generalised fact of which is where a sum of money is advanced to a recipient for a specific purpose, but such recipient becomes insolvent before such purpose has been realised. In order to prevent the money from being the recipient’s bankruptcy assets thus distributable among its general creditors, the payor claims to have a beneficial interest to the money in question. This was allowed by Lord Wilberforce at page 580, who said that in this kind of legal relationship there is a primary trust at the time of advancement, and a secondary trust for the payor if the primary trust fails. This decision was followed in *Re Northern Developments (Holdings) Ltd* (Chancery Division, 6 October 1978); *Re Chelsea Cloisters* (1981) 41 P & CR 98; *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207; *Re EVTR* [1987] BCLC 646; *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164.

<sup>462</sup> *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [79], [100].

<sup>463</sup> Ie, the orthodox dichotomy of resulting trust being either presumed or automatic: *Re Vandervell* (No 2) [1974] Ch 269, 294 (Megarry J).

<sup>464</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 708 (Lord Browne-Wilkinson).

<sup>465</sup> Here assuming Lord Wilberforce’s ‘two trusts’ analysis being correct, ie, the ring-fenced fund and the beneficiaries under trust are legally recognised and persist since the moment of creation of the primary trust, thus the ‘three certainties test’ for creation is passed for such trust.

constructive trusts fall within the ambit of section 283(3)(a) of the 1986 Act, though unfortunately the *Quistclose* trust was cited by one of the leading textbooks on insolvency as the only example for supporting such doubtful proposition.<sup>466</sup>

In sum, it is submitted that one should be careful to reach the conclusion that just as consensual trusts, constructive trusts also have exactly the same attributes beyond *in personam*. Specifically, while the answer to tracing, following, and immunity from execution can still be in the affirmative, the answer to third-party liabilities, limitation periods, and immunity from insolvency should be in the negative.

### 6.1.2 Effectively Causal while Notionally Abstract

Given there are certain, albeit disputable attributes beyond *in personam* for rights under a constructive trust, the next question is, how does that affect the generally abstract picture of English law regarding property transfers, as already observed in previous two chapters. Will it turn the abstract system to causal? The short answer is that while it could be said that English law in this respect is abstract at common law while causal in equity, it would be more meaningful to many comparative lawyers to describe English law as notionally abstract while effectively causal without using the distinction between common law and equity. This will be elaborated in detail in the following paragraphs.

In the English law of trusts, the use of the word ‘proprietary’ is sometimes misleading to civilian lawyers. At first blush, it might well be seen that a trust creates an equitable property right because the beneficiary can, at least eventually, ‘exclude others

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<sup>466</sup> Roy Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) para 6-42.

from access to assets [and] enforceable against an indeterminate class of people.’<sup>467</sup> Thus, the existence of the constructive trust might be seen as a counter-example against the main argument that the abstract system exists in English law, because an ‘equitable property right’ or ‘equitable title’ passes by the creation of trust from the transferee, the ‘legal owner’ back to the transferor where the underlying basis of the property transfer is flawed.<sup>468</sup> However, this is an erroneous conception and cannot lead to the conclusion that the creation of a constructive trust to reverse unjust enrichment after an impaired consent transfer automatically reverts title back to the transferor. In fact, the underpinning of such conception, ie, the idea of ‘split (or dual) ownership in trust’ is a widespread misconception which could also be found among many scholars both in civil and common law jurisdictions as well.<sup>469</sup>

Such misconception can be clarified in three ways. First, the notion of ‘equitable property right’ ignores the universal exigibility problem. As pointed out by Professor Birks, rights *in rem* and rights *in personam* are differentiated according to their

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<sup>467</sup> RC Nolan, ‘Equitable Property’ (2006) 122 LQR 232, 235.

<sup>468</sup> Under such circumstances, even though legal title passes, many judges prefer to use the expression that equitable title could be ‘retained’ by (and thus retroactively revested to) the transferor: *Twinsectra Ltd v Yardley* (2002) [2002] UKHL 12, 81; [2002] 2 AC 164, 187 (Lord Millett); *Chase Manhattan Bank NA Ltd v Israel-British Bank (London) Ltd* [1981] Ch 105, 119 (Goulding J); *Collings v Lee* (2001) 82 P & CR 3 (Nourse LJ); *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 (Rimer J); *El Ajou v Dollar Land Holdings Plc* [1993] 3 All ER 717 (Millett J).

<sup>469</sup> See William F Fratcher, ‘Trust’ in Frederick H Lawson (ed), *International Encyclopedia of Comparative Law*, vol VI (Mohr Siebeck 1973) ch 11, para 1; Andrew G Paton and Rosanna Grosso, ‘The Hague Convention on the Law Applicable to Trusts and on Their Recognition and Implementation in Italy’ (1994) 43 ICLQ 654; Kent Schenkel, ‘Trust Law and the Title-Split: A Beneficial Perspective’ (2009) 78 UMKC LR 181; Gregory S Alexandra, ‘The Dilution of the Trust’ in Lionel Smith (ed), *The Worlds of the Trust* (CUP 2013). For the current situation in the East Asia civilian academia, see generally Ying-Chieh Wu, ‘Dispositions in Breach of Trust: A Comparison of English and Japanese Responses’ (DPhil Thesis, University of Oxford 2010).

exigibility.<sup>470</sup> The ability to exclude third party interference between a beneficiary under trust and a split property right-holder is essentially different. As discussed in previous chapters, by having a property right at law, A would normally have a right *prima facie* exigible against anyone else in the world except those who have the authority to make use of the thing. Therefore, suppose a stranger, X commits conversion or trespass to A's very right. X would be under a *prima facie* duty to A, unless in the case where X is a bona fide purchaser for value without notice. Such universal exigibility for a property right is plain. However, this is not the case when it comes to B's equitable interest.

In *MCC Proceeds Inc v Lehman Brothers*,<sup>471</sup> the claimants were beneficiaries of a trust of company shares held by certain shareholders. The shareholders, without the claimants' knowledge, pledged the share certificates to the defendants to secure a loan. After realising this, the claimant brought conversion against the defendants, but the claim was rejected by the Court of Appeal. Notably, the right to a share in the sense of the right to ask for dividends, for example, is a personal right, but the right to the share certificate is a property right, a title to chattel of which the content being the right to exclusive possession forever. The question in *MCC Proceeds* was, while the trustee (as the shareholder) certainly has the right to exclusive possession forever, whether the beneficiary (the claimant) has such right as well in order to maintain conversion: this is the crucial issue of exigibility. From the result of this case it is clear that the beneficiary

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<sup>470</sup> Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 180. A Similar idea can also be found in Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale LJ 710.

<sup>471</sup> [1997] EWCA Civ 3068, [1998] 4 All ER 675.

does not have such right, therefore lacks universal exigibility.<sup>472</sup> Similarly in *Leigh & Sullivan v Aliakmon Shipping Co Ltd (the Aliakmon)*,<sup>473</sup> the claimant entered into a contract of sale of goods with a seller. As discussed in chapter 3, in such context, title passes when parties intend it to pass,<sup>474</sup> so the claimant could have acquired title at the moment of signing of the contract, but the claimant did not. Instead, their intent was to pass title on physical delivery of the goods. Unfortunately, the goods in cargo were negligently damaged by the defendant shipowner, when the claimant had not yet been the owner, but a mere contractual right-holder who was bound to fail to maintain ‘negligence for loss caused to him by reason of loss of or damage to property,’<sup>475</sup> Nevertheless, in order to successfully maintain such claim, the claimant contended that since the contract is a specifically enforceable one, he also had an equitable title under a vendor-purchaser constructive trust.<sup>476</sup> However, this argument was again rejected in the House of Lords,<sup>477</sup> confirming that the equitable interest under such vendor-purchaser constructive trust was insufficient to sue in property torts, therefore lacking universal exigibility.

According to these aforementioned authorities<sup>478</sup> and summarises by scholars,<sup>479</sup> where a third-party X commits a tort with respect to a property on which B has an

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<sup>472</sup> Notably, Mummery LJ also mentioned *Healy v Healy* [1915] 1 KB 938 was wrongly interpreted to reach a pro-exigibility result in *International Factors Ltd v Rodriguez* [1979] QB 351, because it was not the beneficial interest but the title acquired by taking possession enabled the wife in *Healy* to sue detinue. As a result, *Rodriguez* cannot be seen as a binding counter-authority. This was supported by Lord Brandon in *the Aliakmon*.

<sup>473</sup> [1986] AC 785.

<sup>474</sup> Sale of Goods Act 1979, s 17(1).

<sup>475</sup> *Leigh & Sullivan v Aliakmon Shipping Co Ltd (the Aliakmon)* [1986] AC 785, 809.

<sup>476</sup> *Lysaght v Edwards* (1875–76) LR 2 Ch D 499; *Howard v Miller* [1915] AC 318.

<sup>477</sup> *Leigh & Sullivan v Aliakmon Shipping Co Ltd (the Aliakmon)* [1986] AC 785, 812.

<sup>478</sup> *MCC Proceeds v Lehman Brothers* [1997] EWCA Civ 3068, [1998] 4 All ER 675; *Leigh & Sullivan v Aliakmon Shipping Co Ltd (the Aliakmon)* [1986] AC 785. For the Australian

equitable interest, X breaches no duty to B. Rather, it is B's trustee who can sue X for his trespass. B cannot maintain property torts because B does not have property right to the thing in question, namely the right to exclusive possession. Of course, B could be granted an *indirect* remedy in equity compelling his trustee to sue the tortfeasor, or that they join together to sue for X.<sup>480</sup> But as has been pointed out by Professor Smith,<sup>481</sup> this is simply because of its effect on third parties, just like claims against any third-party interference with obligations in the fields of contract and tort law, which strictly speaking has nothing to do with property rights. Moreover, such nature of B's rights being *indirect* (ie, B after all has no claim against X) also indicates that B does not have an equitable version of B's trustee's rights.<sup>482</sup>

Another argument derives from the historical relationship between law and equity. Maitland admitted that some features in the old days did show that the right of the *cestui que trust* (beneficiary under trust) gradually began to look somewhat like a right *in*

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counterpart, see *DKLR Holding Co (No.2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510.

<sup>479</sup> A Tettenborn, 'Trust Property and Conversion: An Equitable Confusion' (1996) 55 CLJ 36; Ben McFarlane, 'The Centrality of Constructive and Resulting Trusts' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010); Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1.

<sup>480</sup> *Shell v Total* [2010] EWCA Civ 180, [2011] QB 86. It was suggested by Dr Douglas that because the trustee in *Shell v Total* joined the action brought by the beneficiary, this case cannot be seen as a good counter-example of the exigibility point: Simon Douglas, *Liability for Wrongful Interference with Chattels* (Hart Publishing 2011) 44. Even if it could count as a counter-example, it was criticised by scholars for being contrary to previous case law: Adam Rushworth and Andrew Scott, 'Total Chaos' [2010] LMCLQ 536; PG Turner, 'Consequential Economic Loss and the Trust Beneficiary' [2010] CLJ 445; Kelvin FK Low, 'Equitable Title and Economic Loss' (2010) 126 LQR 507; Ben McFarlane, 'The Numerus Clausus and the Common Law' in Nigel Gravells (ed), *Landmark Cases in Land Law* (Hart Publishing 2016).

<sup>481</sup> Lionel Smith, 'Trust and Patrimony' (2008) 38 *Revue générale de droit* 379.

<sup>482</sup> *Baker (Inspector of Taxes) v Archer Shee* [1927] AC 844, 850 (Viscount Sumner); *Schalit v Joseph Nadler Ltd* [1933] 2 KB 79, 83 (Acton and Goddard JJ).

*rem*, but it never has become this – not even in his era.<sup>483</sup> He denied the split ownership notion by emphasizing that equity did not treat the *cestui que trust* as the owner of, for example, the land. The law sees the trustee as the owner, but being bound to hold the land for the benefit of the *cestui qui trust*.<sup>484</sup> There is no conflict between law and equity, and they are not two competing laws regulating property issues. Otherwise section 25 of the Judicature Act 1873 would have abolished the whole law of trusts by enacting that since equity is to prevail, only the beneficiary but not the trustee, is the owner. Yet of course the Act has not done in that way.<sup>485</sup> Indeed, according to Maitland’s aphorism, equity had come not to destroy the law, but to fulfil it. When thinking about this issue, we should not say that the beneficiary is the real owner by extracting his equitable title from the pool of legal title. In the words of McLelland J in *Re Transphere*, although this right of beneficiary constitutes an equitable estate, it is engrafted onto, not carved out of, the legal estate.<sup>486</sup>

The third way is to look back on the starting point where the ‘equitable title’ is created by trust. From this perspective, the split ownership notion violates the principle of *nemo dat quod non habet*: a person cannot in general transfer a better title than what he

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<sup>483</sup> F W Maitland, *Equity: A Course of Lectures* (John Brunyate ed, CUP 1936) 107. For another debate of this theme around his era (though a little bit later), see Austin Wakeman Scott, ‘The Nature of the Rights of the *Cestui Que Trust*’ (1917) 17 Colum L Rev 269, cf Harlan F Stone, ‘The Nature of the Rights of the *Cestui Que Trust*’ (1917) 17 Colum L Rev 467.

<sup>484</sup> Eg, James LJ gave the definition of a trustee as ‘a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*.’ *Smith v Anderson* (1880) 15 Ch D 247.

<sup>485</sup> F W Maitland, *Equity: A Course of Lectures* (John Brunyate ed, CUP 1936) 17–18.

<sup>486</sup> *Re Transphere Pty Ltd* (1986) 5 NSWLR 309, 309. Brennan J also stated similarly in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1982] HCA 14, (1982) 149 CLR 431, 474. For a recent judicial confirmation in English law, see *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424.

himself possesses. The origin of a right *in rem*, including a new ownership, is the ownership itself. By and large, the two typical ways of carving out property rights are: (i) carving out some ‘incidents’,<sup>487</sup> thereby creating a *jus in re aliena*, and (ii) carving out all the incidents of ownership. In other words, to match the ‘carving out’ model, what the transferee acquires must be what the transferor already has. But when it comes to the so-called equitable title, things are different.<sup>488</sup> An important rule concluded by Hope JA<sup>489</sup> and derived from two old judgments,<sup>490</sup> is that an absolute owner in fee simple does not hold two estates: legal and equitable. He holds only the legal estate, with all the rights and incidents attached to that estate. Where a new beneficiary is set, whether by declaration of a new trust or assignment of beneficial right under an existing trust, his acquisition of equitable interests is not carved out from what the legal owner already have, but is instead an entirely new burden on top of the legal title. In contrast, the split ownership notion cannot explain the origin of those incidents constituting the beneficiary’s right over trust funds, because even the previous owner in fee simple did not have such an equitable estate containing those incidents to split from his original property rights at the outset. Likewise, in the field of non-express trusts, such a ‘separation and retention’ idea implied by Lord Wilberforce<sup>491</sup> was considered a myth by

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<sup>487</sup> AM Honoré, ‘Ownership’ in AG Guest (ed), *Oxford Essays in Jurisprudence: First Series* (Clarendon Press 1961).

<sup>488</sup> Cf Peter Jaffey, ‘Explaining the Trust’ (2015) 131 LQR 377, 387: ‘the trust consists of a particular distribution of all the elements of benefit and control that collectively make up the entitlement of an owner.’

<sup>489</sup> *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510.

<sup>490</sup> *Goodright v Wells* (1781) 2 Doug KB 771, 99 ER 491; *Harmood v Oglander* (1803) 8 Ves 106, 32 ER 293.

<sup>491</sup> *Vandervell v IRC* [1967] 2 AC 291.

Lord Browne-Wilkinson<sup>492</sup> and McLelland J.<sup>493</sup> This is because, similarly, when a transferee was seen as holding the property on resulting trust for the transferor, no rights or incidents are separated from the estate. Given there is no ‘separation’ during the process of creating a trust, it is meaningless to talk about ‘retention’. A proper understanding should be: an equitable interest newly arises for the first time under that trust, rather than remaining with the former right holder.<sup>494</sup>

Moreover, this view can be implied by statutory provisions as well. It is provided in the Law of Property Act 1925 that ‘a disposition of an equitable interest ... subsisting at the time of the disposition, must be in writing ...’<sup>495</sup> and ‘a declaration of trust ... must be manifested and proved by some writing.’<sup>496</sup> The former is a formality requirement to effect a disposition while the latter is an evidential requirement for proving the making of a declaration. The prerequisite for this difference between the two subsections is the logical possibility to draw a line between the disposition of a pre-existing equitable interest and the declaration of trust (creation of a new equitable interest). This distinction is obvious so long as we deny the notion of ‘split title’ or ‘dual ownership’. Otherwise following the logic of such notion, the ‘equitable title’ already exists in the property together with the legal title before disposition or declaration. Then a declaration of trust is conceptually a disposition of a pre-existing equitable interest, which on one hand should

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<sup>492</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669.

<sup>493</sup> *Re Transphere Pty Ltd* (1986) 5 NSWLR 309, 311.

<sup>494</sup> Whether such equitable interest should be described as a right *ad rem* or an ‘unconditional power to impose upon the trustee a duty to transfer to the former the rights to the trust *res*’ (Tatiana Cutts, ‘The Nature of Equitable Property: a Functional Analysis’ (2012) 6 J Eq 44, 72), but this debate does not affect the argument here.

<sup>495</sup> Law of Property Act 1925, s 53(1)(c).

<sup>496</sup> Law of Property Act 1925, s 53(1)(b).

be made in writing according to section 53(1)(c), on the other hand, however, need not be made in writing but merely be manifested by evidence in writing according to section 53(1)(b) — a contradiction therefore arises. Obviously, the legislature did not intend to create such a contradiction, and this means it also implicitly disagrees with using the notion of ‘split title’ or ‘dual ownership’ to explain the nature of equitable interest under trust.

It could be argued that beneficial interests are recognised as separate interests in that they can be disposed of separately from the trustee’s own fund and protected separately against the unsecured creditors. But this by no means indicates that it is a species of right *in rem*. For this analysis only seems promising at the level of trust assets, as Smith and Honoré pointed out, and absurdities result when we bring trust liabilities into the picture.<sup>497</sup> Specifically, the beneficiary does not enjoy preferential treatment against all kinds of unsecured creditors, particularly those creditors whose debts are incurred by the trustee for the purpose of managing trust assets. For instance, if the accounting fees and lawyer fees surpass the value of trust assets, these debts must be satisfied before the beneficiary’s claim towards the trust assets. Since obviously we cannot say that those accountants and lawyers have proprietary rights over the trustee’s trust assets, then *a fortiori*, it would be even more unreasonable to say that the beneficiary has any kind of property rights, needless to mention ‘ownership’ to the trustee’s trust assets.

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<sup>497</sup> Lionel Smith, ‘Trust and Patrimony’ (2008) 38 *Revue générale de droit* 379; Tony Honoré, ‘Trusts: The Inessentials’ in Joshua Getzler (ed), *Rationalising Property, Equity and Trusts: Essays in Honour of Edward Burn* (Butterworths 2003).

Now we can trace back to the original question: why is the ‘constructive trust’ usually labelled ‘proprietary’? From the arguments above we have already seen the nature of the right the transferor acquires under a constructive trust is essentially different from that of the right the transferor acquires by the re-vesting of title. The latter can no doubt be labelled ‘proprietary’ or ‘*in rem*’ under English law, while strictly speaking, the former cannot be so labelled. It may be better to call it a right ‘against a right’ rather a right ‘*in rem*’.<sup>498</sup> Another importance of correctly understanding the ‘proprietary’ attributes of constructive trust is that it not only helps to explain the English system of property transfers is not generally causal despite the role of trusts, but also helps to explain why the principle of separation would not be challenged in the English system despite the role of vendor-purchaser constructive trust. This is because although the rule was sometime described as ‘property/ownership passes in equity’ by a specifically enforceable contract,<sup>499</sup> this, due to the misconception of ‘split/dual ownership’ elaborated above, is erroneous from a conceptual perspective;<sup>500</sup> a ‘specifically enforceable contract’ should not be seen as a method of conveyance in English law.

In summary, to say the constructive trust is an award ‘beyond *in personam*’ does not mean that it is genuinely a ‘proprietary’ relief for the transferor involved in an impaired consent transfer. The existence of such device thus cannot be treated as a

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<sup>498</sup> See Ben McFarlane and Robert Stevens, ‘The Nature of Equitable Property’ (2010) 4 J Eq 1; Lionel Smith, ‘Philosophical Foundations of Proprietary Remedies’ in Robert Chambers and others (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009).

<sup>499</sup> *Holroyd v Marshall* (1862) HLC 191, 209; 11 ER 999, 1006. See also *Rose v Watson* (1864) HLC 672, 678; 11 ER 1187, 1190.

<sup>500</sup> Also note that the vendor-purchaser constructive trust itself is not unquestionable. For instance, it was argued by William Swadling, ‘The Vendor-Purchaser Constructive Trust’ in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Law Book Co 2005) that such remedy of specific performance should not be masked with the label ‘constructive trust’ at all.

counter-example of the existence of the abstract system in English law. Rather, it conceptually operates alongside the abstract system, though it makes the English system effectively causal. By saying ‘effectively’ it means although title does not automatically revert, by having an equitable interest under constructive trust the transferor would be able to trace his right into substitutions acquired by the transferee, follow his right into the property in question acquired by others, and have priority in the events of transferee’s execution of judgment debts and insolvency liquidation, just ‘as if’ (taking the fiction in the language of constructive trust) the title were automatically vested to the transferor by standards of many civilian jurisdictions. The transferor in England therefore looks in a better position than his counterpart, for example, another transferor involved in a similar situation of an impaired consent transfer, and holding a mere personal right triggered by unjustified enrichment in Germany.

## **6.2 Incidents in English Law**

As the core policy debate between abstraction and causality lies in cases of insolvency of the recipient (whether the original transferee or any subsequent recipient),<sup>501</sup> the aforementioned attribute of constructive trust, ie, being immune from insolvency is therefore a strong support for its result of making English law of property transfers effectively causal, though as having been argued in the previous paragraphs, that it is right to question whether constructive trusts have such attribute of immunity from insolvency at all. This sub-section handles a question based on an assumption, that even assuming constructive trusts have such attribute, does that mean English law is causality

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<sup>501</sup> Policy debates will be discussed in detail in chapter 8 below.

in equity with a consistent rationale? Before coming to the conclusion that this question should be answered in the negative, we must answer a preliminary question that: under what circumstances will the trust arise, and, how many kinds of trusts are there in these incidents. Three categories of incidents are to be discussed below. As for trusts arising where facts happen (the so-called institutional constructive trusts), such trust can be an (i) immediate trust, or (ii) a trust arising followed by contractual rescission in equity, or (iii) a trust followed by rescission of conveyance in equity. There are also incidents where trusts arising where courts see fit to grant a remedy (the so-called remedial constructive trusts).

### 6.2.1 Immediate Constructive Trust

Among incidents triggering immediate constructive trusts, the first is spontaneous mistake. In *Chase Manhattan Bank v Israel-British Bank (London) Ltd*,<sup>502</sup> the mistaken transferor, Chase Manhattan Bank, which was obliged to pay \$2m to Israel-British Bank, erroneously transferred that sum twice. When the recipient, Israel-British Bank, went into insolvency before repaying the unjustly enriched money, Chase Manhattan had no choice but to resort to a constructive trust to achieve preferential treatment and thus full repayment in the recipient's insolvency distribution. Goulding J held that 'a person who pays money to another under a factual mistake retains an equitable property in it.'<sup>503</sup> Thus generally speaking, even though legal title to money passes from the transferor to the

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<sup>502</sup> [1981] Ch 105.

<sup>503</sup> *Chase Manhattan Bank NA Ltd v Israel-British Bank (London) Ltd* [1981] Ch 105, 119.

transferee by the transferor's own spontaneous mistake, so long as the transferee keeps the money, he holds it on trust for the transferor.

However, the universal applicability of the *Chase Manhattan* trust was rejected 15 years later. In *Westdeutsche Landesbank Girozentrale v Islington LBC*,<sup>504</sup> the transferor, a merchant bank, advanced money to an authority in England under a 10-year interest rate swap exchange contract. As obligations to pay under this agreement had started to be performed since 1987, neither of the parties would have known that such kind of swap contract was to be held by the House of Lords to be void for being an *ultra vires* transaction in 1991.<sup>505</sup> After the advanced money was disposed of by the transferee, the transferor merchant bank argued that a *Chase Manhattan* constructive trust was imposed initially when the money was transferred in order to seek compound interest.<sup>506</sup> Such claim was rejected by Lord Browne-Wilkinson based on the following reasoning. First, although the basis of the transfer, viz the swaps contract was *ultra vires* and thus void, the payment itself was nevertheless valid in the sense that the legal title to money successfully passed. Secondly, the equitable title cannot be 'retained' unless it can be separated; there is no such thing as a separation of legal title and 'equitable title' in English law. Hence the test for the creation of a constructive trust is not 'non-beneficial transfer', but 'unconscionable retention'. Thirdly, as for the conscience issue, it is

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<sup>504</sup> [1996] AC 669.

<sup>505</sup> *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1.

<sup>506</sup> Although the transferor's claim was not made literally on the basis of *Chase Manhattan*, the transferor had to rely on such kind of trust. This is because at that time, the prerequisite to award the claimant a compound interest is that the claimant successfully establishes a proprietary interest; a mere personal right does not suffice. As said above, the law has changed and such prerequisite was abolished in *Sempra Metals Ltd v IRC* [2007] UKHL 34, [2008] 1 AC 561.

impossible for the transferee to ‘unconscientiously retain’ the money when the transferee is unaware of the fact that the basis of the transfer is a mistake.

Nonetheless, it should be noted that Lord Browne-Wilkinson did not totally cut off the link between mistake and constructive trust, at least where the recipient has had some knowledge of the mistake. As his Lordship said of *Chase Manhattan*:

[a]lthough the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust.<sup>507</sup>

As a result, even after 1996, spontaneous mistaken transfers could still possibly trigger a constructive trust for the transferor to reverse unjust enrichment. This is so at least where the transferee has knowledge of the fact that the legal title he holds is based on a mistaken performance of the obligation to transfer *before* the title passes on to a third-party successor. If so, a constructive trust for the spontaneous mistaken transferor would arise as a response to the transferee’s conduct of unconscionable retention.<sup>508</sup>

Now the issue is, whether there is a commonly applicable rationale that could be distilled from *Westdeutsche*? This might lie in the three of the four propositions laid down by Lord Browne-Wilkinson as ‘uncontroversial’:<sup>509</sup>

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<sup>507</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 715.

<sup>508</sup> As discussed in *Bank of America v Arnell* [1999] Lloyd's Rep Bank 399; *BCCI (Overseas) Ltd v Akindele* [2000] EWCA Civ 502, [2001] Ch 437; *Papamichael v National Westminster Bank Plc (No 2)* [2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341.

<sup>509</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 705. The fourth proposition is the consequence of the previous three quoted below, thus the fourth is not listed here.

(i) Equity operates on the conscience of the owner of the legal interest. ...

(ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience.

(iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is [dishonest assistant] ...

This means, where (i) there is an identifiable property, and (ii) where the transferee has got knowledge<sup>510</sup> so that the law regards it as unconscionable to keep the title, then a constructive trust arises immediately for the benefit of the transferor. In other words, the general doctrine seems to be: where the property in question is identifiable, the transferee's knowledge is a sufficient condition<sup>511</sup> for triggering the constructive trust. While knowledge does not have such magical effect at common law,<sup>512</sup> his Lordship believed it does in equity by creating an equitable interest. Interestingly however, there is, as found by Swadling,<sup>513</sup> a contrary evidence right in the very speech of Lord Browne-Wilkinson, from which no other member of the House of Lords dissented. It was his

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<sup>510</sup> His Lordship said it is the knowledge which affects conscience: 'Unless and until the trustee is aware of the factors which give rise to the supposed trust, there is nothing which can affect his conscience.' *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 709. Also at 714 his Lordship said 'I cannot understand how the recipient's "conscience" can be affected at a time when he is not aware of any mistake.'

<sup>511</sup> Rather than necessary conditions, because it is wrong to say that no constructive trust will arise where there is no factor affecting the transferee's conscience, as long as we conceptually acknowledge that automatic resulting trust is a kind of constructive trust rather than consensual trust: *Re Diplock* [1948] Ch 465. Though notably, in the eyes of Lord Browne-Wilkinson at 708, all resulting trusts, whether presumed or automatic, are consensual not constructive.

<sup>512</sup> Presumably due to the existence of the *numerus clausus* principle which is too rigid to be affected by mere knowledge: *Keppell v Bailey* (1834) 2 M & K 517, 39 ER 1042; *Hill v Tupper* (1863) 2 H & C 121, 159 ER 51; *King v David Allen and Sons Billposting Ltd* [1916] 2 AC 54; *Rhone v Stephens* [1994] 2 AC 310.

<sup>513</sup> William Swadling, 'Property and Conscience' (1998) 12 TLI 228, 235. At 236 he also cast doubt on the general function of knowledge (notice) by seeing its role in bona fide purchase, that 'notice performs a purely negative function. It does not turn rights which are otherwise personal into proprietary rights; it simply prevents pre-existing equitable property rights from being destroyed.' Similar notion could also be found in *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146, 167 (Diplock J) that notice 'is a shield not a weapon of offence.'

Lordship's antipathy towards 'off-balance sheet liabilities', in that if the commercial bank (the transferor) could win the present case:<sup>514</sup>

a businessman who has entered into transactions relating to or dependent upon property rights could find that assets which apparently belong to one person in fact belong to another; that there are 'off balance sheet' liabilities of which he cannot be aware; that these property rights and liabilities arise from circumstances unknown not only to himself but also to anyone else who has been involved in the transactions. A new area of unmanageable risk will be introduced into commercial dealings.

Following such antipathy, it means it is totally unacceptable to his Lordship where a new communication between the businessman and one of his creditors would change the nature of a specific right from personal to proprietary at the expense of the businessman's other creditors. Unfortunately, accepting the 'knowledge test' would just lead to this very result his Lordship dislikes: on Day 1 the mistaken payment transferor only has a personal right against the innocent recipient transferee, and on Day 2, by for instance, a phone call between the two, the transferor gives the transferee 'knowledge' of the very mistaken payment, thus successfully turning the personal right to a proprietary right, leaving other creditors of the transferee aware of nothing at all. If this is a correct finding, then the doctrine becomes blurred again; the formula 'identifiable property plus knowledge' seems not to be a very precise one that could be concluded in *Westdeutsche* with respect to the test for triggering a constructive trust to reverse unjust enrichment.

Notably, in support of Lord Browne-Wilkinson, McFarlane suggested a 'positive formula', which is in reality a modified one. McFarlane argued that such positive formula comprises three parts: first, that the transaction must cause the transferee's enrichment

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<sup>514</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 705.

(either acquiring a right or losing a duty) at the expense of the transferor, second, there must be a specific unjust factor (eg, spontaneous or induced mistake) for which there is no legal basis for the transferee to have such enrichment, and third, that the transferee must know both the enrichment and the unjust factor, while holding either the right initially acquired or its traceable product.<sup>515</sup> However, the aforementioned first ‘two parts’ simply reinstates the two constituent elements of an obligation triggered by unjust enrichment, and therefore by adding these ‘two parts’ to Lord Browne-Wilkinson’s original formula is just to reinstate that such formula is for triggering a constructive trust *to reverse unjust enrichment*, as opposed to other restitutionary or compensatory responses to other causative events. It follows while McFarlane’s theory is a self-contained one, it does not help to challenge the aforementioned contrary evidence found by Swadling, thus cannot serve to allay the vagueness in Lord Browne-Wilkinson’s ‘identifiable property plus knowledge’ test for triggering an immediate constructive trust.

Nevertheless, such vagueness in his Lordship’s test did not prevent it from being followed by subsequent cases involving spontaneous mistake.<sup>516</sup> Now the issue is, temporarily leaving the issue of vagueness aside, whether such test could be applied to other scenarios, such as induced mistake, therefore becomes a general test for recognising immediate trusts in all cases involving impaired consent transfers? The answer seems to be in the affirmative; till now, authorities have shown that at least in fraudulent

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<sup>515</sup> Ben McFarlane, ‘Trusts and Knowledge: Lessons from Australia’ in James Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing 2012). See also Ben McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 306.

<sup>516</sup> Eg, *Bank of America v Arnell* [1999] Lloyd’s Rep Bank 399; *Papamichael v National Westminster Bank Plc (No 2)* [2003] EWHC 164 (Comm), [2003] 1 Lloyd’s Rep 341.

misrepresentation cases,<sup>517</sup> the defrauded transferee could have a right under constructive trust to get back the property in question, even though the title to that property has already passed effectively at law.

However, this is not a long-established rule, but the answer appears to be in the negative before this century. In *Box v Barclays Bank plc*,<sup>518</sup> a case decided less than two years after *Westdeutsche*, some investors paid money to a company called Sylcon, a bank carrying on deposit-taking business without governmental authorisation. They later on realised that Sylcon went into insolvency and their deposit has been in accounts of another bank, Barclays. They therefore brought a number of claims against Sylcon, including to confirm Sylcon to be a constructive trustee because they contended that they deposited the money due to fraudulent misrepresentation by Sylcon's director. Such claim was dismissed. Ferris J refused to apply *Westdeutsche* as 'a general statement of the law applicable to all cases of fraud,'<sup>519</sup> and therefore rejected the idea that a constructive trust arises to all cases of misrepresentation where the 'identifiable property plus knowledge' test is met. However, since Ferris J also refused to acknowledge that there was convincing evidence proving the alleged defendant's fraud, and he said:<sup>520</sup>

That conclusion strictly makes it unnecessary for me to consider whether, if I had found that Sylcon obtained the plaintiffs' money by fraud, the result would have been to constitute Sylcon a trustee in respect of that money. But I heard a good deal of argument on the point and I think I should express my views on it.

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<sup>517</sup> As opposed to innocent misrepresentation and negligent misrepresentation cases.

<sup>518</sup> [1998] All ER (D) 108.

<sup>519</sup> *Box v Barclays Bank plc* [1998] All ER (D) 108, p 19.

<sup>520</sup> *Box v Barclays Bank plc* [1998] All ER (D) 108, p 17.

Therefore, Ferris J's denial of a constructive trust triggered by fraudulent misrepresentation can only be treated as *obiter dictum* with reduced authority, especially when it faces judgments on the contrary discussed below.

The first is *Collings v Lee*.<sup>521</sup> An estate agent fraudulently informed his customer (the transferor) that there was a buyer offering to purchase the land at a reasonable price. The buyer is in fact non-existent but merely an alias of the agent himself. Unsurprisingly, the customer mistakenly transferred the title to land to that name and asked the agent for the purchase money, which was never paid. Worse still, the fraudulent agent later on executed a charge on the title to secure a loan from Halifax, who was registered as the legal proprietor of the charge. The transferor realised such fact and claimed that she should not be bound by Halifax's charge. At first instance, based on the assumption that the transferor had no equitable interest, the trial judge resorted to the rule of overriding interest<sup>522</sup> to protect the transferor from being bound by the very charge. Halifax appealed, but failed again. However, Nourse LJ additionally questioned the trial judge's assumption above, and said that the transferor did have an equitable interest under an immediate constructive trust<sup>523</sup> which arose at the moment when the agent by fraudulent misrepresentation 'acquired the property without their knowledge and consent and in breach of his fiduciary duty to them.'<sup>524</sup> Similar idea could also be found in a company

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<sup>521</sup> (2001) 82 P & CR 3.

<sup>522</sup> According to Land Registration Act 2002, sch 3 para 2, then Land Registration Act 1925, s 70(1)(g), the interest to be protected by overriding interest is the interest of persons in actual occupation.

<sup>523</sup> Nourse LJ distinguished *Lonrho v Fayed (No 2)* [1992] 1 WLR 1, a case supporting the idea of 'constructive trust arising after contractual rescission'. This issue will be dealt with in the next sub-section.

<sup>524</sup> *Collings v Lee* (2001) 82 P & CR 3 [17].

case where such fiduciary relationship breaks down. A company director fraudulently induces the company to sell its property to himself without disclosing the development potential, the director breaching his fiduciary duty would also be treated as a transferee holding the property on constructive trust for the defrauded company.<sup>525</sup> Notably, though *Westdeutsche* was not cited in these cases, it does not mean Lord Browne-Wilkinson's immediate trust model is not applicable to the scenario of fraudulent misrepresentation, at least in cases involving breach of fiduciary duty. This is because, it is not difficult to construe the judgment of Nourse LJ in a way that: the reason why the estate agent was a constructive trustee was because of (i) the existence of the identifiable property, and (ii) the agent's knowledge of such acquisition which affects his conscience. *Westdeutsche* was finally cited as the authority two years later in *Papamichael v National Westminster Bank Plc (No 2)*.<sup>526</sup> The claimant was a lady who won a large sum of money on a Greek lottery. She planned to convert the money to US dollars for a fix term deposit wealth-management in NatWest Bank. However, in the course of business the money was remitted to a forex account of her husband, and NatWest refused to return the money to her account. She therefore brought claim against NatWest, which was successful. One of the issues in this case was whether the claimant's husband, entrusted by her to handle the business with NatWest, should hold the money in the forex account on constructive trust for the claimant. The trial judge, citing *Westdeutsche*, held that:

Equity imposes a constructive trust because ... that is what justice requires where an asset has been obtained by fraud. The fraudster knows he has no right to the asset. He is in conscience bound to hold the asset for the transferor.

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<sup>525</sup> *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] BCC 729.

<sup>526</sup> [2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341.

It could therefore be summarised that on the one hand, the test of ‘identifiable property plus knowledge’ is a test accepted by a number of subsequent cases for triggering a constructive trust to reverse the transferee’s unjust enrichment involving impaired consent, and such trust should be an immediate one. On the other hand, given that there is contrary evidence right in Lord Browne-Wilkinson’s judgment in *Westdeutsche*, whether such test is the accurate test conceived by his Lordship is still not beyond doubt. Apart from the internal inconsistency, as will be illustrated below, such test is not a universally-accepted one, exemplified by its major component, the power to rescind model.

### 6.2.2 Constructive Trust after Equitable Rescission

The rationale of constructive trust arising after the exercise of the transferor’s power to rescind has two variances depending on the subject-matter of equitable rescission. The original version which can be called ‘power model I’ believed that constructive trust arises after and *precisely because* the transferor elects to rescind the underlying *contract* in equity. It contains the idea of ‘effective causality’ due to its recognition of the ‘mirror effect’ between proprietary restitution and contractual rescission. Such model was stated by a number of judges pioneered by Lord Millett and received academic support from, for instance, Professors Worthington<sup>527</sup> and Bant.<sup>528</sup> The subsequent version, ie, ‘power model II’ partly indicated from *Allcard v Skinner* and systematically forwarded by Professor Häcker argued that the rationale for a constructive trust to arise does not rest on

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<sup>527</sup> Sarah Worthington, ‘The Proprietary Consequences of Rescission’ [2002] RLR 28.

<sup>528</sup> Elise Bant, ‘Reconsidering the Role of Election in Rescission’ (2012) 32 OJLS 467.

a causal understanding of conveyances, but is triggered by equitable rescission of *conveyance*, which can be done in the same way, and on the same grounds as equitable rescission of underlying contract, but independently from it.<sup>529</sup> It could therefore be said that such model contains the idea of effective abstraction as opposed to effective causality. The analysis will begin with the power model I and then power model II in the following paragraphs.

In *Lonrho Plc v Fayed*,<sup>530</sup> the transferor, Lonrho planned to sell the majority of its shareholding in the House of Fraser to a bidder who did not plan to buy the remainder of the shares of the company, so that Lonrho could then be discharged from the undertaking it owed to the Secretary of State and finally buy out the company. The transferee, a corporate vehicle mastered by the Fayedys purchased the shares in question by hiding the financial situation and the scheme of entirely controlling the House of Fraser, which Lonrho realised later on. This means that had Lonrho known the deception, it would not have agreed to sell its share to the corporate vehicle and would not have lost the chance to acquire shares from other shareholders. Lonrho therefore sued the Fayedys on three grounds, one being an equitable interest to the issued shares capital held by the Fayedys under a constructive trust. While the whole statement of claim was struck out, Millett J (as he then was) also responded to the question of constructive trust in the negative, with a general statement that:<sup>531</sup>

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<sup>529</sup> Birke Häcker, 'Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324.

<sup>530</sup> [1992] 1 WLR 1.

<sup>531</sup> *Lonrho Plc v Fayed* [1992] 1 WLR 1, 11–12.

A contract obtained by fraudulent misrepresentation is voidable, not void, even in equity. The representee may elect to avoid it, but until he does so the representor is not a constructive trustee of the property transferred.

In other words, a constructive trust did not arise immediately when the Fayeds acquired shares in question with knowledge of their own fraudulent misrepresentation; rather, it depends on whether Lonrho ever effectively exercised the power to rescind the contract. As Lonrho did not rescind in time due to his acquiescence, he lost the chance of becoming a beneficiary under a constructive trust despite the Fayeds' conscience had been affected much earlier.

In a similar case, many swindled victims deposited their money to several fraudsters and then to a property investment company, the ultimate transferee. Since the transferors could not trace their rights at common law due to a mixture of funds, they claimed to be able to trace their rights in equity to make the ultimate transferee liable for knowing receipt. They lost at first instance<sup>532</sup> for failure to establish the mental element of the defendant's knowing receipt, but they won the appeal thanks to the Court of Appeal recognised the knowledge of the defendant.<sup>533</sup> What the Court of Appeal did not reverse, being our concern here, was the trial judge, Millett J's view on a preliminary issue of whether there was a constructive trust for the defrauded transferors in the first place. Millett J again said that a precondition for triggering the constructive trust is contractual rescission by the defrauded transferors.<sup>534</sup> Of course, Millett J in these cases

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<sup>532</sup> *El Ajou v Dollar Land Holdings Plc* [1993] 3 All ER 717.

<sup>533</sup> *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685.

<sup>534</sup> *El Ajou v Dollar Land Holdings Plc* [1993] 3 All ER 717, 734. Although Millett J said that the trust here 'is not some new model remedial constructive trust, but an old-fashioned institutional resulting trust,' it should be noted that such a resulting trust is nevertheless also a constructive trust, though an institutional rather than a remedial one. This is because 'resulting' and

did not have a chance to express his disagreement with the immediate trust doctrine of Lord Browne-Wilkinson, simply because of the fact that these cases were decided earlier than *Westdeutsche*. Yet Millett J insisted on his rejection in some post-*Westdeutsche* cases when he became a Lord Justice.<sup>535</sup>

Other judges also expressed similar rejections. Rimer J in particular, spent a fair bit of ink in *Shalson v Russo*,<sup>536</sup> a case with the similar issue whether a constructive trust would immediately arise for the lender when the lender was fraudulently induced to advance money, in order to enable the lender to trace the right into substituted assets before having rescinded the underlying contract. Notably, by answering this in the negative, Rimer J launched an attack directly on Lord Browne-Wilkinson's immediate trust doctrine, at least explicitly expressed the idea that his Lordship's doctrine should be confined to its original scenario, ie, spontaneous mistake and should not intrude in the field of induced mistake to 'support the proposition that property transferred under a voidable contract induced by fraud will immediately (and prior to any rescission) be held

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'constructive' are logically not exclusive of each other; they address different questions. The word 'resulting' tells us the direction the beneficial interest moves, while 'constructive' tells us whether such beneficial interest arises by declaration or by operation of law.

<sup>535</sup> Eg, *Bristol and West Building Society v Mothew* [1998] Ch 1, 22–23: 'Misrepresentation makes a transaction voidable not void. It gives the representee the right to elect whether to rescind or affirm the transaction.... The right to rescind for misrepresentation is an equity. Until it is exercised the beneficial interest in any property transferred in reliance on the representation remains vested in the transferee.' This was restated in *Portman Building Society v Hamlyn Taylor Neck (a firm)* [1998] 4 All ER 202, 208.

<sup>536</sup> [2005] Ch 281 [106]–[127].

on trust for the transferor.<sup>537</sup> Lord Goff also once stated that the transferor ‘cannot short circuit an unrescinded contract simply by alleging a constructive trust.’<sup>538</sup>

Now it sounds very plausible to conclude that ‘[f]or impaired transfers, therefore, the power model is now in the ascendant.’<sup>539</sup> In addition, comparing the reversioning of title upon contractual rescission at common law and trust upon rescission in equity, one might question that where the flawed underlying basis involves fraudulently induced mistake, English law seems to be somewhat inconsistent. This is because on the one hand, given that a trust is the response, English law in this respect is therefore abstract, however, on the other hand, given reversioning of title is also the response, English law in this respect is therefore causal. How can a particular context be causal and abstract at the same time? Nonetheless, a possible explanation could be, the reason why common law reversioning of title cannot apply to cases involving shares and land but only those involving chattels is because the former set of cases concerns with some kind of public register. The public register makes it logically impossible to have the title reversioned magically while the register remains unchanged, so that the only solution is to create a right under a trust engrafting on the very registered right. There is therefore no contradiction.<sup>540</sup>

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<sup>537</sup> *Shalson v Russo* [2005] Ch 281 [111].

<sup>538</sup> *Guinness Plc v Saunders* [1990] 2 AC 663, 698.

<sup>539</sup> Charles Mitchell, ‘Unjust Enrichment’ in Andrew Burrows (ed), *English Private Law* (3rd edn, OUP 2013) para 18.273.

<sup>540</sup> However, contradiction would still be there if the position of English law is that so far as transfers of title to movables are concerned (so that public register cannot be an explanation), if the avoided underlying contract is a fraudulently induced one, the response is legal (ie, reversioning of title), while if the avoided underlying contract is an innocently induced one, the response is equitable (ie, constructive trust).

However, just as the immediate trust model, the power model I has three problems demonstrating that it is in no way better than the immediate trust model for rationalising why constructive trust arises. First, such overwhelming trend might have suffered an extra-judicial hit from its major promoter, Lord Millett himself. This is especially so if we see his Lordship's objection to Lord Browne-Wilkinson's immediate trust doctrine not in a way of building a new power model I, but in a way of reminding us that the constructive trust is not an unrestricted, independent device based on conscience, but is highly dependent on doctrines in the law of contract and property. In other words, to map the law of constructive trust to reverse unjust enrichment in equity, Lord Millett understood it hand-in-hand with its counterpart at common law, ie, reversion of title, both being forms of proprietary consequences following contractual rescission. This means, his Lordship's power model is built on a premise that rescission of a fraudulently induced contract could have some negative effects on the validity of conveyance: this has been beyond doubt for a number of centuries since *Load v Green*.<sup>541</sup> However, things changed in 2005, the very year when a first attack on causality in property transfers was launched by Swadling,<sup>542</sup> making Lord Millett no longer trusted such premise for the power model I. His Lordship admitted that:<sup>543</sup>

When I delivered this paper in Sydney in December 2004 I accepted the traditional view that rescission for fraud re-vested the legal title in the transferor: see *Car & Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525. The proposition can be traced back to the judgment of Parke B in *Load v Green* (1846) 15 M & W 216; 153 ER 828. Since then, however, Mr Swadling has convincingly demonstrated that Parke B invented the

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<sup>541</sup> (1846) 15 M & W 216, 153 ER 828. A detailed analysis can be found in chapter 4 above.

<sup>542</sup> William Swadling, 'Rescission, Property, and the Common Law' (2005) 121 LQR 123.

<sup>543</sup> Lord Millett, 'Proprietary Restitution' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Law Book Co 2005) 320, fn 31.

rule, which is difficult to justify in principle and is based on previous authority which does not support it: W Swadling, 'Rescission, Property, and the Common Law' (2005) 121 LQR 122. The better view, which he espouses and which is supported by authority before and since, is that a defrauded vendor should be able to rescind his contract of sale but this should not carry with it any reversion of title, at least in the case where title passed by delivery pursuant to the rescinded contract and not by the contract itself: see *Singh v Ali* [1960] AC 167. If this is right, then equity must follow the law by denying any reversion of the title merely because the underlying transaction is set aside.

Had it been the law, the power model I would have been shrink to apply to cases of voidable contracts followed by valid conveyances. Luckily for the model, currently it is not in crisis and is still a very strong competing model to the immediate trust model, partly because the quotation above is an extra-judicial statement, and his Lordship did not get a chance to turn it into a judicial one (because he had already retired as a Law Lord in 2004), nor was it cited by other judges in post-2005 cases.

Moreover, a consequential inconsistency<sup>544</sup> lies in a comparison of events for the immediate trust model and trust upon rescission model. As shown in previous sections, an immediate trust is the legal response for spontaneous mistake cases while a trust upon rescission is the legal response for fraudulently induced mistake cases. From the transferor's perspective, to have a right under trust immediately at the moment of the transferee's receipt (with knowledge) is normally better than to have a right under trust after the transferor's election of contractual rescission, because the earlier to have a right

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<sup>544</sup> It is called a 'consequential' inconsistency as opposed to 'logical' inconsistency, because logically speaking it is consistent within the framework of the 'power model I'. Following the logic of 'causality in equity', if there is a contract to get out the way first, namely by rescission for fraudulent misrepresentation, then the unjust enrichment claim is necessarily contingent on this. Prior to the exercising the power to rescind the contract, the defrauded party can have no more than an equitable power to bring about the trust; it is the contractual rescission that makes the trust spring into existence. On the contrary, naturally if there is no contract in the first place, the spontaneous mistaken transferor has an immediate right to restitution thanks to an immediately vested trust.

against right supplementary to the personal right for unjust enrichment, the better safeguards the transferor will have against the potential risk of being unable to get fully paid from the transferee. However, since fraudulently induced mistakes, as a kind of relatively more severe mistakes (especially where the fraud comes from the transferee rather than any third party) should normatively be treated heavier than spontaneous mistakes, the trust upon rescission model cannot explain why on the contrary, it gives lighter protection to transferors involved in fraudulently induced mistakes compared to transferors involved in spontaneous mistakes who can enjoy earlier protection by an immediate trust.

The third peril of the power model I is its internal inconsistency, which was reflected by a relatively older case, *Allcard v Skinner*.<sup>545</sup> The plaintiff was introduced to join the Protestant sisterhood, and in 1872 and 1874 she donated several large sums of money and railway stock to the church for the poor, with a total obedience to the Lady Superior, and without seeking advice from any external person. In 1879, she left the sisterhood in order to join a Catholic church, but did not seek to claim to get the property back until 1885 when she finally brought an action for recovery of these rights to be re-conveyed to her. Her claim failed due to laches for such inappropriate delay. Albeit the failed result, considering that she became an enthusiast due to dominant religious influence exerted by the donee, the court did hold that such a transaction is voidable for undue influence, not void.<sup>546</sup> The question then became, what would have been the legal

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<sup>545</sup> (1887) 36 Ch D 145.

<sup>546</sup> Unlike duress and incapacity cases, here the court rightly decided that victims under undue influence normally do not lose their free agent, and hence are able in law to dispose of their property rights.

response to such undue influence? The minority view, by Cotton LJ, was that: although legal title effectively passed to the defendant transferee, the transferee could have held an immediate constructive trust ‘on the ground that it was property the beneficial interest in which [the transferor] had never effectually parted with.’<sup>547</sup> The reason why there was no constructive trust recognised for the plaintiff is not because she was not entitled to that motion throughout. She could have become a beneficiary under trust by setting the transaction aside in 1879 when she quitted, but she lost such an opportunity due to inappropriate delay till 1885, thus barred for equitable doctrine of laches. The majority view of Lindley and Bowen LJJ, by contrast, was not for an immediate trust, nor was it for a constructive trust arising upon contractual rescission. Rather, it was simply the ‘equitable power to rescind the conveyance’. For instance, Lindley LJ said:<sup>548</sup>

It is not, however, necessary to decide whether this delay alone would be a sufficient defence to the action. The case by no means rests on mere lapse of time. There is far more than inactivity and delay on the part of the Plaintiff. There is conduct amounting to confirmation of her gift. Gifts liable to be set aside by the Court on the ground of undue influence have always been treated as voidable and not void. ...Moreover, such gifts are voidable on equitable grounds only.

Lindley LJ’s reasoning differs from that of Cotton LJ in two points. First, to deprive the transferor’s power to rescind, a mere lapse of time is not enough; some kinds of confirmation or ratification must be inferred from the transferor’s act. Second and more importantly, unlike cases involving fraudulently induced non-gratuitous transfers with contracts, the present case is a gratuitous transfer, meaning that there was no contract to rescind at all. As a result, it must be the conveyance which was voidable and thus can be

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<sup>547</sup> *Allcard v Skinner* (1887) 36 Ch D 145, 172.

<sup>548</sup> *Allcard v Skinner* (1887) 36 Ch D 145, 186.

rescinded. By saying such power is an equitable one merely indicates its origin; it has no substantial difference from the power to rescind at common law<sup>549</sup> in that, in particular, the operation of such equitable power to rescind has a direct effect of reversion of title back to the transferor, without the need to resort to the intermediate tool of constructive trust triggered upon contractual rescission.<sup>550</sup> Similarly, no language of trust was used either in Bowen LJ's opinion that 'the lady considered her position at the time, and elected and chose not to disturb the gift which she then at that moment felt, if she had the will, she had the power to disturb.'<sup>551</sup> It can therefore be inferred from the majority's view in *Allcard v Skinner* that, as long as the transferor is allowed to 'avoid', 'revoke', or 'set aside' the conveyance in equity, constructive trust is not a 'must' for the transferor, not to speak of it as always an equitable corollary of the transferor's rescission of the underlying contract. This leads to Häcker's power model II, a generalised power model helping to explain both common law and equitable rescission in favour of wholesale abstraction that:<sup>552</sup>

If a conveyance is voidable and set aside, this is not because either the common law or equity operates a causal transfer system, but because a defect in the transferor's intention has allowed him to revoke his consent

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<sup>549</sup> The reason why the transferor in *Allcard v Skinner* did not rely on common law power to rescind is because the defect in her consent was undue influence, which cannot be avoided at common law, but only in equity. If this were a case of fraudulent misrepresentation, she could have relied on common law power to rescind the conveyance.

<sup>550</sup> This might seem bizarre from the traditional view that equitable rescission can only revert 'equitable' not 'legal' title: *Alati v Kruger* (1955) 94 CLR 216, 224. Yet such notion 'equitable title to such property reverts upon rescission', as mentioned above, has been rejected later on by *Transphere* in Australian law and *Westdeutsche* in English law.

<sup>551</sup> *Allcard v Skinner* (1887) 36 Ch D 145, 193.

<sup>552</sup> Birke Häcker, 'Causality and Abstraction in the Common Law' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (CUP 2010) 216. See also Birke Häcker, 'Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324

to the transfer of title (besides allowing him to rescind an underlying contract where appropriate).

An advantage of such power model II is also revealed by the quotation above, ie, it can apply to all conveyances independently of whether or not there is an underlying basis and what its fate regarding validity may be. This being the more plausible ‘power model’, it is submitted that such power model II would bring a fundamental discrepancy comparing the power model I regarding the relation between the power model and the main theme of this chapter, ie, effective causality. Specifically, unlike the power model I, the power model II simply demonstrates that English law is not only notionally abstract in equity (as was discussed in section 6.1.2 above), but also effectively abstract in equity. In other words, even though effectively speaking, title may revert to the transferor retrospectively in equity whether or not by way of constructive trust, it has nothing to do with the ‘mirror effect’ of causality. This is because the way such power model operates is that it does not allow the transferor to indirectly rescind the underlying basis, but simply allows the transferor to directly rescind the voidable conveyance. Just as the position at common law, the validity of conveyance is not infected by the flawed underlying basis in equity too.

### 6.2.3 Remedial Constructive Trust

In addition to the contrast between the doctrines of immediate trust and trust upon rescission, and their inherent inconsistencies, there is a third rationale, ie, the remedial constructive trust proposition making the coherent rationale more difficult to find to explain why in English law a constructive trust arises to reverse unjust enrichment,

though it received less popularity compared to the previous two ‘institutional’ rationales.<sup>553</sup>

This came from a case involving initial failure of basis,<sup>554</sup> an unjust factor with the transferor’s qualified rather than impaired consent. This is *Neste Oy v Lloyds Bank Plc*.<sup>555</sup> The plaintiffs were a shipowning company which from time to time employed the agent company PSL, which undertook to handle port issues on behalf of the plaintiffs. According to the contract between them, money was transferred in advance six times to PSL for such purpose. However, the last payment was made after PSL became insolvent and ceased trading, which frustrated the purpose and constituted a failure of consideration. When the plaintiffs realised that Lloyds Bank exercised its contractual power to set-off against PSL’s debt, they claimed that money paid during all the six transfers to the agent was held on trust and thus not available to be set-off by the defendant Lloyds Bank. This was not supported by Bingham J, who said that all the six payments should not be treated equally. The distinction between the first five payments and the last one, according to Bingham J, is that the latter was:

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<sup>553</sup> A prevailing notion among English lawyers is that, despite whether there should be such dichotomy, theoretically a constructive trust could be either ‘institutional, that is to say one which arises by operation of law in defined circumstances and in accordance with settled principles of equity, or remedial in character, that is to say one which is imposed by the court in its discretion whenever it is considered just to do so.’ PJ Millett, ‘Restitution and Constructive Trusts’ (1998) 114 LQR 399, 399. In other words, institutional constructive trusts are pre-existing trusts ‘recognised’ (or ‘declared’) by the Court, while remedial constructive trusts are newly ‘created’ (or ‘granted’) by the Court with discretion and retrospectivity. See also John McGhee (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell 2016) para 26-014.

<sup>554</sup> As opposed to subsequent failure of basis, which would always result in a mere personal claim, usually being liabilities for breach of contract. *Re Goldcorp Exchange Ltd* [1995] 1 AC 74. For terminology, see Peter Birks, *Unjust Enrichment* (2nd edn, Clarendon Press 2005) 194.

<sup>555</sup> [1983] 2 Lloyd’s Rep 658.

made at a time where there is bound to be a total failure of consideration ... [and] Given the situation of PSL when the last payment was received ... It ... seems to me that at the time of this receipt PSL could not in good conscience retain this payment and that accordingly a constructive trust is to be inferred.<sup>556</sup>

Therefore, partially in support of the plaintiffs' claim, Bingham J held that only the money of the last payment shall be held by the agent company on constructive trust, whereas the remaining five transfers were merely outright transfers and no trust was triggered either by consent or by operation of law.

The problem is, however, that Bingham J did not explain why such constructive trust arose. Yet this is not impossible to infer. The ultimate purpose of the plaintiffs was to prevent Lloyds Bank from set-off the money they paid in advance in the event of PSL, the recipient's insolvency. To succeed, they must find a device, and they found constructive trust. Needless to say, this is the topic of the relation between constructive trust and immunity from insolvency distribution, a topic already discussed in the previous section of this chapter. While Bingham J did not find any institutional constructive trust to confirm any pre-existing equitable interest, considering that the plaintiffs' right to the sixth payment deserved insolvency priority, Bingham J nevertheless creatively picked up the weapon named after 'constructive trust' to arm the plaintiffs with retrospective proprietary effect as he saw it fit. Obviously, therefore, such constructive trust was not an institutional one, but a remedial one.

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<sup>556</sup> *Neste Oy v Lloyds Bank Plc* [1983] 2 Lloyd's Rep 658, 666. Note that it cannot be inferred from this quotation that Neste followed the conscience/knowledge test of Lord Browne-Wilkinson, and therefore could be seen as a case of immediate trust. This is because Bingham J did not allow the plaintiffs to rely on mistake since they took the point too late, not to speak of applying the knowledge test for the conscience point.

Notably, however, Bingham J's third, remedial model was overruled very recently.<sup>557</sup> In *Angove Pty Ltd v Bailey*,<sup>558</sup> Lord Sumption, with whom other four judges unanimously agreed, questioned *Neste Oy* on the vagueness of the idea of 'conscience' in that:<sup>559</sup>

Bingham J's point of departure in the *Neste Oy* case ... was that the recipient of money may be liable to account for it as a constructive trustee if he cannot in good conscience assert his own beneficial interest in the money as against some other person of whose rights he is aware. As a general proposition this is plainly right. But it is not a sufficient statement of the test, because it begs the question what good conscience requires. Property rights are fixed and ascertainable rights. Whether they exist in a given case depends on settled principles, even in equity. Good conscience therefore involves more than a judgment of the relative moral merits of the parties. For that reason it seems to me, with respect, that Bingham J's observation in *Neste Oy* that any reasonable and honest director would have returned the sixth payment upon its receipt begs the essential question whether he should have returned it. It cannot be a sufficient answer to that question to say that it would be 'contrary to any ordinary notion of fairness' for the general creditors to benefit by the payment. Reasoning of this kind might be relevant to the existence of a remedial constructive trust, but not an institutional one.

His Lordship concluded that *Neste Oy* should be overruled because 'the decision ... cannot be justified, at any rate on the ground on which it was decided.'<sup>560</sup>

Moreover, apart from the conscience point which has now been overruled in *Angove*, even assuming Bingham J's personal judgment of conscience is correct in the sense that the initial failure of basis suffices to justify that the plaintiffs in *Neste Oy*

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<sup>557</sup> Bingham J's judgment had not been overruled earlier, albeit not followed in *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272 (Ch), [2008] BCC 22 due to a matter of fact, not law: the claimant failed to establish the facts that the company has already decided to cease trading before the moment they receive that sum of payment from the claimant.

<sup>558</sup> [2016] UKSC 47, [2016] 1 WLR 3179.

<sup>559</sup> *Angove Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179 [28].

<sup>560</sup> *Angove Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179 [31].

deserves insolvency preferential treatment, this does not mean a remedial constructive trust could be created by the court to help to realise such policy-motivated proprietary restitution.<sup>561</sup> Such idea was well explained in *Re Polly Peck International plc (No 2)*.<sup>562</sup>

The facts in *Re Polly Peck* are substantially different from our main scenario, though the judgment was highly relevant. A partition incident happened in Cyprus due to the Turkish invasion of Cyprus, which made the plaintiffs' hotels in question expropriated by the then newly founded Northern Cyprus. In the meantime, Polly Peck International went into insolvent administration. In order to accord more cash flow, the administrator decided to sell assets of Polly Peck's subsidiaries, including the hotel in question. The subsidiary held shares to the hotel under the law of the widely-unrecognised state of Northern Cyprus, while the plaintiffs held the same shares to the hotel under the law of Cyprus. As a result, when the plaintiffs realised that the title to shares in question was sold, they brought trespass against the subsidiary and claimed that they should be entitled to an equitable proprietary interest<sup>563</sup> in the money received by the administrator because of this transaction. Such claim failed in the Court of Appeal. After having excluded the possibility of any institutional constructive trust for the plaintiffs, the key issue turned out to be, whether the Court could newly create an equitable interest

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<sup>561</sup> Note that here the *ground for restitution* is not policy-motivated, but principal-based, which is initial failure of basis. What is policy-motivated is *the proprietary restitution*, for which no principle could be found to explain the ground. This is different from scenarios where the *ground for restitution* is policy-motivated in the first place, exemplified by *Woolwich Equitable Building Society v IRC* [1993] AC 70. In this scenario, the nature of restitution is purely personal not proprietary. For details, see William Swadling, 'Property and Unjust Enrichment' in JW Harris (ed), *Property Problems: From Genes to Pension Funds* (Kluwer 1997).

<sup>562</sup> [1998] 3 All ER 812.

<sup>563</sup> So that they needed not to join the long queue of unsecured creditors with little hope to be fully recovered.

under a remedial constructive trust for the plaintiffs, so as to accord them insolvency priority. In a unanimous decision, Mummery LJ denied such possibility and said that.<sup>564</sup>

The essential characteristic of the statutory scheme is that the liquidator or administrator is bound to deal with the assets of the company as directed by statute for the benefit of all creditors who come in to prove a valid claim. ... A question may arise as to whether a particular asset was or was not the beneficial property of the company at the date of the commencement of the winding up (or administration). If it is established in a dispute that it is not an asset of the company then it never becomes subject of the statutory insolvency scheme. [citing *Chase Manhattan*, a case of institutional constructive trust] ... If, on the other hand, the asset is the absolute beneficial property of the company there is no general power in ... the court to amend or modify the statutory scheme so as to transfer that asset or to declare it to be held for the benefit of another person. To do that would be to give a preference to another person who enjoys no preference under the statutory scheme. ... The insolvency road is blocked off to remedial constructive trusts, at least when judge driven in a vehicle of discretion.

To move the scenario from wrongs (in *Re Polly Peck*) to unjust enrichment (in *Neste Oy*) would not change this fundamental proposition, because the law of unjust enrichment is no more capable than the law of wrongs in terms of providing grounds for any possible discretionary proprietary interest. As Birks pointed out, ‘the law of unjust enrichment was not a discretionary frolic in distributive justice.’<sup>565</sup> Such concern for remedial constructive trusts for having two critical features, ie, judicial discretion and retrospectivity can be found in judgments as well,<sup>566</sup> making English law, unlike the law of its Commonwealth counterparts and the US law, generally rejects the remedial

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<sup>564</sup> *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812, 827.

<sup>565</sup> Peter Birks, ‘The End of the Remedial Constructive Trust?’ (1998) 12 TLI 202, 208. See also Peter Birks, ‘Three Kinds of Objection to Discretionary Remedialism’ (2000) 29 UWALR 1.

<sup>566</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 714–15, cited in *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch) 273 and *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 1 P & CR 16.

constructive trust.<sup>567</sup> Indeed, the division of labour between the Parliament and the Court is generally that where the former creates a law, the latter should apply the law, and should not discretionarily modify the statutory scheme. So far as distribution of assets is concerned, the Court do have their ‘monopolised’ field of institutional constructive trusts developed in various common law doctrines as mentioned above. Outside such field, since the Parliament has long been in charge of the zero-sum game by enacting insolvency/bankruptcy statutes, it would be somewhat inappropriate for the Court, whenever the Court sees it fit by the device of the remedial constructive trust, to intrude in these parliament-monopolised policy considerations on how to favour one sets of right-holders at the expense of others. It therefore could be summarised that till now, English law as to why a constructive trust arises to reverse unjust enrichment has now been a bit clearer than before, as competing doctrines, though still existent with internal consistencies, has been at least deduced from three to two, ie, the immediate trust model and the power model.

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<sup>567</sup> *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, 104; *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812, 831; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250 [47]; *Angove Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179 [27]. Perhaps the only one recent and clear challenge was Lord Scott’s opinion in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [20], cited by *Clarke v Meadus* [2010] EWHC 3117 (Ch) [82], discussed in Lynton Tucker and others (eds), *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) para 7-026, and criticised extra-judicially by Lord Neuberger, ‘The Stuffing of Minerva’s Owl? Taxonomy and Taxidermy in Equity’ (2009) 68 CLJ 537, and Lord Scott’s opinion was not part of the *ratio* in *Thorner v Major*. Besides, it is not clear whether *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 and *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 can count as exceptions, as the word ‘remedial’ were not mentioned in either of these cases. Overall, it seems that English law is not likely to change this position despite anticipation of American lawyers such as Scott, who said, ‘Perhaps they will ultimately regard a constructive trust as a remedial device, available whenever it is necessary to prevent unjust enrichment.’ Austin Wakeman Scott, ‘Constructive Trusts’ (1955) 71 LQR 39, 50.

## CHAPTER 7 CONSTRUCTIVE TRUSTS FOR CHINESE LAW?

We have seen in previous chapters that despite lacking a coherent rationale as to why a constructive trust arises to reverse unjust enrichment, there are nevertheless cases making English law appear to be effectively causal in equity. In this chapter the methodology is switched from doctrinal to reformist, aiming to see whether these observations in English law of trusts could be lessons for the upcoming Chinese Civil Code. To transplant a device from another jurisdiction, one has to consider at least two issues for the home institution.<sup>568</sup> The first is whether the home jurisdiction has suitable ‘soil’ for such transplant, by which it means whether the current system of concepts and rules in the home jurisdiction will work compatibly with the concepts and rules brought by the newly transplanted device. The second is whether such device is justifiable, given those consequences (eg, making the transferor better off at the expense of the transferee’s general creditors) which would result from the operation of such device. Chapter 7 mainly deals with the first issue, and the second issue will be discussed in chapter 8. To put it in another way, things done in this chapter are merely to set out conceptual and institutional barriers for reform and possible solutions for overcoming these barriers while assuming English incidents of causality are good sources of reference for legal transplant; it by no means indicates the correctness of the normative assumption that using constructive trusts to reverse unjust enrichment is justifiable, which has still not yet been uncontentious even in its homeland.

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<sup>568</sup> For the idea of legal transplant, see generally Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, U of Georgia Press 1993).

To answer the central question raised at the beginning this chapter, it is better to handle them in sequence based on the primary division of the two aforementioned categories in English law. The answer to category (i) is plain. Based on current concepts and rules in Chinese law, the upcoming Chinese Civil Code can well be designed in a notionally causal way, just like it can be designed in a notionally abstract way. Indeed, since it is possible, as illustrated in chapters 2 and 3, to interpret a separate juridical act of conveyance based on current rules in Chinese law, what is left to be done by the legislature is simply to add a provision, whether or not limited to fraud as they think fit, stating that the validity of conveyance would be infected (if they intend to ‘turn’ causal) or not (if they intend to ‘turn’ abstract) by the voidness of the underlying contractual obligation. The complex one, by contrast, lies in the aforementioned category (ii), which is the main target of this chapter. The central question is, given that English law may use the device of constructive trust to make transfer of rights involving spontaneous mistakes or fraudulently induced mistakes, and given that Chinese law also recognises trusts,<sup>569</sup> whether it is systematically possible for the upcoming Chinese Civil Code to take lessons from English law by incorporating constructive trusts in the upcoming civil code as a tool for proprietary restitution for unjustified enrichment?

This chapter accordingly comprises three sections. The first section sets out the current law in China to illustrate that constructive trusts are generally rejected in Chinese trust law. The second section re-examines false inconsistencies and forwards genuine

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<sup>569</sup> Unlike major continental European civilian jurisdictions where trust is generally not recognised by domestic legislation (cf Czech law has accepted trusts since 2014: Czech Civil Code (Czech Republic), arts 1448–74), East Asian civilian jurisdictions do recognise trusts despite differences from the English orthodoxy: Trust Acts 1922, 2006 (Japan); Trust Acts 1961, 2011 (Korea); Trust Law 1996 (Taiwan); Trust Law 2001 (China). For a thorough introduction to the Chinese trust law written in English, see Lusina Ho, *Trust Law in China* (Sweet & Maxwell Asia 2003).

inconsistencies between various attributes of English constructive trusts and fundamental ideas in Chinese civil law, in order to prove that a theoretical explanation of the constructive trust as opposed to consensual trust is necessary for Chinese law to conceptually accept constructive trust as a device to reverse unjustified enrichment. The third section analyses two possible models which could serve as the ideal theoretical explanation, ie, the English ‘rights against rights’ model, and the civilian ‘dual patrimony’ model respectively. Particular attention is also taken in this section to see to what extent Chinese law has already embraced either of these two models.

## 7.1 The Current Law

### 7.1.1 Consensual Trusts in Chinese Law

The starting point of Chinese trust law on its recognition of trusts is, so far as various types of non-charitable trusts are concerned, that it by and large only recognises trusts with certain beneficiaries<sup>570</sup> created by declaration. Such declaration can be done by two ways, one being that the settlor transfers a right to a trustee, who declares to hold it on trust for someone, the other being that the settlor himself declares to hold the right on trust.<sup>571</sup> The beneficial interest can be created for a third-party beneficiary, for the settlor, or for the trustee provided that such trustee is not the sole beneficiary.<sup>572</sup> However, there are strict formality requirements for creation of a trust in Chinese law, in that the

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<sup>570</sup> So private purpose trust is not recognised. Trust Law 2001 (China), art 11(5). This could be said as similar to English law, where non-charitable purpose trusts are void unless a number of anomalous (even wrongly-decided) exceptions: *Re Endacott* [1960] Ch 232.

<sup>571</sup> Trust Law 2001 (China), art 8(2), though it is not straightforwardly clear from the wording of this provision that trusts created by the right-holder’s self-declaration is valid.

<sup>572</sup> Trust Law 2001 (China), art 43.

declaration must be done in the form of writing<sup>573</sup> with certain stipulations explicitly stated,<sup>574</sup> and cannot be proven by presumption.<sup>575</sup> This is different from English law where the role of writing is neither a necessary requirement for the creation of a trust by declaration as a matter of substance,<sup>576</sup> nor a necessary requirement even for the proof of a trust by declaration as a matter of procedure.<sup>577</sup>

### 7.1.2 Constructive Trusts in Chinese Law

The attitude of Chinese trust law towards trusts created by operation of law is generally in the negative. For instance, similar to the presumed resulting trust not recognised in Chinese law as explained above, here the automatic resulting trust, ie, a resulting trust being ‘not dependent on any intentions or presumptions’<sup>578</sup> is unrecognised in Chinese law either. Where a trust is rendered void because of a failure to declare objects of sufficient certainty,<sup>579</sup> the person receiving the right does not hold such right on an

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<sup>573</sup> Trust Law 2001 (China), art 8(1).

<sup>574</sup> Trust Law 2001 (China), art 9. Necessary information needed to be specified in the written trust agreement are: (i) the purpose, (ii) the settlor and the trustee, (iii) the beneficiary or a scope for identification, (iv) the subject-matter of the trust, and (v) the way to get beneficial interest.

<sup>575</sup> Cf presumed resulting trusts in English law: *Dyer v Dyer* (1788) 2 Cox Eq Cas 92, 30 ER 42; *Re Vinogradoff* [1935] WN 68. For the abolition of the presumption of advancement and its possible consequences, see Equality Act 2010, s 199 and William Swadling, ‘Legislating in Vain’ in Andrew Burrows and others (eds), *Judge and Jurist: Essays in Honour of Lord Roger of Earlsferry* (OUP 2013). The reason why Chinese law does not have presumed resulting trusts is because unlike English law where such kind of trust was originally to explain what happened in feudal era when an *inter vivos* transfer was made to someone not the wife or child of the transferor, Chinese trust law does not have such task. See William Swadling, ‘Explaining Resulting Trusts’ (2008) 124 LQR 72.

<sup>576</sup> An exception is a disposition of an existing right under a trust with respect to land: Law of Property Act 1925, s 53(1)(c).

<sup>577</sup> An exception is a declaration of trust with respect to land: Law of Property Act 1925, s 53(1)(b).

<sup>578</sup> *Re Vandervell’s Trusts (No 2)* [1974] Ch 269 (Megarry J).

<sup>579</sup> Trust Law 2001 (China), art 11(5). By contrast, there is no provision in Chinese law equivalent to the English rule against perpetuities.

automatic resulting trust for the transferor, but is liable to re-convey such right back to the transferor, or to pay over the value of the right received.<sup>580</sup>

Only three types of constructive trust, ie, trusts arising by operation of law, are recognised in Chinese law, though none of them has anything to do with using trusts as a tool for restitution of unjustified enrichment involving a flawed underlying basis. The first is where a trustee of an express trust uses the trust money in exchange for a new right beneficially in his own name in breach of trust; such substituted right is held on constructive trust for the beneficiary.<sup>581</sup> The second is where an express trust is terminated and the beneficiary gives up his beneficial interest; the right to the subject-matter is to be transferred back to the settlor, and the trustee, before the completion of the transfer of such right, holds the right on constructive trust for the settlor.<sup>582</sup> The third is where a charitable trust fails because the purpose is no longer possible to realise for being unable to identify the scope of objects; the public authority<sup>583</sup> can make an order to redirect the subject-matter to the nearest possible purpose.<sup>584</sup> Given that judges under Chinese law normally cannot go beyond the legislation, so that they can only find constructive trusts where the legislation allows, it can therefore summarised that, putting the discussion on English law in chapter 6 in the Chinese shoes, it is impossible to deduce

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<sup>580</sup> Contract Law 1999 (China), art 58, though the nature of such claim-right, ie, whether it is of *in personam* or *in rem*, as discussed above in chapter 4 of this thesis, is vague, so it is not clear enough to reach the conclusion that the transferee holds the very right beneficially, and if he becomes insolvent, the right is available for his general creditors.

<sup>581</sup> Trust Law 2001 (China), art 26. This is similar to constructive trust arising for unauthorised disposition in English law: *Foskett v McKeown* [2001] 1 AC 102.

<sup>582</sup> Trust Law 2001 (China), arts 54, 55.

<sup>583</sup> There is a tiny difference between English and Chinese law in that the public authority of the former is the court while that of the latter is the government.

<sup>584</sup> Trust Law 2001 (China), art 72. It is similar to the *cy-près* doctrine in the English law of trusts.

from the current Chinese trust law that a constructive trust would arise to reverse the transferee's unjustified enrichment either from the moment when the transferee knows the absence of basis, or from the moment when the transferor elects to rescind the underlying contractual basis. A reform is needed if such role of trust is to be transplanted, which has to be done in a way adapted and consistent to the general system of Chinese private law. Luckily, as will be argued in the next paragraph, genuine systematic inconsistencies are at least not as many as might be supposed.

## 7.2 Systematic Inconsistencies Revisited

### 7.2.1 False Inconsistencies

#### A. *Unitary Ownership and Numerus Clausus*

The first alleged inconsistency is the most well-known one which will come to the minds of many comparative lawyers at first blush. Like many colleagues in civilian jurisdictions,<sup>585</sup> it is almost a commonly believed assumption among Chinese scholars that the English trust cannot 'flourish amidst our indigenous flora' due to its incompatibility with the notion of unitary ownership (一物一权) and the principle of *numerus clausus* (物权法定).<sup>586</sup> If such conflict lies in consensual trusts, it must lie in

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<sup>585</sup> See eg, Vera Bolgar, 'Why no Trusts in the Civil Law' (1953) 2 Am J Comp L 208; MJ de Waal, 'The Uniformity of Ownership, *Numerus Clausus* and the Reception of the Trust into South African Law' (2000) 8 Eur Rev Priv L 439.

<sup>586</sup> There is just too much literature in Chinese to cite, and there is even a monograph specifically aiming at localising such 'problem' as if it were the case in English law: YU Haiyong, *英美信托财产双重所有权在中国的本土化 [How to Localize the British and American Law on Trust Property in China]* (CUPL Press 2011). For such assumption written in English, see eg, ZHANG

constructive trusts as well. However, as having already been discussed in detail in chapter 6 above, these alleged inconsistencies are in reality misconceptions of trusts in English law. To give a brief response here again, Chinese scholars think the English trusts work by way of the splitting of legal and equitable title because they neglected the point that the beneficiary's right under a trust arises by creation not by retention or division in English law. They think the English trusts challenge *numerus clausus* because they neglect the point that the beneficiary's right under a trust is not a right *in rem* (against things), but a special right *in personam* (against persons), or to be precise, a right against right. Consequently, these two assertions should not be seen as genuine systematic inconsistencies against adopting trusts in civilian Chinese law, whether the trust in question is a consensual or constructive one. Admittedly, one could argue that rights against rights are quite alien to jurisdictions including China holding a firm idea on the dichotomy of rights against things and rights against persons. Yet surely it has nothing to do with *numerus clausus*, which governs types and contents of rights against things (ownership and lesser property rights) only.

### *B. Judicial Discretion and Legislating Constructive Trusts*

The second alleged inconsistency concerns the need for judicial discretion to award remedies under constructive trusts. It was argued by some scholars in China that, given the fluid nature of constructive trusts, the country would need a group of competent and experienced judges who know under what circumstances a constructive trust ought to be

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Ruiqiao, 'A Comparative Study of the Introduction of Trusts into Civil Law and Its Ownership of Trust Property' (2015) 21 T & T 902.

awarded. In contrast to judges in English courts who have been well-equipped after so many years of legal practice, judges in Chinese courts, like in many other civilian jurisdictions, are not mainly appointed from senior practitioners but basically from younger assistant judges. It would therefore be dangerous to give them such high degree of judicial discretion which is different to what the law normally expects them to do.<sup>587</sup> However, such notion was put forward based on an assumption that constructive trusts are discretionary remedies in English law which, as discussed in chapter 6 above, is a wrong idea. Quite the opposite, the prevailing idea among English lawyers is that constructive trusts are not remedial but institutional, by which it meant the Court does not grant a newly-created right under a constructive trust for the first time before the Court, but only confirms a right under a constructive trust reflecting a pre-existing legal relationship. In other words, lessons to take from English law have nothing to do with encouraging Chinese judges to expand their power thus to create trust whenever they think 'fair and reasonable' and thus to reallocate rights which should not have been allocated to certain parties.

This being so, it follows that confirming a pre-existing right under a constructive trust would be no different from confirming other kinds of pre-existing rights in terms of the level of difficulty for judges. If judges have the ability to recognise a right under a contract, there is no reason why they should not have the ability to recognise a right under a trust, provided that there is an authority (either in the form a legislative provision, a judicial interpretation or a guiding case) for them to cite. Moreover, since a constructive trust to reverse unjust enrichment involving spontaneous mistake, fraudulently induced

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<sup>587</sup> See eg, YU Weiming, *信托受托人研究 [On Trustees]* (Law Press 2007) 37.

mistake or undue influence is an ‘institutional’ one, there is no reason why the relevant rules cannot be clearly expressed in the form of legislative provisions if it is to be adopted in a civilian jurisdiction.<sup>588</sup>

A further question then arises. If the Chinese Civil Code does intend to add a provision confirming the constructive trust as a consequence for unjust enrichment in the context of transfer involving a flawed underlying basis due to spontaneous mistake, fraudulently induced mistake or undue influence in light of lessons from English law, why not incorporate other incidents of constructive trusts in English law triggered by other events simultaneously, such as breach of fiduciary duty,<sup>589</sup> exceptional circumstances regarding an imperfect gift,<sup>590</sup> and specifically enforceable vendor-purchaser contracts,<sup>591</sup> and so on? Indeed, there have been a number of scholarly suggestions for adopting constructive trusts to reverse profits made in breach of fiduciary duty,<sup>592</sup> or to reverse all types of unjustified enrichment in Chinese law.<sup>593</sup> However, it is argued that it is not a prerequisite to adopt the entire list of incidents of constructive trusts

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<sup>588</sup> It was argued in Xu Wei, *信托受益人利益保障机制研究 [Research on Protection Mechanism for Beneficiary]* (Shanghai Jiao Tong University Press 2011) 193 that using legislation to establish constructive trusts would be a good idea, exemplified by Liechtensteiner Civil Code (Liechtenstein), s 898, citing Maurizio Lupoi, *Trust: A Comparative Study* (Simon Dix tr, CUP 2000) 281. However, based on illustration of this provision in Marcus Wyler, ‘The New Civil Law of the Principality of Liechtenstein’ (1926) 8 *Journal of Comparative Legislation and International Law* 197, 210, this provision in reality talks about implied (in fact) trusts between people with special relationships of ‘silent trusteeship’, rather than constructive trusts.

<sup>589</sup> Eg, *Attorney General of Hong Kong v Reid* [1994] 1 AC 324; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250.

<sup>590</sup> Eg, *Strong v Bird* (1874) LR 18 Eq 315; *Re Rose* [1952] Ch 499.

<sup>591</sup> Eg, *Lysaght v Edwards* (1876) 2 Ch D 499.

<sup>592</sup> CHEN Xueping, DOU jingjun, *信托关系中受托人权利与衡平机制研究 [Trustees’ Rights and Their Balance Mechanisms under the Trusts]* (Law Press 2008) 250.

<sup>593</sup> XING Jiandong, *衡平法的推定信托研究 [A Study of Constructive Trust on Equity]* (Law Press 2007) 462.

in order to adopt the present incident of constructive trust, because constructive trusts in English law are heterogeneous without a steady and exhaustive list. No certain, coherent and unifying test for a constructive trust to arise has been concluded and commonly agreed by trust law text-book or monograph writers.<sup>594</sup> Similar comments can be found in judgments as well. Edmund Davies LJ for instance, said that ‘English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand.’<sup>595</sup> Of course one could say, that circumstances by operation of law in which constructive trusts arise have a common factor described as ‘unconscionability’, ‘unfairness’, or ‘injustice’, but these vague and discretionary synonyms are too general concepts,<sup>596</sup> and cannot serve as a persuasive ‘greatest common divisor’ to tell why it is wrong and inconsistent for an outsider jurisdiction to accept constructive trusts for reversing unjust enrichment only, while reject constructive trusts under other unordered sets of situations in which a constructive trust arises in English law.

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<sup>594</sup> AJ Oakley, *Constructive Trusts* (3rd edn, Sweet & Maxwell 1997) 28; Simon Gardner, *An Introduction to the Law of Trusts* (3rd edn, Clarendon Press 2011) 275; Philipp H Pettit, *Equity and the Law of Trusts* (12th edn, OUP 2012) 142; Robert Pearce and Warren Barr, *Pearce & Stevens’ Trusts and Equitable Obligations* (6th edn, OUP 2014) 246; Sarah Wilson, *Todd & Wilson’s Textbook on Trusts & Equity* (12th edn, OUP 2015) 161; Alastair Hudson, *Equity and Trusts* (8th edn, Routledge 2015) 550; Graham Virgo, *The Principles of Equity & Trusts* (2nd edn, OUP 2016) 327; Gary Watt, *Trusts & Equity* (7th edn, OUP 2016) 246; David Hayton and others (eds), *Underhill and Hayton: Law Relating to Trusts and Trustees* (19th edn, LexisNexis 2016) para 22.21. For monographs trying to forward such ‘greatest common divisor’, see eg, DWM Waters, *The Constructive Trust: The Case for a New Approach in English Law* (The Athlone Press 1964); Gbolahan Elias, *Explaining Constructive Trusts* (Clarendon Press 1990); Ying Khai Liew, *Rationalising Constructive Trusts* (Hart Publishing 2017), though they themselves differ from each other.

<sup>595</sup> *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, 300.

<sup>596</sup> Loosely speaking, correcting one’s conscience could be understood as the long-established core purpose of the *entire* branch of equity: *Earl of Oxford’s Case* (1615) 1 Ch Rep 1 (Lord Ellesmere). Moreover, the meaning of the word ‘conscience’ is fluid throughout the historical development of equity as well: Mike Macnair, ‘Equity and Conscience’ (2007) 27 OJLS 659.

## 7.2.2 Genuine Inconsistencies

### A. *Proprietary Restitution for Unjustified Enrichment*

The first genuine barrier is the inconsistency between the English notion of proprietary restitution for unjust enrichment and the Chinese understanding of unjustified enrichment in the law of obligations. Before elaborating such inconsistency, it should be noted in the first place that not all constructive trusts in English law will bring ‘proprietary’ effects. Where the subject-matter of a constructive trust is not title to a thing (*choses* in possession), but the entitlement itself (*choses* in action) such as simple debts, company shares,<sup>597</sup> or money in bank accounts,<sup>598</sup> it is impossible to turn the nature of such right from personal to proprietary by simply placing it behind a trust,<sup>599</sup> whether such trust is consensual or constructive. However, since there are anyways scenarios where the subject-matters are property rights to land or to chattels, the difficulty of accepting

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<sup>597</sup> Although there are statutory provisions saying that ‘shares are personal property’, and ‘a certificate under the common seal of the company ... held by a member is prima facie evidence of his title to the shares’: Companies Act 2006, ss 541, 768(1), shares in a registered company are transferable rights against the company not against any third-party strangers. Thus to describe shares as ‘personal property’ not ‘real property’ only means shares are entitlements to dividends rather than any property owned by the company; it does not mean shares are rights *in rem* in relation to movables as opposed to immovables. And it is redundant to say ‘title to shares’ because shares themselves are entitlements, ie, *choses* in action rather than *choses* in possession. A holder of certificated shares is entitled to a share certificate, which is indeed a right in rem, but such memorandum is completely different from shares, because a shareholder’s status is not lost without such certificate. See *Bligh v Brent* (1837) 2 Y & C Ex 268, 160 ER 397; *Colonial Bank v Whinney* (1886) 11 App Cas 426. See also Chantal Stebbings, ‘The Nature of Shares in Landowning Joint Stock Companies in the Nineteenth Century’ (1987) 8 J Leg Hist 25.

<sup>598</sup> Coins and banknotes are money in the strict sense, ie, cash which are *choses* in possession. By contrast, money in bank accounts are *choses* in action, which do not belong to the depositor but the bank. See *Wookey v Pole* (1820) 4 B & Ald 1, 6; 106 ER 839, 841 (Best J); *Foley v Hill* (1848) 2 HL Cas 28, 36; 9 ER 1002, 1005 (Lord Cottenham); *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, 748 (Staughton J).

<sup>599</sup> William Swadling, ‘Property: General Principles’ in Andrew Burrows (ed), *English Private Law* (3rd edn, OUP 2013) para 4.145.

proprietary response brought by a constructive trust to unjust enrichment is impossible to be circumvented for the reform in Chinese law.

But why is this an inconsistency? In Chinese law, it could be concluded from two aspects that there is hardly any relationship between property rights and unjustified enrichment. First, unjustified enrichment is seen by academics as a causative event for an obligation,<sup>600</sup> ie, a right *in personam* not *in rem*. Unjustified enrichment is also seen by the legislature as being exclusively a part of the law of obligations, which can be inferred from the placing of its provisions.<sup>601</sup> Moreover, as mentioned in chapter 1 above, the list in Chinese property law on the methods of acquiring property rights, whether original acquisition by methods of non-judicial acts or derivative acquisition by methods of judicial acts, do not include an entry called ‘unjustified enrichment’;<sup>602</sup> a right of a proprietary nature cannot be triggered and thus acquired by unjustified enrichment. It is therefore inconceivable according to most Chinese lawyers that unjustified enrichment would trigger a right under constructive trust with a number of proprietary attributes by the standard of Chinese law such as insolvency immunity, immunity of execution of judgment debts, and third-party specific claims and personal claims.

Second, the subsistence of property rights is seen as an exclusion to the application of unjustified enrichment in Chinese law, which could be exemplified by two

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<sup>600</sup> See eg, YANG Lixin, *债法总论 [General Introduction to Obligation Law]* (Law Press 2011) 105; CUI Jianyuan, *债法总论 [General Principles of the Law of Obligations]* (Law Press 2013) 25.

<sup>601</sup> General Provisions of Civil Law 1986 (China), art 92 is under the heading of ‘Personal Rights’ (债权); General Provisions of Civil Law 2017 (China), art 118 is also a provision specifically for personal rights.

<sup>602</sup> Property Law 2007 (China), arts 28–31.

simple hypothetical cases. In case one, where A entered into a contract of loan to get possession of B's car but refused to give it back when the loan comes to an end, B's claim-right against A in relation to the thing is based on vindication in property law, since the ownership never passed.<sup>603</sup> If B suffers additional loss, then B's claim-right against A in relation to the loss is based on breach of contract in contract law.<sup>604</sup> In case two where A illegally dispossessed B of his possession to the car, B's claim-right against A in relation to the thing is based on vindication in property law, since the ownership never passed.<sup>605</sup> If B suffers additional loss, then B's claim-right against A in relation to the loss is based on either the very vindication provision in property law, or the general provision in tort law.<sup>606</sup> Moreover, even if A who innocently interferes with property rights receives additional benefit in possessing and using the very subject-matter, A is not liable to disgorge such benefit to B.<sup>607</sup> Provisions of unjustified enrichment never have always a role to play.

By contrast, neither of these aforementioned two aspects of Chinese law firmly stands in English law; unjust enrichment and rights of proprietary nature are not seen as mutually exclusive. As regards the first aspect, if using the Birksian causative event

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<sup>603</sup> Property Law 2007 (China), art 34.

<sup>604</sup> Contract Law 1999 (China), art 107.

<sup>605</sup> Property Law 2007 (China), art 34.

<sup>606</sup> Tort Liability Law 2009 (China), arts 2, 15. Liability to compensate for interference with property rights under Property Law 2007 (China), art 37 is not strict but fault-based as well.

<sup>607</sup> This is because Property Law 2007 (China), art 243 limits the scope of 'return' to the original thing and its fruit (孳息) but not additional gains. Since ownership of fruit normally follows the ownership of the original thing, it can be inferred that the premise of the duty to return in art 243 is that 'ownership does not pass'; given there is no 'enrichment', unjustified enrichment therefore has no role to play here either. This is different from the English position: see Daniel Friedmann, 'Restitution for Wrongs: The Basis of Liability' in WR Cornish and others (eds), *Restitution: Past, Present and Future* (Hart Publishing 1998).

theory<sup>608</sup> to explain causative event triggering the right under constructive trust in mistake cases, then it is not difficult to find that even if wrongs (of deceit) can be the explanation to fraudulently induced mistake cases,<sup>609</sup> unjust enrichment seems to be the only explanation to spontaneous mistake.<sup>610</sup> Thus the type of constructive trust discussed in *Chase Manhattan* (spontaneous mistake)<sup>611</sup> and *Westdeutsche* (mistake plus knowledge)<sup>612</sup> in chapter 6 above could be seen as authorities demonstrating that unjust enrichment in English law can not only trigger a personal right, but may also triggers a right of proprietary nature. As regards the second aspect, it is still contentious among academics and undecided among judges whether claims for unjust enrichment can be brought where there is no transfer of title at all.<sup>613</sup> On the one hand, it was argued by some academics that since there is no transfer of title, the claimant does not enrich the defendant at all. Even if the defendant could be said to be to some extent *enriched*, it is due to his acquisition of an inferior title by taking possession independent of the claimant's transfer; such benefit could not be said as enriched *at the expense* of the claimant, but by other causative events of property torts, for instance, the tort of

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<sup>608</sup> Peter Birks (ed), *English Private Law* (OUP 2000) xxxix–xliii; ‘Property, Unjust Enrichment, and Tracing’ (2001) 54 CLP 231.

<sup>609</sup> Though unjust enrichment can well be the explanation to such, because fraudulently induced mistake is an unjust factor.

<sup>610</sup> Because all other causative events, ie, consent, wrongs, or ‘miscellaneous others’ cannot possibly be an explanation better than unjust enrichment.

<sup>611</sup> *Chase Manhattan Bank NA Ltd v Israel-British Bank (London) Ltd* [1981] Ch 105.

<sup>612</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669.

<sup>613</sup> For instance, judges in *Foskett v McKeown* [2001] 1 AC 102 said that it was ‘property’ rather than ‘unjust enrichment’ which triggers the right under a trust for beneficiaries against their express trustee who misappropriated the trust fund to pay for his insurance policy bill. In *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, although ‘unjust enrichment’ was mentioned by the judges, this was to describe third-party recipients’ of the casino money, rather than confirming the solicitors’ misappropriation of the trust fund.

conversion.<sup>614</sup> On the other hand, some restitution law textbooks state that the proof of wrongdoing is not necessary (thus the requirement of fault is not necessary) in this kind of claims, because ‘ignorance’ or ‘lack of consent’ (in the sense that ‘no intent to convey’ at all) is *a fortiori* from ‘fundamental mistake’, which counts as an unjust factor, and in itself proves enrichment by subtraction, thus sufficing to maintain a restitutionary claim independent of any wrong incidentally committed.<sup>615</sup>

To sum up, without mitigating the inconsistency between the role of unjust(ified) enrichment and the response of proprietary restitution, it could be anticipated that the draftsmen of the Chinese Civil Code would be quite reluctant to accept the constructive trust as a tool for reversing unjust enrichment. An inference that the role of constructive trust to reverse unjust enrichment in English law seems to be an anomaly in the eyes of civilian comparative lawyers could be found in as geographically near as Scotland. For instance, when Gretton argued against the exportability of the constructive trust into the field of unjustified enrichment, he put forward the idea that such role of the constructive trust ‘was an accident’ due to the long-term ‘absence of an autonomous enrichment law’ in the English legal history;<sup>616</sup> it was therefore almost inevitable for equity to resort to

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<sup>614</sup> See eg, William Swadling, ‘A Claim in Restitution?’ [1996] LMCLQ 63; ‘Ignorance and Unjust Enrichment: The Problem of Title’ (2008) 28 OJLS 627; Ross Grantham and Charles Rickett, ‘Restitution, Property and Mistaken Payments’ [1997] RLR 83; ‘Property Rights as a Legally Significant Event’ (2003) 62 CLJ 717.

<sup>615</sup> Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1985) 140–46; Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 403–35; Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015), 152–56. Lack of consent was even listed as the first and ‘strongest’ example of the sub-category of deficient intent in Charles Mitchell, ‘Unjust Enrichment’ in Andrew Burrows (ed), *English Private Law* (3rd edn, OUP 2013) paras 18.46–18.55.

<sup>616</sup> Other comparative lawyers had similar observations as well. For instance, Nicholas also said that unjust enrichment in England was ‘a comparatively recent growth’ and had for a long time ‘not yet attained the coherence of a general principle’. It had been ‘withered by judicial scorn’ till the first half of the twentieth century: Barry Nicholas, ‘Unjust Enrichment in the Civil Law and Louisiana

trusts when problems of unjust enrichment came before courts of equity from time to time.<sup>617</sup>

## B. *Chinese Commercial Trusts and Chinese Civil Law*

Another genuine obstacle is the inconsistency between the purpose of the Chinese trust legislation and that of the transplant of constructive trust to reverse unjustified enrichment. The story began before 2001 when Chinese lawyers discussed the viability of introducing trusts to operate compatibly with other branches of Chinese civil law. As happened in many civilian jurisdictions, the most difficult issue to handle was the nature of the beneficiary's right under the trust; Chinese lawyers considered that such right was neither similar to a typical right *in personam* nor a typical right *in rem*.<sup>618</sup> Although the Chinese legislature adopted trusts in 2001, this by no means indicates that the issue had been resolved. Rather, the legislature decided to leave this issue of incompatibility aside. As a result, endless debates and suggestions on right-holding relationships among the

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Law' (1962) 36 Tul L Rev 605, citing *Baylis v Bishop of London* [1913] 1 Ch 127, 140 (Hamilton LJ); *Sinclair v Brougham* [1914] AC 398, 456 (Lord Sumner); *Holt v Markham* [1923] 1 KB 504, 513 (Scrutton LJ), cf *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61 (Lord Wright).

<sup>617</sup> George L Gretton, 'Constructive Trusts and Insolvency' (2000) 8 Eur Rev Priv L 463. For his general criticism against accepting constructive trusts in Scots Law, see George L Gretton, 'Constructive Trusts: I' (1997) 1 Edin L Rev 281; 'Constructive Trusts: II' (1997) 1 Edin L Rev 408.

<sup>618</sup> See eg, ZHOU Xiaoming, *信托制度比较法研究 [A Comparative Study on Trust Law]* (Law Press 1996) chs 5, 6; MA Junju and MEI Xiaying, '财产权制度的历史评价和现实思考 [Historical Comments and Modern Thoughts on the Property Rights Regime]' [1999] 1 Social Sciences in China 90; SHEN Zhanming, '试论信托的本质 [The Essence of Trust]' [1998] 3 Hebei Law Science 54; LIANG Guiqing, '信托制度的演变与我国信托立法的基本原则 [The Evolution of Trusts and Basic Principles of Chinese Trust Legislation]' [1998] 5 Guangxi Social Science 29; LI Qunxing, '信托的法律性质与基本理念 [The Nature and Basic Ideas of Trusts]' [2000] 3 Chinese Journal of Law 118.

settlor, the trustee and the beneficiary have been carried on since then.<sup>619</sup> Nevertheless, a consensus has also been generally reached among Chinese lawyers that the beneficiary's right under the trust could well be a policy-motivated anomaly to the prevailing dichotomy of *in rem* and *in personam*,<sup>620</sup> because most importantly, the Chinese trust law was not seen as a part of traditional civil law (传统民法) for the purpose of reforming traditional civil law concepts, but a kind of 'special law' for commercial purposes such as facilitating trade, fund investment and in particular wealth management, as explained by the legislature<sup>621</sup> and academics.<sup>622</sup> For the same reason, trust practices in China are predominantly commercial ones rather than civil ones.<sup>623</sup> It was based on the policy consideration for encouraging express trusts in commercial practices rather than principles that the Chinese legislature decided to embrace the beneficiary's right under the English express trusts despite the fact that it is somewhat anomalous in the sense that

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<sup>619</sup> XU Wei, '信托受益权的法律性质新探 [A New Analysis on the Nature of Beneficiary's Right under Trust]' [2006] 4 *Journal of Shanghai University of Finance and Economics* 7; ZHANG Chun, '关于信托受益权的性质: 对有关国家法学界的有关研究的审视与检讨 [The Nature of Beneficiary's Right under Trust: A Review of Research in Relevant Countries]' [2010] 5 *Journal of Hunan University (Social Science)* 6; ZHAO Lianhui, '信托受益权法律性质新解: 剩余索取权理论的引入 [New Interpretation of the Legal Nature of the Trust Beneficiary Right: An Introduction of Residual Claim Theory]' [2015] 5 *CUPL Journal* 44.

<sup>620</sup> XU Mengzhou, *信托法 [Trust Law]* (Law Press 2006) 118; ZHANG Chun, *信托法哲学初论 [An Introduction to the Philosophy of Trust Law]* (Law Press 2014) 274; HE Baoyu, *信托法原理研究 [Research on the Jurisprudence of Trust Law]* (2nd edn, China Legal Publishing House 2016) 58.

<sup>621</sup> BIAN Yaowu, *中华人民共和国信托法释义 [Legislative Explanation of the Chinese Trust Law]* (Law Press 2002) 3.

<sup>622</sup> TANG Shumei, *信托受益权研究: 理论与实践 [Research on the Beneficial Rights under Trust: Theory and Practice]* (Law Press 2009) 114; DONG Huining, *信托财产法律问题研究 [Research on Legal Issues of Trust Property]* (Law Press 2011) 30.

<sup>623</sup> ZHAO Lianhui, *信托法解释论 [Explaining Trust Law]* (China Legal Publishing House 2015) 86. By contrasting 'commercial' and 'civil' it meant that in China, the trustee in most cases is a commercial entity such as a trust company, a commercial bank, a securities company or an insurance company which routinely manages trust fund for profit-making purposes, rather than a natural legal person who occasionally holds a right on (especially a bare) trust for another natural legal person: ZHANG Junjian, *信托法纵横谈 [Talks on Trust Law]* (China Financial and Economic Publishing House 2016) 172.

its nature straddles rights *in personam* and *in rem*.

When it comes to the issue whether to embrace the English constructive trusts, however, such policy considerations no longer underpin the idea that treating trusts as a special regime in parallel with traditional civil law branches. Remembering scenarios in English law discussed in chapter 6, it is not difficult to find that lessons from English law in the role of constructive trusts to reverse unjust enrichment has nothing to do with encouraging commercial practices, but is more relevant to a form of judicial confirmation to pre-existing relationships of everyday life. In addition, it is obvious to tell the distinction from the role of such kind of trust, which is ‘to reverse unjust enrichment’: since unjustified enrichment is an inherent part of Chinese traditional civil law branches like contract, tort, *negotiorum gestio* and others, adopting this type of constructive trust would therefore be inevitable to challenge the current principles of Chinese civil law rather than mere policy-motivated considerations. In other words, while the Chinese legislature could see the English rules regarding express trusts as a ‘special law’ only for facilitating commercial transactions in China, it could not see the English rules regarding constructive trusts to reverse unjust enrichment as such ‘special law’ as well without finding a way to sort out the conceptual incoherence brought by such kind of constructive trusts to the current principles in Chinese civil law. One cannot mix policy-motivated considerations with principle-based considerations and say: we can simply transplant constructive trusts into Chinese law just as what we did to express trusts at the beginning of this century. This is because those policy considerations for facilitating commercial transactions regarding express trusts have nothing to do with constructive trusts at all, and because we cannot turn a blind eye to its effects on the Chinese civil law system. Overall,

given that finding a way to accommodate the right under constructive trust to reverse unjust enrichment to Chinese civil law is necessary because of the two genuine inconsistencies elaborated in this section, the next section examines two possible ways out, one being inspired by the English model, the other by a popular civilian model.

### **7.3 Choice of Theoretical Models**

From a reformist perspective, simply because a particular device was born under the label ‘equity’ is not a problem at all, and the case of transplanting constructive trusts is no exception. Trusts do not cover the entire picture of equity in English law; there are many species of ‘equitable rights’ which have nothing to do with trusts. For instance, when distinguishing the concept between (i) one having an equitable interest over another’s right and (ii) one holding such right on trust for another, Lord Browne-Wilkinson said:<sup>624</sup>

There are many cases where B enjoys rights which, in equity, are enforceable against the legal owner, A, without A being a trustee, eg an equitable right to redeem a mortgage, equitable easements, restrictive covenants, the right to rectification, an insurer’s right by subrogation to receive damages subsequently recovered by the assured.

In fact, regimes could be found in Chinese law equivalent to equitable regimes in English law, exemplified by the negative real servitude (equivalent to the restrictive covenant)<sup>625</sup>

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<sup>624</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 706–07.

<sup>625</sup> Property Law 2007 (China), arts 156, 159. For a comparison to the English counterpart, see Zhicheng Wu, ‘A Conceptual Comparison on Lesser Property Rights between English Law and Chinese Law’ in Bettina Heiderhoff and Ilaria Queirolo (eds), *Current Legal Challenges in European Private and Institutional Integration* (Aracne 2017).

and the Court's discretion to order contractual rectification.<sup>626</sup> No one would say that we should rethink the justification of having the restrictive covenant as a species of lesser property rights, or the right to rectification as a species of judicial discretionary power simply because their English counterparts originated in equity while the Chinese did not have such origin of equity; the Chinese have these regimes because they need them and they operate quite well within the entire system. Similarly, the equitable right to order for repayment of money or for re-conveyance of title under the heading of 'constructive trusts' is not special compared to equitable rights under other headings such as 'restrictive covenants' or 'subrogation'. This being so, the central question of this chapter is in fact not the feasibility of transplanting the *label* of 'constructive trust', but the choice of theoretical methods of adopting the beneficiary's *right* under a constructive trust: after lifting the veil of 'constructive trust', whether Chinese law could grant a right to a transferor to order for repayment of money or for re-conveyance of title against not only the transferee but also all subsequent successors in title. If the answer is in the affirmative, then the further question arises whether the Chinese Civil Code is prepared to accept rights against rights as a third category in parallel with the traditional two categories, ie, rights against persons and rights against things. If the answer is in the negative, then we have to ask whether the Chinese Civil Code is well prepared to accept the segregation of liabilities and thereby having a transformed civilian version of constructive trust.

### 7.3.1 The English Model: Rights against Rights

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<sup>626</sup> Contract Law 1999 (China), art 125. *Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law* (Supreme Court Interpretation No 5, 2009) art 1.

The first theoretical choice of accommodating English constructive trusts to Chinese civil law is to reform the current conceptual pyramid of Chinese civil law without modifying the English model elaborated by Professors McFarlane and Stevens, according to whose argument rights under trusts should be understood not as rights against things (*in rem*) nor as rights against persons (*in personam*) but rather as rights against rights.<sup>627</sup> By accepting rights against rights as a third category of patrimonial rights<sup>628</sup> alongside rights against things and rights against persons, the acceptance of the beneficiary's right under a constructive trust would thus be inherently and conceptually rational for Chinese law. Obviously, the rights against rights model is a descriptive theory of rights originating in equity and not (and need not be) a normative one, at least so far as the English law of trusts is concerned,<sup>629</sup> and Professor Stevens also admits that they did not endeavour to 'articulate normative reasons why rights of that kind arise.'<sup>630</sup> However, given that this cannot be fitted into the Roman dichotomy of rights *in personam* and rights *in rem*, a dichotomy which is commonly accepted among Chinese lawyers, a normative justification is therefore needed for the adoption of such model in Chinese law. In fact, academic views vary with respect to the idea whether to treat the beneficiary's right under trust as *sui generis*. On the one hand, proponents argued that the civil law is an

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<sup>627</sup> Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1. Details of such description have been provided in chapter 6 above.

<sup>628</sup> The basic dichotomy of rights in Chinese private law consists of: patrimonial rights (财产权) and non-patrimonial rights (人身权). The first denotes rights that are alienable and of monetary value, the second denoting rights are not alienable and of no monetary value in themselves, such as rights of personality (人格权). Under the category of patrimonial rights, traditionally there are two sub-categories, namely, property rights or rights *in rem* (物权) and personal rights or rights *in personam* (债权).

<sup>629</sup> Though it remains contentious whether such model can explain *all* kinds of rights originated in equity labelled as 'equitable property rights', it can at least explain *one* kind of equitable right, ie, the beneficiary's right under trust.

<sup>630</sup> Robert Stevens, 'Set Off and the Nature of Equity' in Paul S Davies and others (eds), *Defences in Equity* (Hart Publishing 2018) forthcoming.

open-ended system of branches and welcomes anomalous rights which are difficult to fall into the taxonomy of patrimonial and non-patrimonial, as well as the sub-taxonomy of property and personal (under the heading of patrimonial rights). And this is exemplified by the history of the law of intellectual property rights, which were originally rejected from civil law but later accepted and treated as a kind of rights *sui generis*.<sup>631</sup> On the other hand, opponents argued that to treat the beneficiary's right under trust as *sui generis* is simply to pretend as if the legal *status quo* had already allowed so.<sup>632</sup> An examination of the legal *status quo* is therefore needed to see if current rules in Chinese law, especially the Chinese trust law has already, whether intentionally or not, embraced the idea of rights against rights.

This can be made clear by comparing transaction avoidance provisions in contract law and trust law. In Chinese contract law, due to the principle of privity, a party to a contract generally cannot sue a third party when the counter-party disposes for the benefit of that third party of his property right even though such property right is of high relevance to the purpose of the contract, unless such disposition constitutes a transaction at an under value<sup>633</sup> or an unlawful preference<sup>634</sup> which would jeopardise the performance

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<sup>631</sup> See eg, ZHOU Xiaoming, *信托制度: 法理与实务* [Trusts: Theory and Practice] (China Legal Publishing House 2012) 70. Nowadays intellectual property rights (知识产权) are recognised as a kind of civil law rights comprise a combination of moral (non-patrimonial) and economic (patrimonial) rights, though the law of intellectual property is not viewed as a part of traditional civil law branches and will not be a part of the upcoming Chinese Civil Code. Similarly, the idea of shareholder's right (股权) is seen as a collective right consisting of non-patrimonial rights (ie, the rights attached to the status of the shareholder such as the right to company information) and patrimonial rights (eg, the personal right to ask for dividends).

<sup>632</sup> See eg, ZHANG Tianmin, *失去衡平法的信托* [Trust without Equity] (Citic Publishing 2002) 24.

<sup>633</sup> Contract Law 1999 (China), art 74. Incidents include the counter-party selling his property to a third party for free, or at an unreasonable undervalue known to the third party.

<sup>634</sup> *Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law* (Supreme Court Interpretation No 5, 2009) art 18. Incidents include the counter-

of a contractual obligation owed by the counter-party.<sup>635</sup> From this point, can we say that contractual rights in Chinese law are rights against persons. By contrast, when it comes to Chinese trust law, where a trustee transfers a right (usually a property right) held on trust to a third party in breach of trust, the beneficiary of the trust can not only sue the trustee for such breach, but can also sue that third party recipient by nullifying the dispositive juridical act (between the trustee and the third party) and ordering the recipient, whether immediate or remote, to re-convey the very property right held on trust in specie to the original trustee, or to pay traceable proceeds if it is impossible to make specific restitution.<sup>636</sup> From this point, can we say that the beneficiary's right under a trust in Chinese law is not merely a right against persons (ie, the trustee), but a right against rights (ie, third party acquiring the right held on trust).<sup>637</sup> Interestingly, some academics even put forward explanations which quite resemble the McFarlane and Stevens' model, saying that 'the beneficiary's right under trust is a *right-based* one, with both proprietary and personal attributes'<sup>638</sup> and that 'the beneficiary's right under trust is not a personal

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party abandoning his security rights thus renders his personal right unsecured, or maliciously extending a due debt owed by a third party.

<sup>635</sup> Taking an example where a creditor advances money to a debtor under a loan contract, and the debt becomes due, the creditor normally has no claim against a third party who receives money from the debtor. However, if the debtor is in financial distress yet still donates a car to a third party, then the creditor can bring a claim against that third-party recipient for a court order to set aside the very gratuitous transfer between the recipient and the debtor, so that the creditor's contractual right to get repayment can be safeguarded.

<sup>636</sup> Trust Law 2001 (China), arts 22, 49.

<sup>637</sup> One might question if the beneficiary's right under trust is neither a right against persons nor a right against things, but a right against things. This is erroneous for two reasons. First, according to *numerus clausus* (Property Law 2007 (China), art 5), to be a property right in Chinese law, such right must be so provided by law, though the beneficiary's right under a trust is nowhere to be labelled as a 'property right' either in the Property Law 2007 or other legislations. Second, to be a property right in Chinese law, the holder of such right must be able to bring vindication claims against strangers (Property Law 2007 (China), arts 33–35), though no provision in the Trust Law 2001 enables the beneficiary to do so by holding such right.

<sup>638</sup> TANG Yihu, *信托财产权利研究 [Research on Proprietary Rights under Trust]* (CUPL Press 2005) 44 (emphasis added).

right against the trustee, but a personal right *against the right held on trust*,<sup>639</sup> though neither of these two writers heard such model from England partly because both their thoughts were published earlier than 2010 when McFarlane and Stevens' work was published.

Yet can we reach the conclusion that Chinese trust law has already embraced the idea of rights against rights as a third category of rights? The answer seems not to be straightforwardly in the affirmative after a careful comparison with its English counterpart. The major and most decisive difference<sup>640</sup> lies in one of the constituent elements of the beneficiary's claim against third party recipients, which is the requirement of knowledge in Chinese law. In English law, the beneficiary's specific claim against third party recipients with respect to the right held on trust is strict, in the sense that any third-party recipient would be liable for specific restitution as long as he acquires the very right held on trust, unless he is an equity's darling, meaning that he is a (i) good faith purchaser of (ii) a common law right (iii) for value (iv) without notice.<sup>641</sup> In other words, the third-party recipient's liability to return the specific right is strict because he cannot have a good defence even if he proves that he did not know nor ought to have known the trustee's breach of trust at the moment of the disposition. In Chinese

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<sup>639</sup> ZHANG Junjian, *信托法基础理论研究 [Research on Fundamental Principles of Trust Law]* (China Financial and Economic Publishing House 2009) 160.

<sup>640</sup> There are minor differences as well. First, Chinese law does not have an equivalence to *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282, so that there is no rule in Chinese law saying a solely-entitled adult beneficiary could ask for the misappropriated trust property be returned directly to his place rather than the trustee's place. Second, such specific claim in Chinese law would lapse for four years (one year for elimination of power, three years for limitation period: General Provisions of Civil Law 2017 (China), art 188), while that in English law would lapse for either six years or no time-lapse depending on whether the Court sees the recipient as a genuine trustee: Limitation Act 1980, s 21.

<sup>641</sup> *Pilcher v Rawlins* (1871–72) LR 7 Ch App 259.

law, however, the beneficiary's specific claim against third party recipients with respect to the right held on trust is not strict but fault-based, because only those third-party recipients who knew the trustee's breach of trust at the moment of the disposition is liable to make specific restitution; lack of knowledge hence counts as a good defence.<sup>642</sup> It is submitted that the liability for such specific claim being strict is a crucial criterion for determining whether the beneficiary's right under trust can accurately be called a right against a right. This is because the core test for telling rights against things from right against rights is the scope of exigibility, the former availing against all *strangers* save for good faith purchasers for value without notice, the latter availing against all *acquirers* of the right save for good faith purchasers for value without notice. Given in the former case the liability for a stranger to return the right is strict, in the latter case the liability of an acquirer to make restitution in specie should also be strict rather than fault-based. It therefore follows that, from a reformist perspective, only by changing the nature of liability for third-party recipients with respect to the beneficiary's specific claim in articles 22 and 49<sup>643</sup> of the Chinese Trust Law 2001 from a fault-based one to a strict one, can we then say that the English model, ie the idea of rights against rights as a third category has been embraced by Chinese law.

### 7.3.2 The Civilian Model: Dual Patrimony

The second theoretical alternative is dual patrimony, which is a modified model of the aforementioned English one. The idea was first put forward by Lepaulle, a French jurist

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<sup>642</sup> Trust Law 2001 (China), art 22, 49.

<sup>643</sup> See the paragraph immediately above.

trying to explain Anglo-American trusts in civilian terms.<sup>644</sup> This model, though it did interpolate trusts in common law jurisdictions,<sup>645</sup> later became quite influential in many civilian jurisdictions as the guideline for the trust law legislation or academic suggestions,<sup>646</sup> including suggestions that Chinese law should consider to adopt this model as well.<sup>647</sup> According to such model, if trusts are to be received in civilian jurisdictions, the essence should not be the segregation of rights but the segregation of liabilities. A patrimony comprises both assets and liabilities.<sup>648</sup> The traditional version of the civilian notion of patrimony was that every legal person, whether natural or artificial, has only one single patrimony. Thus, when such a person incurs a debt without providing any security over a specific thing (such as a charge or a pledge), his patrimony could be seen as his ‘security’ for the repayment of debt. The modern version challenged the notion of single patrimony by accepting the notion of separate patrimonies in certain situations including trusts. Accordingly, apart from one’s private patrimony comprising

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<sup>644</sup> Pierre Lepaulle, ‘An Outsider’s View Point of the Nature of Trust’ (1928–29) 14 Cornell LQ 52.

<sup>645</sup> See eg, Lionel Smith, ‘Trust and Patrimony’ (2008) 38 *Revue générale de droit* 379; Ben McFarlane, ‘The Centrality of Constructive and Resulting Trusts’ in Charles Mitchell (ed), *Constructive and Resulting Trust* (Hart Publishing 2010).

<sup>646</sup> Eg, Scotland: George L Gretton, ‘Trusts without Equity’ (2000) 49 ICLQ 599; Kenneth GC Reid, ‘Patrimony Not Equity: the Trust in Scotland’ (2000) 8 *Eur Rev Priv L* 427; Scottish Law Commission, *Nature and Constitution of Trusts* (Scot Law Com DP No 133, 2006) paras 2.16–2.28. Italy: Maurizio Lupoi, ‘Italy: An Independent Approach to Trusts in a Civil Law Country’ (2003) 9 T & T 8; Alexandra Braun, ‘Italy: The Trust Interno’ in David J Hayton (ed), *The International Trust* (3rd edn, Jordans 2011). The Netherlands: HLE Verhagen, ‘Trusts in the Civil Law: Making Use of the Experience of “Mixed” Jurisdictions’ (2000) 8 *Eur Rev Priv L* 477. Quebec: Quebec Civil Code, arts 2, 1260, 1261. Model Laws: Draft EU Directive on Protected Funds, art 3; Draft Common Frame of Reference (DCFR): art X-1:202.

<sup>647</sup> Kenneth Reid, ‘Conceptualising the Chinese Trust: Some Thoughts from Europe’ in CHEN Lei and CH van Rhee (eds), *Towards a Chinese Civil Code: Comparative and Historical Perspectives* (Martinus Nijhoff 2012); Lusina Ho and Rebecca Lee (eds), *Trust Law in Asian Civilian Jurisdictions: A Comparative Analysis* (CUP 2013) 265.

<sup>648</sup> It was reasonably argued by Lau that we should treat two sub-models of the model of dual patrimony, ie, ‘patrimony by appropriation’ and ‘patrimony as legal personality’ differently: WM Lau, *The Economic Structure of Trusts* (OUP 2011) 77, but this chapter would not take such distinction too seriously because this has little to do with the reception of this model in Chinese law.

his own assets and liabilities in one 'box', he could have another trust patrimony which is distinct from the previous one. This could be seen as another 'box' comprising the trust assets and liabilities, as long as there is really something of value in this 'box', whether in the form of the original subject-matter or its substitutions due to the operation of real subrogation. It follows that his personal creditors can reach his own patrimony but not his trust patrimony; it is his beneficiary, also seen as a creditor, who can reach the trust patrimony. It could therefore be said that, though not copying the English orthodoxy on trusts, the beneficiary's right to the subject-matter of the trust, whether consensual or constructive, is nevertheless immune from the execution of judgment personal debts of the trustee, and immune from insolvency distribution of assets held beneficially by the trustee.

Similar to the reception of the English rights against rights model discussed above, the question whether the idea of dual patrimony has been embraced by Chinese law arises here again. This question is to be answered by examining relevant provisions in Chinese trust law, and then provisions in other relevant branches afterwards. So far as Chinese trust law is concerned, 'patrimony' (责任财产) is nowhere to be found as an explicitly recognised term in the Chinese Trust Law 2001. Nor is it clear that articles 16 and 17 of the 2001 Law implicitly recognise it either. Article 16 provides that:

The trust property differs from the property owned by the trustee (hereinafter referred to as inherent property for short) and shall not be deemed as the inherent property of the trustee or become part of the inherent property.

If the trustee dies, or is disbanded, terminated, or being declared bankrupt, the trust property shall not be deemed as his legacy or assets available for liquidation.

And article 17 provides that:

Trust property shall not be enforced except under any of the following circumstances:

- (i) where the creditor has a pre-existing priority in relation to the trust property before the property is held on trust;
- (ii) where debts incurred from the trustee's management of trust and the trust creditors require the debts to be paid off;
- (iii) where taxes that are due to pay from the trust property; and
- (iv) Other circumstances provided by law ...

Although these provisions clearly mention that the subject-matter of a trust does not form part of the trustee's private asset available for execution of his own judgment debt, for insolvency liquidation and for succession, they do not give the underlying reason. The reason may be interpreted as dual patrimony; it may well be interpreted as rights against rights. Notably, however, the phrase 'inherent property' (固有财产) in article 16 seems to be quite similar to the idea of patrimony, save for the meaning of the former only includes assets not liabilities. From this point it is reasonable to anticipate that the idea of dual patrimony, or at least something similar to such idea was in the minds of the legislature when they were enacting this Law. Likewise, article 26 provides that the trustee is not allowed to make profits for himself by taking advantage of his capacity of a trustee; otherwise the profits he obtains shall be seen as a part of subject-matter of the trust rather than held by him beneficially. For instance, if a trustee exchanges ownership

to a car for some company shares in breach of trust, then the beneficiary's claim can reach to the company shares now held by the trustee. This can be seen as another provision indicating that the Chinese trust law has accepted the idea of dual patrimony and real subrogation, but the underlying rationale of this provision can also be explained in an English way without the help of the theory of dual patrimony, just as the House of Lords did in *Foskett v McKeown*,<sup>649</sup> by saying that this is because the beneficiary's right to the original subject-matter prior to the unauthorised substitution persists in respect of the new subject-matter.<sup>650</sup>

Looking outside the Chinese trust law, we can find both negative and positive clues on whether Chinese law has embraced dual patrimony. Thinking of the bigger picture, the trust is only one way of holding rights. As Swadling has pointed out, generally speaking there are many ways in which the law could recognise that rights can be held. These include: (i) outright/beneficially/absolutely, (ii) as a security for the performance of an obligation, (iii) as an executor/administrator of a deceased's estate, (iv) as an administrator of an insolvent estate, and (v) as a trustee.<sup>651</sup> If the theory of dual patrimony is employed to explain why a person, apart from rights held beneficially, can hold other particular rights as a trustee simultaneously in Chinese law, then such theory should equally be employed to explain why such person can hold rights as a security, an executor, an administrator as well. However, such coherence cannot be found. Of course,

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<sup>649</sup> [2001] 1 AC 102.

<sup>650</sup> Cf academic criticisms on the 'persistence' explanation: see eg, Peter Birks, 'Property, Unjust Enrichment, and Tracing' (2001) 54 CLP 231.

<sup>651</sup> William Swadling, 'Trusts and Ownership: A Common Law Perspective' (2017) 24 Eur Rev Priv L 951, 953.

one could argue that because of Chinese law does not recognise the mortgage,<sup>652</sup> but only the charge as the only type of non-possessory security right. so that it is meaningless to talk about holding rights as a security. Nonetheless, though Chinese law does recognise the executor and administrator, the theory of dual patrimony is clearly rejected in both scenarios. The executor of a deceased is not seen as holding the deceased's assets as a separate patrimony. Rather, these assets are co-owned by all the successors before severance.<sup>653</sup> The administrator of a bankrupt is not seen as holding the bankrupt's assets as a separate patrimony either. Rather, ownership to these assets still belongs to the bankrupt, with the administrator having a mere power to dispose of these assets for the benefit of the bankrupt's general creditors.<sup>654</sup> Moreover, in another field where dual patrimony might possibly exist, ie, commercial partnership, such idea is also rejected in Chinese law, because a partner's undivided share is available for his personal creditors; he is not allowed to hold his share in the commercial enterprise as a separate patrimony from his private patrimony.<sup>655</sup> All these three are negative indications.

As for positive indications, it was provided in surety law, property law, and maritime law that in the event of destruction of the subject-matter of a charge, where

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<sup>652</sup> Though there are academic views appealing for accepting such form of security by transfer of ownership: see recently eg, GAO Shengping, '动产让与担保的立法论 [Legislating Mortgage to Movables]' [2017] 5 Peking University Law Journal 1193.

<sup>653</sup> *Opinions on Several Issues concerning the Implementation of the General Provisions of Civil Law* (Supreme Court Interpretation No 6, 1988) art 177. Notably, although this provision has been repealed since 2008, this was because of the form of co-ownership between non-family members should be co-ownership with undivided shares rather than joint co-ownership according to Property Law 2007 (China), art 103. The repeal did not turn the status of the executor to the owner.

<sup>654</sup> Enterprise Bankruptcy Law 2006 (China), arts 25, 30.

<sup>655</sup> Partnership Enterprise Law 2006 (China), art 42. Other partners surely have the right to refuse the partner's personal creditors to be new members of the enterprise, but they have to cut off the share of the very partner by severance thus to decrease the overall amount of assets in the enterprise.

there is any money paid to the chargor due to insurance or compensation, such money would replace the original subject-matter of the charge, as a result of which, the chargee's personal right is still secured by the money despite the destruction of the original subject-matter.<sup>656</sup> Such provision in property law was even named after 'real subrogation' (物上代位性). Indeed, the underlying idea of these three legislative provisions could be understood in a way that the subject-matter of a charge is not a thing, but a 'box', so that the thing can be subrogated by the money paid in the form of insurance or compensation. This idea is therefore very close to dual patrimony. Overall, just like the issue whether Chinese law has embraced the rights against rights model discussed in the previous subsection, the issue whether Chinese law has embraced the patrimony model has to be answered 'yes and no' as well, in the sense that both the English model and the civilian model could possibly be the viable solution for the Chinese civil law to *conceptually* welcome the English constructive trust as a device to reverse unjustified enrichment.

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<sup>656</sup> Maritime Law 1992 (China), art 20; Guarantee Law 1995 (China), art 58; Property Law 2007 (China), art 174.

## CHAPTER 8 JUSTIFICATION DEBATE OF CAUSALITY VERSUS ABSTRACTION

Having discussed to what extent do separation and abstraction exist in both English and Chinese law, and having discussed the possibility for Chinese law to embrace constructive trusts to reverse unjust enrichment in English law, this final chapter draws a comparison not on positive rules but on normative justifications on the choice between abstraction and causality.

First things first, given that the entire thesis concerns two conceptual contrasts, namely, separation versus anti-separation and abstraction versus anti-abstraction, it is necessary to explain why this chapter only focuses on the justification debate regarding the latter instead of both.<sup>657</sup> A brief answer is that only the latter needs a normative judgment, because what the law is and what the law should be are two distinct questions. As pointed out by Professor Wang,<sup>658</sup> whether property transfers should be understood in a *separationist* or *unitary* way is merely a question of *interpretive choice* (解释选择), because whether or not a conveyance is conceptually interpreted as a separate juridical

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<sup>657</sup> Despite the fact that whether Chinese law should adopt a separationist approach to understand the relation between contract and conveyance has also been a topic under debate. See eg, CHANG Pengao, ‘论现实存在与物权行为的无关联性 [On the Irrelevance between the Positive Rule and the Normative Judgment regarding the Juridical Act of Real Rights]’ [2015] 1 Law Science 103; SU Yeong-chin, ‘从民法典理论看大陆新制定的《民法总则》 [Comments on Mainland China’s New General Principles of Civil Law from the Perspective of Civil Code Theories]’ [2017] 3 China Law Review 71. Cf, RAN Keping, *物权法总论 [General Principles on Real Rights Law]* (Law Press 2015) 228–39; CUI Jianyuan, ‘处分行为理论真的那么美妙吗? [Is the Theory of Dispositive Juridical Act Really So Wonderful?]’ [2016] 5 Journal of CUPL 53.

<sup>658</sup> WANG Yi, *民法原理与民法学方法 [Principles and Research Methods of Civil Law]* (Law Press 2009) ch 1. See also WANG Yi, ‘民法价值判断问题的实质性论证规则’ [Substantive Rules of Reasoning for Value Judgment in Civil Law] [2004] 6 Social Sciences in China 104; ‘对中国民法学学术路向的初步思考’ [A Reflection on the Academic Approach of Chinese Civil Law] [2006] 1 Law and Social Development 87. For a similar idea on the difference between separation and abstraction, see WU Yiming, ‘物权行为无因性: 逻辑的必然还是价值的衡量 [The Abstraction Principle: Logical Consequence or Value Judgment]’ [2009] 4 Political Science and Law 120.

act from the underlying contract applying a different set of rules determining its validity, they both can explain why parties' consent leads to the result of the transfer of property; it normally does not cause conflict of interests among parties. By contrast, whether property transfers should operate in an *abstract* or *causal* way is a question of *value judgment* (价值判断), because the choice between abstraction and causality leads to completely different results as to whether the validity of conveyance would be infected by the invalidity of the underlying basis; it normally does cause conflict of interests among various parties.

The practical importance of choosing causality or abstraction lies in three-party situations rather than two-party situations. In two-party situations, no doubt that generally the transferee should not be in a better position than the transferor, but in reality such a normative judgment does not matter because the results of causality and abstraction are roughly the same from a consequentialist perspective. Where the subject-matter of property right is present in the hands of the transferee, both restitution in kind (abstraction) and vindication (causality) would help the transferor get back the subject-matter as the property right-holder. Where the subject-matter is absent due to eg, complete destruction, monetary restitution would be the result for the transferor in both causal and abstract system. Only in three-party situations does the consequence of causality differ from that of abstraction. Specifically, as concluded by Professor Liang, an anti-abstractionist who gave a formal kick-off to the match between causality and abstraction in 1989 in mainland China, the most important result is that the transferor would normally have no possible claim against third parties, and would only have a personal claim against the transferee under the operation of abstraction in a number of

situations.<sup>659</sup> These include: (i) where the transferee transfers the property right on to a third-party purchaser, (ii) where the transferee creates a security interest over the property right, (iii) where a creditor of the transferee obtains a court order for execution of his judgment debt via a compulsory sale of the property right, (iv) where the transferee goes into insolvency,<sup>660</sup> (v) where the transferee dies and succession follows, and (vi) in the case of the destruction of property, the third party acquirer is not even liable *in personam*.

These are truly consequences. However, he went a step further to say that because of these consequences, abstraction is unfair to the transferor and thus cannot be justified, and causality is therefore the better choice for Chinese law. But why is it unfair? It seems not so self-evident merely by listing the aforementioned consequences; it is at least necessary to find out a criterion to demonstrate why the transferor<sup>661</sup> deserves preferential treatment over third-party purchasers of the transferee, third-party creditors of the transferee, and subsequent purchasers and creditors of them. Indeed, just as the award of a right under constructive trust cannot be justified unless there is some reason demonstrating why ‘the claimant should have priority over the general creditors of the

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<sup>659</sup> LIANG Huixing, ‘我国民法是否承认物权行为’ [Is Juridical Act of Real Rights Recognised in Chinese Civil Law?] [1989] 6 Chinese Journal of Law 56.

<sup>660</sup> Normative concerns regarding insolvency under the operation of abstraction can also be found in German academia, where it was believed that ‘the transferor as an underdog’ is an inevitable consequence of an abstract system; it is impossible for an abstract system to allay such consequence simply by introducing an exceptional rule for insolvency distribution, which would otherwise entirely collapse the abstract system. See eg, Jens Thomas Füller, *Eigenständiges Sachenrecht?* (Mohr Siebeck 2006) 232–35.

<sup>661</sup> For the purpose of simplicity, in this chapter the phrase ‘the transferor’ denotes the transferor who conveys property right upon a flawed underlying basis, ‘the transferee’ denotes the transferee who acquires such property right, and ‘third parties’, ‘third-party creditors’, ‘third-party purchasers’ denote those who subsequently acquire such property right from the transferee, or have a personal claim to be settled by acquiring such property right or from the proceeds from a compulsory sale of such property right.

defendant, over the solvent third party, or over the general creditors of that third party,’<sup>662</sup> the award of other forms of proprietary remedies including the power to re-vest must also be justifiable in this regard.

A stark contrast between English and Chinese lawyers regarding the debate of causality versus abstraction lies in mapping the justification. For a long time, English lawyers had been quite unfamiliar with such debate, and even though it has been realised by modern English lawyers in this century, normative considerations are not seen in the law of property,<sup>663</sup> nor in the law of obligations: contract, but are buried in the law of obligations: unjust enrichment, which is somewhat inconceivable for Chinese lawyers. This is because, in the eyes of most Chinese lawyers, as mentioned in chapter 7 above, unjustified enrichment triggers only personal rights but not rights or powers of proprietary nature. In other words, unjust enrichment implies passing of property, and the prerequisite for causality (with retrospective effect) is that there should have been no enrichment at all, whether unjust or not. Although this is indeed the correct view for Chinese law, they naturally, though mistakenly assume that this should also be the predominant view shared among English academics with respect to English law<sup>664</sup> — No

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<sup>662</sup> DWM Waters, ‘The English Constructive Trust: A Look into the Future’ (1966) 19 *Vanderbilt L Rev* 1215, 1250.

<sup>663</sup> The concepts of abstraction and causality is nowhere to be found in property law books till early this century. For instance, abstraction was exceptionally mentioned in FH Lawson and Bernard Rudden, *The Law of Property* (Clarendon 2002) 21, but was used in a different sense. The thinking of property transfers within the pattern of abstraction versus causality is a quite recent phenomenon, eg, Michael Bridge and others, *The Law of Personal Property* (2nd edn, Sweet & Maxwell 2017) 18-030 (first edition being in 2013), though very brief and without normative considerations.

<sup>664</sup> Though there are indeed voices in England arguing that unjust enrichment should not be the correct explanation for proprietary restitution: Graham Virgo, ‘Restitution Through the Looking Glass: Restitution within Equity and Equity within Restitution’ in Joshua Getzler (ed), *Rationalising Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis 2003); ‘The New Birksian Approach to Unjust Enrichment’ [2004] *RLR* 260; *The Principles of the Law*

wonder that Chinese colleagues have long been unaware of the counterpart debate of abstraction versus causality in the English law of restitution for unjust enrichment. As pointed out by Häcker, ‘proprietary restitution provides a crucial cornerstone for any comprehensive account of the causality and abstraction in the common law,’<sup>665</sup> such neglect would therefore also result in a huge lacuna in comparative research for the upcoming Chinese Civil Code. If we look into the well-travelled debate of proprietary restitution in English law, we will find out that some of the points are good lessons for Chinese anti-abstractionists to further explain their feeling as to why abstraction is ‘unfair’, and these points are equally good lessons for Chinese abstractionists to enhance their counter-arguments as to why abstraction is not, but causality is, ‘unfair’.

Justifications do not lie in a vacuum, they must be attached to and defend certain institutions. One of the major differences between the idea of causality in Chinese and English law is that, while the power to revest is the only available form of proprietary remedy in Chinese law, this is not the case in English law. Possible proprietary remedies in English law include<sup>666</sup> the constructive trust (being the most common and widely

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*of Restitution* (3rd edn, OUP 2015) chs 1, 21; Richard Calnan, ‘Proprietary Remedies for Unjust Enrichment’ in Andrew Burrows and Edwin Peel (eds), *Commercial Remedies: Current Issues and Problems* (OUP 2003); Lord Millett, ‘Proprietary Restitution’ in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Law Book Co 2005). However, the main scenario on which these arguments focus (ie, unauthorised substitution and tracing) is irrelevant with the main scenario of this thesis (ie, transfer involving a flawed underlying basis due to impaired consent, illegality, informality or incapacity).

<sup>665</sup> Birke Häcker, ‘Causality and Abstraction in the Common Law’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (CUP 2010) 201.

<sup>666</sup> Rectification was mentioned in Charles Mitchell and others, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) para 40-42 as the fifth category of proprietary remedies for unjust enrichment, though as a mere equity, it has no retrospective effect which differs from the other four more commonly recognised proprietary remedies.

applicable one as mentioned in chapter 6 above), power to revest, equitable lien,<sup>667</sup> and subrogation to extinguished rights.<sup>668</sup> As a result, when comparing justification viewpoints put forward by Chinese lawyers with those by English lawyers, it is better to distinguish arguments for powers to revest from arguments for other forms of remedies. For instance, the celebrated ‘proprietary base’ theory by Professor Birks<sup>669</sup> and the ‘initial and subsequent failure’ theory by him and Professor Chambers<sup>670</sup> are commonly used to justify equitable proprietary remedies of ‘subrogation’ and ‘constructive trust’ in English law, but are not designed to defend the common law remedy of the ‘power to revest’. Given that Chinese law does not recognise subrogation and constructive trust as proprietary remedies, the arguments of ‘proprietary base’ and ‘initial and subsequent failure’ will therefore not be considered as a separate heading for comparative purposes in this chapter.

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<sup>667</sup> Eg, *Cooper v Phibbs* (1867) LR 2 HL 149. Although such case concerns unjust enrichment (for mistaken improvement) following contractual rescission (of a fishery lease), it has nothing to do with transfer of property. See also *Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72, 53 ER 563, though the facts in such case are completely irrelevant to this thesis.

<sup>668</sup> *Banque Financiere de la Cite SA v Parc (Battersea) Ltd* [1999] 1 AC 221; *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, [2016] AC 176. Similarly to those cases of lien in the previous footnote, the facts in these cases are irrelevant to this thesis either.

<sup>669</sup> Peter Birks, *An Introduction to the Law of Restitution* (OUP 1985) 378–85; ‘Establishing A Proprietary Base’ [1995] RLR 83. The gist of such theory is that to justifiably award the claimant a proprietary remedy (usually in the form of constructive trust or subrogation) in relation to a specific thing now held by the defendant, title to either (i) the very thing, or (ii) another thing by which the defendant exchanged for the very thing, or (iii) another thing by which the defendant used to discharge any encumbrance on the very thing must have been previously owned by the claimant.

<sup>670</sup> Robert Chambers, *Resulting Trusts* (Clarendon Press 1997) 151–70; ‘Resulting Trusts’ in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006); Peter Birks, ‘Retrieving Tied Money’ in William Swadling (ed), *The Quistclose Trusts: Critical Essays* (Hart Publishing 2004); *Unjust Enrichment* (2nd edn, Clarendon Press 2005) 185–99. The gist of such theory is that to justifiably award the claimant a proprietary remedy (usually in the form of constructive trust) in relation to a specific thing now held by the defendant, there must be no period of time when the defendant ever held the beneficial interest of the very thing; the claimant must not intend to enrich the defendant beneficially from the outset of and throughout the transaction.

This chapter will start with challenging two theories that can be used to justify proprietary restitution in the form of power to revest argued by many English law writers, the ‘swollen assets’ theory and the ‘involuntary assumption of risk’ theory.<sup>671</sup> It will then move on to challenge two main anti-abstractionist arguments put forward by many Chinese writers. The first is that the ‘causality plus bona fide acquisition’ model strikes a perfect balance between security of property and security of transaction better than abstraction. The second is that causality is especially necessary for restitution of property of sentimental value. Finally, given that all the aforementioned discussion are negative arguments against causality, a ‘detecting opportunity’ theory is to be provided as a positive argument for justifying why abstraction is preferable to causality.

## **8.1 Swollen Assets and Involuntary Assumption of Risk**

### **8.1.1 Swollen Assets**

When facing the conflict of interest between the transferor and the transferee’s general creditors, to prefer the general creditors over the transferor seems to be a rather counter-intuitive choice in the eyes of some English writers because it is unacceptable that ‘assets

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<sup>671</sup> William Swadling, ‘Policy Arguments for Proprietary Restitution’ (2008) 28 LS 506 has given a comprehensive account of these arguments and their problems. The next section of this chapter will add a few points to Swadling’s critique and to curtail it to fit the specialised context of the ‘causality versus abstraction’ debate thereby making it particularly useful to Chinese law. For a full account of these two theories from a protagonist perspective, see eg, Craig Rotherham, *Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights* (Hart Publishing 2002) 77–86. For similar thoughts in other common law jurisdictions, see David M Paciocco, ‘The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors’ (1989) 68 Can Bar Rev 315; Andrew Kull, ‘Restitution in Bankruptcy: Reclamation and Constructive Trust’ (1998) 72 Am Bankr LJ 265; Hanoch Dagan, ‘Restitution in Bankruptcy: Why All Involuntary Creditors Should Be Preferred’ (2004) 78 Am Bankr LJ 247; Peter Watts, ‘Constructive Trusts and Insolvency’ (2009) 3 J Eq 250, though it should be noted that the form of proprietary remedy discussed by them is the remedial constructive trust (effective causality) not the power to revest (notional causality).

which *ought never to have been added to the insolvent's estate* ought to be available to his unsecured creditors.<sup>672</sup> At first blush it reads indeed unacceptable, but on second thought, the problem is that such argument, especially the emphasised phrase in reality begs the question. The general question between abstractionism and anti-abstractionism is whether title conveyed with a flawed underlying basis should remain the transferor's. This, to be specialised in the context of the transferee's insolvency, can just be expressed in an alternative way that whether assets acquired with a flawed underlying basis *ought to have been added to the insolvent's estate*. If the answer to the general question is deemed in the negative, then of course the special question in the context of insolvency, as in the quoted argument above, should be in the negative as well — but it is the central question that is the one in need of justification. In other words, the quoted argument alone provides no reason other than circularity.

To justify the 'ought never to' question in the context of insolvency quoted above within the law of insolvency and without assuming the rationality of causality in property transfers generally, it is not enough for anti-abstractionists' simply to assert that abstraction is 'unfair' for the transferor. To explain why it is 'unfair', it was argued by Professor Jones that the transferee's general creditors 'do not expect to be, and should not be, reimbursed from what is after all a *windfall* ... because of the existence of assets materially *swollen* by the [for instance] mistaken payment' from the transferor.<sup>673</sup>

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<sup>672</sup> Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 181 (emphasis added).

<sup>673</sup> Gareth Jones, 'Remedies for the Recovery of Money Paid by Mistake' [1980] CLJ 275, 276 (emphasis added). Although his discussion focuses on the proprietary remedy in the form of constructive trust, his argument could be used for the form of power to revest as well.

The central idea of the ‘swollen assets’ theory is that as long as the transferor swells the ‘overall wealth’<sup>674</sup> of the transferee, in order to prevent the transferee’s general creditors from getting an undeserved windfall in the event of insolvency, the transferor should be entitled to a proprietary restitutionary claim regardless of whether such claim can be established on any ‘particular right’ currently held by the transferee,<sup>675</sup> because in this sense the position of the general creditors is the same as that of the transferee.<sup>676</sup> Notably however, because the form of proprietary restitution under discussion is the power to reconstitute rather than lien and because the power to reconstitute is impossible to award if the property right in question can no longer be identified,<sup>677</sup> the swollen assets theory must be modified by adding a qualification, ie the existence of the ‘particular right’ held by the transferee.

Before reviewing such theory, a preliminary distinction between English law and Chinese law must be made. Obviously, it only makes sense to speak of ‘undeserved windfalls’ in the above context where the overall assets of the transferee are insufficient to be distributed among creditors in insolvency proceedings. In other words, impecuniosity and insolvency is the premise of using ‘swollen assets’ and ‘undeserved windfalls’ to justify favoured treatment to the transferor at the expense of the transferee’s general creditors. Unlike many jurisdictions recognising insolvency/bankruptcy for both entities and individuals, Chinese law only has a limited insolvency regime, by which is

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<sup>674</sup> For a conceptual distinction between two senses of wealth/thing, ie the ‘abstract’ conception (often used in the law of unjust enrichment denoting the abstract value) and the ‘particular’ conception (often used in the law of property denoting a particular subject-matter) respectively, see Bernard Rudden, ‘Things as Things and Things as Wealth’ (1994) 14 OJLS 81.

<sup>675</sup> Simon Evans, ‘Rethinking Tracing and the Law of Restitution’ (1999) 115 LQR 469.

<sup>676</sup> RH Maudsley, ‘Proprietary Remedies for the Recovery of Money’ (1959) 75 LQR 234.

<sup>677</sup> Eg, the destruction of the subject-matter or the extinction of the right.

meant insolvency proceedings only apply to non-charitable artificial legal persons,<sup>678</sup> but not others, especially natural legal persons.<sup>679</sup> At first blush, it seems that ‘swollen assets’ and ‘undeserved windfall’ can only serve to justify causality for companies but not for individuals in China. This is because if the transferee is a natural legal person, since he cannot be bankrupt, all debts owed by him, whether to general creditors or to the transferor, is not extinguished after execution and distribution proceedings.<sup>680</sup> Since the transferor technically does not suffer a loss in his right to get fully paid, it cannot be said that any of the transferee’s general creditors who gets paid from the transferee’s assets receives an ‘undeserved windfall’ at the expense of the transferor.

However, an opposite conclusion might be reached after a closer look at the rules in Chinese law regarding distribution proceedings for debtors being natural legal persons. First, although the enforcement of multiple judgment debts owed by individuals generally follows ‘first in first out’ distribution rather than ‘pari passu’ distribution,<sup>681</sup> it does not simply mean that the transferor, if he files later than some of the transferee’s unsecured creditors, cannot do anything but see those creditors get fully paid, leaving almost

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<sup>678</sup> Enterprise Bankruptcy Law 2006 (China), art 2.

<sup>679</sup> *Interpretation of the Supreme People’s Court of Several Issues concerning the Enforcement Procedures* (Supreme Court Interpretation No 15, 1998) art 89. Although lawyers have been appealing for a personal bankruptcy law for a long time, the Chinese legislature is still hesitated in doing so. See eg, TANG Weijian, ‘关于建立我国个人破产制度的构想(上) [Some Thoughts on Establishing a Personal Bankruptcy Regime for China: I]’ [1995] 3 *Tribune of Political Science and Law* 41; XU Defeng, ‘论个人破产免责制度 [On Personal Bankruptcy Regime]’ [2011] 4 *Peking University Law Journal* 742. This seems very odd from an outsiders’ viewpoint, but it could be attributed to the prevailing notion rooted in the Chinese tradition shared among many non-lawyers, that a man’s debt cannot come to an end until his death (人不死账不赖) and should even be paid off by his son after his death (父债子还).

<sup>680</sup> *Interpretation of the Supreme People’s Court of Several Issues concerning the Enforcement Procedures* (Supreme Court Interpretation No 15, 1998) art 95.

<sup>681</sup> *Interpretation of the Supreme People’s Court of Several Issues concerning the Enforcement Procedures* (Supreme Court Interpretation No 15, 1998) art 88.

nothing valuable in the transferee's remaining assets for him to enforce. Rather, as long as those 'early bird' creditors have not finished their execution proceeding under the help of the Court, the transferor (as well as other 'late bird' creditors) can apply to join such execution proceeding as if it was also filed by him, thereby having a chance to block the 'first in first out' consequence.<sup>682</sup> Equally, however, if the transferor is an early bird, his 'first in first out' execution attempt might as well be interrupted by the transferee's other creditors. Second, where the aforementioned joining application is filed by the transferor, the Court must treat all claims collectively and act in a role similar to that of an insolvency liquidator, in the sense that the Court must work out a distribution plan in a 'pari passu' way among the transferor and other applying unsecured creditors.<sup>683</sup> Based on these two features, ie, pari passu and collectiveness, it is reasonable to say that distribution proceedings for an impecunious individual to some extent do resemble liquidation proceedings for an insolvent company. Moreover, although the transferor's restitutionary claim-right against the transferee is not extinguished after the aforementioned collective distribution proceedings, so that the transferor can theoretically file for execution against any assets acquired by the transferee in the future and found out by the transferor, this practically speaking is not easy to realise. As a result, it makes sense for the transferor to argue that in Chinese law, even where the transferee is an individual rather than a company so that bankruptcy does not apply, the 'quasi-bankruptcy' distribution run by the Court among him and the transferee's general

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<sup>682</sup> *Interpretation of the Supreme People's Court of Several Issues concerning the Enforcement Procedures* (Supreme Court Interpretation No 15, 1998) arts 90, 92.

<sup>683</sup> *Interpretation of the Supreme People's Court of Several Issues concerning the Enforcement Procedures* (Supreme Court Interpretation No 15, 1998) art 94; *Interpretation of the Supreme People's Court of Several Issues concerning the Enforcement Procedures in the Application of the Civil Procedure Law* (Supreme Court Interpretation No 13, 2008) art 25.

creditors still makes him practically lose the chance to get fully paid while part of the transferee's overall assets swelled by him practically gives other creditors an undeserved windfall.

Now back to the analysis of the 'undeserved windfall' and 'swollen assets' theory itself: a problem of such theory is that it is improper to use the word 'windfall' to describe what the general creditors expect from the transferee. As pointed out by Mr Crilley,

'the position of unsecured creditors is arguably much stronger ... not just because there is no rational basis for saying that the wrong done to them is less improper ... but because they gave value. They have suffered a loss and to think of them as likely to receive a windfall is wrong-headed: the real issue is how far their losses can be made good.'<sup>684</sup>

Moreover, sometimes a bankrupt may have various kinds of creditors under the heading of 'general creditors' whose personal right is triggered by various causative events ranging from consent, wrongs, unjust enrichment and others. Among these kinds, it is notable that one kind of creditor, ie those who have supplied goods to the transferee on credit without receiving the bargained-for payment, is no different to the transferor in the sense that they also swelled the transferee's assets available for distribution.<sup>685</sup> They therefore could equally argue that other kinds of creditors would get a windfall at their expense under the *pari passu* distribution. Obviously, however, their argument based on 'undeserved windfall' and 'swollen assets' does not make them any better off in

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<sup>684</sup> Darrel Crilley, 'A Case of Proprietary Overkill' [1994] RLR 57, 69. Although these were said in the context of wrongdoing, the core idea applies here too in the sense that general creditors are making good what are due to them rather than seeking a windfall.

<sup>685</sup> R M Goode, 'Ownership and Obligation in Commercial Transactions' (1987) 103 LQR 433, 444.

insolvency distribution, then by the same token, such argument should not make the transferor better off either. This is another problem of such theory.

### 8.1.2 Involuntary Assumption of Risk

Nevertheless, some argue that it is possible to say that the transferor is not in the same position as those who have supplied goods to the transferee on credit without receiving the bargained-for payment. That is, the transferor did not ‘*consciously* take the risk that his recipient may become insolvent and that he may have to share the pickings of his estate with the general creditors’<sup>686</sup> while the transferee’s general creditors (here it meant unsecured creditors) did, the gist of such theory being the contrast between ‘voluntary assumption’ and ‘involuntary assumption’. A similar argument is that the transferor’s position is ‘analogous to that of a secured creditor: that is, it has not taken the risk of the creditor’s insolvency because it did not mean the defendant to be enriched at all.’<sup>687</sup> Under such a theory, the object of assumption is the fact that the transferee is about to go into insolvency proceedings, not the fact that the underlying contractual basis of the conveyance with the transferee is flawed. The reason is plain. First, if the latter fact is the object of assumption, then such theory would be a circular argument for justifying causality.<sup>688</sup> Second, causality is not a purely subjective principle in the sense that no

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<sup>686</sup> Gareth Jones, ‘Remedies for the Recovery of Money Paid by Mistake’ [1980] CLJ 275, 276 (emphasis added).

<sup>687</sup> Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 178. See also Andrew Burrows, ‘Proprietary Restitution: Unmasking Unjust Enrichment’ (2001) 117 LQR 412; James Edelman and Elise Bant, *Unjust Enrichment in Australia* (OUP 2006) 71.

<sup>688</sup> The circularity here can be exemplified by the following Q&A. Q: ‘why the conveyance made by you to him should be void due to the fact that you were defrauded in the contract of the fact that he concealed his low credit-worthiness?’ A: ‘Because I did not perceive the risk that he in fact concealed his low credit-worthiness!’

matter whether the transferor voluntarily assumed (as in the case of *Singh v Ali*<sup>689</sup>) or not (as in the case of *Caldwell*<sup>690</sup>) the flaw in the underlying basis, as long as such basis is flawed, it will infect the validity of conveyance.

The assumption of risk theory has two qualifications. First, it only helps the swollen assets theory reply to the second aforementioned problem by explaining the difference between the transferor and the transferee's unsecured creditors who have supplied goods to the transferee on credit without receiving the bargained-for payment. However, it does not help the swollen assets theory to reply to the first aforementioned problem, ie, the accusation that the transferee's general creditors get an undeserved windfall, because the fact that these creditors *voluntarily* assumed the risk of the transferee's insolvency does not change the fact that they gave value to the transferee and they were simply trying to make good their loss. Second, such theory must be used in combination with the swollen assets theory to justify the transferor's preferential treatment over the transferee's general creditors who have supplied goods to the transferee on credit without receiving the bargained-for payment, because there is an apparent fallacy for using the involuntary assumption of risk theory alone as the justification: suppose the transferee someday hit a pedestrian while driving a car, then such tort victim also involuntarily assumed the risk of the transferee's insolvency, though of course the victim's involuntariness cannot upgrade his personal claim to a proprietary one.

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<sup>689</sup> [1960] AC 167.

<sup>690</sup> [1965] 1 QB 525, though it should be noted that while the transferor involuntarily assumed the risk of *the flaw in the underlying basis*, the transferor did voluntarily assume the risk of *the transferee's insolvency*. This will be discussed in detail in the next section.

Similar to the review of the swollen assets theory above, there is also a preliminary distinction between English law and Chinese law before reviewing the rationality of the assumption of risk theory. Such theory takes a consequentialist approach in that it tries to use the consequence in insolvency law to justify the distribution of proprietary rights in pre-insolvency law. However, the main role of insolvency law is to distribute assets according to pre-insolvency laws rather than to rewrite them.<sup>691</sup> Worse still, insolvency law as a zero-sum game is the preserve of the legislature, while pre-insolvency law including common law rules on whether title transferred to the transferee under a flawed underlying basis would be re-vested to the transferor is the job of the Court. As Swadling pointed out, protagonists of using such theory to justify proprietary restitution ‘would have courts illegitimately assume the role of legislator.’<sup>692</sup> The problem then arises that consequentialist justification cannot replace the search for common law principles. Birks also elaborated that:

The question whether a claim deserves priority in insolvency is an impossible question. ... The question whether ... the mistaken payment generated ... proprietary interest cannot be answered by asking the legislator’s question, whether in an insolvency mistaken payers ought or ought not to be treated better than unsecured creditors. ... Lawyers have

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<sup>691</sup> Sir Roy Goode stated that the ‘first principle’ of ‘cardinal importance’ of insolvency law is to respect the personal and proprietary rights determined and acquired prior to the insolvency proceedings, and simply to enforce them in a collective way, rather than to establish or alter them. ‘Liquidation does not itself terminate contracts or extinguish rights, though it does inhibit the pursuit of remedies.’ Roy Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) 94.

<sup>692</sup> William Swadling, ‘Policy Arguments for Proprietary Restitution’ (2008) 28 LS 506, 522. In reply, Rotherham argued that in fact there are there is a good deal of judicial support for the view that using insolvency consequentialist arguments to justify pre-existing proprietary rights is perfectly appropriate: Craig Rotherham, ‘Policy and Proprietary Remedies: Are We All Formalists Now?’ (2012) 65 CLP 529.

no special competence in distributive justice. They cannot be expected to say who deserves what.<sup>693</sup>

However, such debate on the judicial usurpation of the legislative role is of no help to the causality versus abstraction debate in Chinese law due to a simple reason: the understanding of both Chinese abstractionists and anti-abstractionists is to treat such debate as reformist legislative topic rather than a doctrinal juridical topic. Given that it is a reformist debate, it could be reasonably anticipated that most Chinese lawyers would not think that there is any problem with the insolvency consequentialist approach to justify who deserves to suffer more than others. Nevertheless, the absence of such technical problem for the Chinese debate by no means indicates that the assumption of risk theory is a perfect match for the swollen assets theory to form a persuasive consequentialist justification for causality. On the contrary, the following paragraphs will demonstrate that such theory has an inherent flaw regardless of whether it is discussed under the context of English law or that of Chinese law.

### 8.1.3 Distinguishing Voluntary from Involuntary

An important and fundamental premise that the ‘assumption of risk’ theory could serve as a strong ally to help the ‘swollen assets’ theory in justifying causality is the possibility of distinguishing ‘voluntary’ from ‘involuntary’, and then to categorise the transferor and an unsecured creditor who supplies goods on credit into these two pigeon-holes respectively in order to show the distinctive feature of the transferor. It is submitted that the Achilles heel of such a strong ally is that while ‘voluntary’ and ‘involuntary’ are quite easy to

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<sup>693</sup> Peter Birks, ‘The End of the Remedial Constructive Trust’ (1998) 12 TLI 202, 214–15.

define as a matter of common language, it is very difficult to clearly define them as a matter of law.

The first possible borderline between these two words is of course to use the distinction in common language, that is whether the person, whether the transferor or an unsecured creditor who supplies goods on credit did it out of his own *free will*,<sup>694</sup> and knowledge is the premise of the existence of one's free will. Thus, the transferor who mistakenly entered into a contract and then conveyed a property right to the transferee can argue that he did not *perceive* the risk of the transferee's insolvency; had he known it he would not have conveyed the very right to the transferee. However, an unsecured creditor who supplies goods on credit can say exactly the same thing as long as this actually happened in his mind at that time. Moreover, it is equally possible for the transferor and an unsecured creditor who supplies goods on credit that both of them *ought to perceive* the risk of the transferee's insolvency but they failed to perceive for some reasons. For instance, both of them could be rationally ignorant of the risk because otherwise it would cost too much for them to investigate the transferee's financial situation. As a result, the first possible borderline is not a correct one.

The second possible borderline between involuntary and voluntary is whether the person *could have done something* to avoid the risk. Since people are normally free to bargain for security interests before entering into the contract as a creditor, it is

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<sup>694</sup> Francis H Bohlen, 'Voluntary Assumption of Risk I' (1906-07) 20 Harv LR 14, see also 'Voluntary Assumption of Risk II' (1906-07) 20 Harv LR 91.

reasonable for the law to assume them to be risk-takers if they elect not to do so.<sup>695</sup> Thus the transferor could argue that he is different from creditors who supplied goods on credit in that the latter were normally at fault in failing to safeguard themselves against the risk of the transferee's insolvency, whereas he was the person involuntarily assumed the risk of the transferee's insolvency. However, in practice not all creditors could be said 'at fault'; some of them in fact could not have done anything to avoid the insolvency risk. This is often due to the imbalance of the bargaining power each creditor has compared to the transferee. Under such borderline, an unsecured creditor with low bargaining power is in the same 'involuntary' position as the transferor in the sense that they both could *practically* do nothing to avoid the insolvency risk. As a result, the second possible borderline is not a correct one either.

The third possible borderline is whether the person *could hypothetically have done something* to avoid the risk. Taking unsecured creditors with low bargaining power as an example, by saying 'hypothetically' it meant despite the fact that they cannot practically be expected to bargain for security interests from the transferee, it does not prevent the law from seeing them as having voluntarily assumed the risk. This is because there are nevertheless devices legally possible for them to ask for, eg, charge or pledge from the transferee. However, the transferor can equally be said to have had legally recognised means to bargain for secured transaction, and this is the case even for a defrauded transferor. In *Caldwell*<sup>696</sup> for instance, the original seller of the Jaguar car

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<sup>695</sup> See Andrew Tettenborn, *The Law of Restitution in England and Ireland* (Cavendish Publishing 2002) 129; Rebecca Lee, 'Rental Deposits as (Quistclose) Trusts' (2003) 33 HKLJ 27; *In Re Goldcorp Exchange Ltd* [1995] 1 AC 74.

<sup>696</sup> *Car & Universal Finance Ltd v Caldwell* [1965] 1 QB 525.

could have asked for adding a retention of title clause to the contract, which is a form of secured transaction, stipulating that title to the car does not pass to the fraudster until the cheque is honoured. As a result, the third possible borderline is not a correct one.

Notably however, such third possible borderline cannot be said as an entirely false one if we limit the scenario to spontaneous mistake cases while exclude induced mistake cases. In spontaneous mistake cases exemplified by *Chase Manhattan*,<sup>697</sup> the mistaken transferor did not expect any performance from the transferee after the payment because the transferor believed that the (non-existent) obligation to pay has been discharged, which means the transferor did not think he need any security interest at all, not to speak of having *hypothetically done something* to avoid the risk of the transferee's insolvency. Hence it follows that the spontaneous mistake caused the transferor's *involuntary* assumption of risk. By contrast, in fraudulently induced mistake cases exemplified by *Caldwell*,<sup>698</sup> as already said in the paragraph immediately above, the defrauded transferor did expect some return (in the form of cheque which is possible to be dishonoured) and the failure of it to materialise may result in litigation for the obligation to pay, which means the transferor should have *hypothetically done something* to take security and should be blamed for failure to do so just like the transferee's unsecured creditors who supplied goods on credit. Although the reasoning in this paragraph successfully helps explain the rationality of the swollen assets and assumption of risk theories by drawing a conceptual borderline between voluntary and involuntary, it nevertheless harmed the rationality of causality. This is because, if a system is causal, then it must be causal no

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<sup>697</sup> *Chase Manhattan Bank NA Ltd v Israel-British Bank (London) Ltd* [1981] Ch 105.

<sup>698</sup> [1965] 1 QB 525.

matter what kind of impaired consent is involved in the underlying basis; spontaneous mistake and fraudulently induced mistake should be treated alike to be able to infect the validity of conveyance. However, if causality employs the swollen assets and assumption of risk theories to justify itself, the normative position of causality would be a self-contradiction: while transferors under spontaneous mistakes deserves causal treatment because they swelled the assets of the transferee and involuntarily assumed the risk of the transferee's insolvency, transferors under fraudulently induced mistakes do not deserve causal but abstract treatment because they voluntarily assumed the risk of the transferee's insolvency. Obviously, causality does not want its justification to limit itself to the former cases only.

To sum up, given that it is extremely difficult to find a universally applicable borderline to distinguish *voluntary* from *involuntary* which is the core of the assumption of risk theory, it is submitted that such theory is too vague to be used as an argument to help the swollen assets theory in justifying causality.<sup>699</sup> In fact, assumption of risk has been questioned in a number of contexts as a private law theory for demonstrating one's 'special position' in order to avoid normal consequences. In the US, although assumption of risk was traditionally regarded as a general defence, in the late-nineteenth and twentieth century courts and legislatures viewed it as unfair, especially for worker's compensation cases. This is because it was often used by employers to avoid liabilities they normally had to bear for workmen's injuries in the course of their employment due

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<sup>699</sup> By contrast, for an example of an English court accepting the combination of swollen assets and involuntary assumption of risk, see *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072 (Lord Templeman). Moreover, in English tort law of negligence, voluntary assumption of risk is widely used by courts as a denial of fault (breach), causation and duty of care: James Goudkamp, *Tort Law Defences* (Hart Publishing 2013) 55–74.

to the fact that workers voluntarily assumed the risk in their working condition and exposed themselves to it.<sup>700</sup> In the Netherlands, assumption of risk has been explicitly rejected by the Supreme Court in that neither Dutch private law nor the new Dutch Civil Code recognises assumption of risk as a doctrine proving a ground for excuse which can neutralise wrongfulness, and thereby liabilities one normally has to bear.<sup>701</sup> Having considered these changes in tort law, it is submitted that perhaps it is the time for property and restitution lawyers to reconsider whether the assumption of risk theory and its underlying distinction between voluntary and involuntary should be taken for granted any longer to prove the transferor's 'special position' in order to avoid normal consequences (ie *pari passu* distribution) in the event of the transferee's insolvency.

## 8.2 Security of Transaction and Security of Property

### 8.2.1 The 'Causality plus Bona Fide Acquisition' Model

There has been a long debate among Chinese scholars over whether Chinese law should adopt abstraction<sup>702</sup> or causality<sup>703</sup> since the 1980s. Among policy arguments for

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<sup>700</sup> See Charles Warren, '*Volenti Non Fit Injuria* in Actions of Negligence' (1894–95) 8 Harv LR 457; G Edward White, 'The Emergence and Doctrinal Development of Tort Law, 1870–1930' (2014) 11 U St Thomas LJ 463.

<sup>701</sup> Supreme Court 28 June 1991, *Dekker v Van der Heide*, NJ 1992, 622. I would like to thank Professor Willem van Boom for his kindness in translating the judgment from Dutch to English.

<sup>702</sup> See eg SUN Xianzhong, '物权行为理论探源及意义' [Exploring the Theory of Juridical Act of Real Rights and its Application] [1996] 3 Chinese Journal of Law 80; '再谈物权行为理论' [The Theory of Juridical Act of Real Rights Revisited] [2001] 5 Social Sciences in China 125; *中国物权法总论* [*General Principles of Real Rights Law of China*] (2nd edn, Law Press 2009) 412–56; ZHAO Yongshan, '论物权行为' [On Real Juridical Acts] [1998] 4 Modern Law Science 24; TIAN Shiyong, *物权行为理论研究* [*Study on the Theory of Juridical Act of Real Rights*] (CUPL Press 2002) chs 7, 8; '物权法中物权行为理论之辨析' [Analysing the Theory of Juridical Act of Real Rights in Chinese Property Law] [2008] 12 Legal Science 93; GE Yunsong, '物权行为理论

causality, as much of them resemble each other, the following review will not cite each of them from time to time in order to avoid duplication, but will summarise and extract two strong arguments (apart from the ‘unfairness’ argument which has been discussed above) to comment on.

The first strong anti-abstractionist argument put forward by Chinese scholars is the idea that the ‘causality plus bona fide acquisition’ model strikes a perfect balance between security of property and security of transaction. Policy consideration underneath this confrontation is the balance between security of property and security of transaction. Apart from the theories of ‘swollen assets’ and ‘assumption of risk’ reflecting the confrontation between the transferor and the transferee’s general creditors, another confrontation is between the transferor and third-party purchasers from the transferee,

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研究 [Study on the Theory of Real Juridical Act]’ [2004] 6 Peking University Law Journal 702; XU Diyu, ‘物权行为无因性理论之目的论解释 [A Teleological Explanation of the Abstraction Principle]’ [2005] 2 Chinese Legal Science 84; DONG Xueli, ‘物权行为无因性相对化理论之否定 [The Negation of the Relative Theory of Die Lehre des Abstraktionsprinzip]’ [2007] 1 Law Science 65; ZHU Qingyu, ‘物权行为的规范结构与我国之所有权变动 [The Normative Structure of Dingliches Rechtsgeschäft and the Transfer of Ownership in China]’ [2013] 6 The Jurist 62.

<sup>703</sup> see eg, LIANG Huixing, ‘我国民法是否承认物权行为 [Is Juridical Act of Real Rights Recognised in Chinese Civil Law?]’ [1989] 6 Chinese Journal of Law 56; WANG Yi, *物权变动论 [On the Transfer of Real Rights]* (Renmin UP 2001) 311–32; WANG Liming, *民商法研究 [Studies on Civil and Commercial Law]* vol 3 (Renmin UP 2001) 206–26; MI Jian, ‘物权抽象原则的法理探源与现实斟酌 [The Theoretical Origin and Realistic Consideration of Abstraction Principle]’ [2001] 2 Journal of Comparative Law 44; XIE Huaishi and CHENG Xiao, ‘物权行为理论辨析’ [Analysing the Concept of Juridical Act of Real Rights] [2002] 4 Chinese Journal of Law 89; XIAO Houguo, *物权变动研究 [Study on the Transfer of Real Rights]* (Law Press 2002) 181–96; YIN Tian, *物权法理论评析与思考 [Comments and Thoughts on Property Law Theories]* (Renmin UP 2004) 180–235; CUI Jianyuan, ‘从解释论看物权行为与中国民法’ [A Positivist Analysis of the Concept of Juridical Act of Real Rights and Chinese Civil Law] [2004] 2 Journal of Comparative Law 60; CHEN Huabin, *民法典与民法物权 [Civil Code and Civil Law of Property]* (Law Press 2009) 231–73.

whether original or subsequent.<sup>704</sup> The difference between a third-party creditor and a third-party purchaser is that the latter acquires the title in question whereas the former does not. Since a purchaser's claim is specifically in relation to the title just like the transferor's while a creditor's claim is not, this implies that the 'transferor versus third-party' confrontation in the latter case is fiercer than that in the former case.

Similar to the theories of 'swollen assets' and 'assumption of risk', the practical tension here is also the question of who should bear the risk of the transferee's impecuniosity. Take the case where a transferor conveys a property right to a transferee under a voidable underlying contractual basis, and the transferee later conveys the same property right to a third-party purchaser. The transferor now rescinds the contract and brings a vindictory claim against the third-party purchaser. Regardless of possible variances such as (i) whether the latter conveyance was done before the transferor's act of rescission and (ii) whether the third-party purchaser is a good faith one for value without notice, both the transferor and the third-party purchaser would argue for having the property right (good against the other) in question. The reason is plain. Although whoever loses the case can still get compensated by a personal claim based on his contract with the transferee,<sup>705</sup> the transferee is not always solvent to fully satisfy the personal claim. Hence normally it is true that the one who holds property right is in a safer position than the one who holds a personal monetary claim against the transferee. In

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<sup>704</sup> Here the word 'purchasers' denotes both purchasers in its narrow sense (ie, only acquirers for value) and purchasers in its wide sense (ie, acquirers both for and without value), so that it makes sense to use the phrase 'for value' as a qualification for 'purchaser' when discussing 'good faith purchaser for value without notice'.

<sup>705</sup> For the transferor, as his claim is based on causality, he must have elected to rescind the contract with the transferee thus his claim of compensation is based on contractual rescission. For the third-party purchaser however, he would always get compensated whether he elects to keep the contract alive, terminate the contract, or rescind the contract with the transferee.

this hypothetical case, generally speaking, the transferor triumphs in a causal system, while the third-party purchaser wins in an abstract system. To justify each result, security of property assists to rationalise the result of causality, while security of transaction helps to rationalise the result of abstraction.

Indeed, an obvious advantage of abstractionism is that it promotes security of transaction.<sup>706</sup> While modern days most contracts are still not easily accessible to non-contracting third parties, the majority of conveyances are accessible to third parties. Given the existence of possession as the prima facie ground<sup>707</sup> for holding property rights to movables and registration as the ground for holding property rights to immovables, security of transaction is unquestionably a core value of property law. If everyone can trust the status of property-holding, the overall measurement cost would decrease which is ultimately beneficial to the entire society, even if it is realised at the expense of security of property to some degree. A third-party purchaser can argue that because he relied on such publicity and public faith when purchasing the property in question from the transferee, it is more reasonable for the law to prioritise his interest over the transferor's. A third-party security right-holder<sup>708</sup> can argue in this way for enjoying legal certainty in terms of the whole market economy as well. Obviously, such an argument is only persuasive in an abstract system from a consequential perspective because in a

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<sup>706</sup> See generally Astrid Stadler, *Gestaltungsfreiheit und Verkehrsschutz durch Abstraktion* (Mohr Siebeck 1996).

<sup>707</sup> To mention the 'title-evidencing' role of possession here by no means negates the 'title-creating' role of possession, as in both English law and Chinese law, taking possession can well be the way of acquiring property rights.

<sup>708</sup> Eg, this could be a bank who advanced money to finance the transferee to complete the transaction with the transferor, and asked the transferee to use the very property to create a security interest to secure the loan. It often happened in practice especially where the purchase price of the property in question is high, such as real estate. This could equally be a lender of a subsequent third-party purchaser who used the acquired property right to secure his loan.

causal system, such an argument would not amount to a valid defence against the transferor's claim of vindication.

Chinese anti-abstractionists did acknowledge such advantage, though they argued that security of property is equally a core value of property law. Moreover, in striking a balance between security of property and security of transaction, they contended that security of transaction may well be guaranteed without adopting abstraction, because the regime of bona fide acquisition (善意取得) could perfectly take over the role of protecting the interest of third parties. To understand their proposition, taking the hypothetical case above as an example, even though the governing law follows causality not abstraction, the result would not always be that the transferor is on the winning side. Although causality means the property right in question, due to the transferor's contractual rescission, is seen retrospectively as having never been conveyed to the transferee, so that the transferee later disposed of the very property right as a non-owner to the third-party purchaser, as long as the latter transaction satisfied the 'nemo dat exceptional rule' of good faith purchase for value without notice, the third-party purchaser can nonetheless have a good title against the transferor. Anti-abstractionists therefore concluded that comparing to the abstract system which provides third parties with excessive protection thus overly emphasising security of transaction, the 'causality plus bona fide acquisition' model struck a perfect balance between security of property and security of transaction.

### 8.2.2 The Problems

Could such intuitively attractive model withstand close examination to become a sufficient and universally applicable justification against abstractionism? It is submitted that the answer is in the negative for two reasons.

First, such model assumed the good faith purchasers being the only kind of people who deserves preferential treatment over the transferor. The most significant feature of the ‘causality plus bona fide acquisition’ model is that it draws a line between third parties who do and who do not amount to good faith purchasers for value without notice. A problem naturally arises as to whether all those kinds of people who do not have to give their ways to the transferor under the abstract system deserves to be kicked out of the scope of protection under the ‘causality plus bona fide acquisition’ model. A good example is the transferee’s creditors who get their debts settled by conveyance instead of monetary payment (以物抵债) from the transferee. For instance, on Day 1, A conveyed property rights to two cars (under a flawed underlying contractual basis) to B, a car-dealer company. The market value of each car (No 1 and No 2) was around £20,000. Beforehand on Day 0, C advanced £20,000 to B in order to enable B with enough cash flow for its daily businesses. On Day 2, B and C reached an agreement that instead of B selling the car No 1 and pay C from the proceeds of the sale, B could simply convey the property right to the car to C to discharge the debt. The agreement was immediately executed. On Day 3, an innocent purchaser D came to B’s place looking for a second-hand car and entered into a contract with B to purchase the car No 2 for £20,000. The contract was also immediately executed. On Day 4, A brought vindicatory claims against C and D with regard to the car No 1 and No 2 respectively. Under the operation of the ‘causality plus bona fide acquisition’ model, the result is that A would win his claim

against C but lose his claim against D. This is because D was seen as a good faith purchaser for value without notice while C was not. Notably although unlike D, C indeed did not pay for the car No 1, it is nevertheless improper to say that C simply acquired the car for nothing in return. Rather, C did give B an amount of £20,000 as well as D, the difference being only that C gave the money a little bit in advance so that such advancement was seen as a mere debt rather than the consideration for purchasing the car No 1. It is therefore highly unreasonable why such tiny variance would lead to a significantly different treatment under the ‘causality plus bona fide acquisition’ model between the two innocent acquirers C and D regarding the two cars.<sup>709</sup>

Another significant feature of the ‘causality plus bona fide purchase’ model is that it gives favoured treatment only to those who *have acquired* the very property right from the transferee. Specifically, such model assumes that those bona fide purchasers for value without notice are in a same position as the (eg, defrauded) transferor, unlike mala fide purchasers who are in a worse position than the transferor, hence for the sake of security of transaction, rules of bona fide purchase comes into operation at the expense of the transferor. However, such model cannot explain why those creditors of the transferee who *have not yet materialised their claims by acquiring* the very property right but whose claims could be partially realised by liquidating the very property right do not deserve a similar preferential treatment. For instance, as having been explored in the previous section, those innocent unsecured creditors who supplied goods on credit to the transferee

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<sup>709</sup> If someone argues that the constituent elements of bona fide acquisition can be further loosened in order to cover and protect those kinds of third parties creditors like C, then such a super-wide concept of bona fide acquisition would functionally turn a causal system into an abstract one, because it would avail all the transferee’s creditors who get their debts discharged by conveyance against the original transferor of the very property.

who later on goes into insolvency are more or less in a same situation as the (eg, defrauded) transferor too, because they both can be said to have voluntarily assumed the risk of the transferee's risk of insolvency, and to have swelled the general assets of the transferee. Just as neglecting those bona fide purchasers for value without notice, neglecting the interests of those innocent unsecured creditors who supplied goods on credit by causality would also harm security of transaction, though rules of bona fide purchase cannot help mitigate such problem, which again demonstrates the inconsistency inside such model.

Second, the regime of bona fide acquisition is not necessarily designed to mitigate the lack of third-party protection under the operation of causality in every jurisdiction. A clear example is the homeland of abstraction, Germany, where the regime of bona fide acquisition is also recognised. Obviously, such regime is not for destroying the abstract system at all. In German law, bona fide acquisition has nothing to do with striking a balance between security of property and security of transaction via replacing abstraction by 'causality plus good faith acquisition' so that not to provide 'excessive' third-party protection alleged by anti-abstractionists. This is because such regime does not apply in the context of a valid conveyance under a flawed underlying basis, but rather in the context of a void conveyance being ultra vires made by a non-owner who does not have the power nor the authority of disposition.<sup>710</sup> Moreover, ironically, the combination of abstraction and bona fide acquisition in German law makes the third-party protection even stronger than it would be had there were no bona fide acquisition in German law. This is because under the operation of such combination, abstraction could be used to

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<sup>710</sup> German Civil Code (Germany), ss 932–35.

protect those third-party purchasers in cases where the conveyance between the original transferor and the transferee is valid but the contract is void, and bona fide acquisition could be used to protect those third-party purchasers in cases where both the conveyance and the contract between the original transferor and the transferee are void.<sup>711</sup> It therefore follows that the justification under ‘causality plus bona fide acquisition’ model makes no sense to the German law.

Apart from German law, English law is another example demonstrating the irrelevance between the regime of bona fide acquisition and the mitigation of the lack of third-party protection under the operation of causality. This can be seen particularly via a brief comparison with Chinese law regarding constituent elements. To satisfy the requirements of bona fide acquisition in Chinese law, (i) the purchaser must be innocent of the fact that the vendor is not the true owner nor is authorised to transfer the ownership of the very property, (ii) the purchaser has paid for the value of the very property with a reasonable price, (iii) the conveyance must be perfectly completed, ie, delivery in cases of movables, and registration in cases of immovables,<sup>712</sup> and (iv) the underlying contract between the non-owner and the purchaser must be valid.<sup>713</sup> As long as these requirements

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<sup>711</sup> Thus bona fide acquisition has been described as ‘a sort of “safety net” for third parties whose acquisition is not already secured on a proprietary level’: Birke Häcker, *Consequences of Impaired Consent Transfers: A Structural Comparison of English and German Law* (Mohr Siebeck 2009) 219, but note that on pages 250–52 she also mentioned that such double security for the transferor can be said as a legislative accident in the developing of the BGB which was not intended by the German legislature.

<sup>712</sup> Property Law 2007 (China), art 106; *Interpretation I of the Supreme People's Court on Several Issues concerning the Application of the Property Law* (Supreme Court Interpretation No 5, 2016) arts 15–20.

<sup>713</sup> *Interpretation I of the Supreme People's Court on Several Issues concerning the Application of the Property Law* (Supreme Court Interpretation No 5, 2016) art 21.

are met, a valid bona fide acquisition is normally constituted,<sup>714</sup> the purchaser therefore acquires property right originally by operation of law, with the sudden extinction of the very property right of the original owner.<sup>715</sup> In other words, bona fide acquisition is not a context-specific regime under Chinese law. In English law by contrast, just because a purchaser being innocent has paid for value to the non-title holder without notice of the original title holder does not mean such purchaser can have a superior title than that of the original title holder.<sup>716</sup> There is a very limited number of scenarios where good faith purchase for value without notice amounts to a valid defence to the original title holder's property tort claim. It was argued by Swadling that these context-specific exceptions to the nemo dat rule can be further classified into two groups according to two different purposes of these exceptions,<sup>717</sup> and it follows that the current, legally-recognised nemo dat scenarios have nothing to do with the purpose of mitigating the lack of third-party protection under the operation of causality.

The first purpose is facilitation of trade, under the heading of which the scenario was market overt, the doctrine being that as long as a good faith purchaser buys goods for value without notice of the seller's lack of power to dispose of the goods and such transaction happens at a legally constituted open market according to the usage of that

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<sup>714</sup> The only exceptional scenario is where the subject-matter is a stolen thing. As for lost things, although the original owner can claim for restitution within two years, it does not change the fact that property right has passed to the good faith purchaser: Property Law 2007 (China), art 107.

<sup>715</sup> Property Law 2007 (China), art 108.

<sup>716</sup> *Northern Counties of England Fire Insurance Co v Whipp* (1884) 26 Ch D 482 (immovables); *Farquharson Brothers & Co v King & Co* [1902] AC 325 (movables), see also Sale of Goods Act 1979, s 21. The only kind of subject-matter having a general exception to the nemo dat rule is money, in the sense that one can generally give a better title than the title he has as long as the recipient acts in good faith for value: *Miller v Race* (1758) 1 Burr 452, 97 ER 398.

<sup>717</sup> William Swadling, 'Restitution and Bona Fide Purchase' in William Swadling (ed), *The Limits of Restitutionary Claims: A Comparative Analysis* (UKNCCL 1997) 82.

market between the hours of sunrise and sunset, he acquires a better title than the original title holder. The underlying rationale of this ancient doctrine is to strike a balance between security of ownership and security of transaction.<sup>718</sup> This is because on the one hand, the doctrine provides a reliable and creditable place for daily and weekly trade for the necessary use of the people; on the other hand, it also provides an opportunity for the original title holder to reclaim his goods during the daytime. Notably however, the market overt doctrine had been challenged for a long time since last century, and was finally abolished in 1994<sup>719</sup> because the legislature thought that such doctrine not only represented an obsolescent pattern of trading no longer common in modern-day transactions but also brought with the fear of encouragement of crime, especially in art and antiquities illegal trading.<sup>720</sup>

The second purpose is not for the facilitation of trade, under the heading of which there are four scenarios, namely, estoppel,<sup>721</sup> seller remaining in possession after sale,<sup>722</sup> buyer in possession after sale with the consent of the seller,<sup>723</sup> and sale by mercantile agents.<sup>724</sup> The underlying rationale of these exceptional scenarios has nothing to do with security of transaction, but a principle that the original title holder, because of his own

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<sup>718</sup> *Bishopsgate Motor Finance Co Ltd v Transport Brakes Ltd* [1949] 1 KB 322, 336–37 (Denning LJ).

<sup>719</sup> Sale of Goods (Amendment) Act 1994, s 1.

<sup>720</sup> See Brian Davenport and Anthony Ross, 'Market Overt' in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (2nd edn, LLP 1998); Janet Ulph, 'Conflicts of Title and the Obligation of the Seller' in Ewan McKendrick (ed), *Sale of Goods* (LLP 220).

<sup>721</sup> Sale of Goods Act 1979, s 21(1).

<sup>722</sup> Sale of Goods Act 1979, s 24.

<sup>723</sup> Sale of Goods Act 1979, s 25; Hire Purchase Act 1964, pt III (re-enacted in Consumer Credit Act 1974, sch 4).

<sup>724</sup> Factors Act 1888, ss 8 and 9.

conduct, ought to bear the risk of the non-owner's dishonesty (which also deceived the innocent purchaser) and is therefore prevented from asserting his title.<sup>725</sup> This means, with the abolition of the only scenario, ie, market over representing the good faith purchase defence for the purpose of striking a balance between security of transaction and security of property, currently the entire regime of good faith purchase in English law can no longer be said for upholding such purpose. As such, it can no longer serve to mitigate the lack of third-party protection under the operation of causality even if English law one day decides to accept causality as a widely applicable principle. It therefore follows that the justification under 'causality plus bona fide acquisition' model makes no sense to the current English law either.

### **8.3 Property of Sentimental Value**

Another strong anti-abstractionist argument put forward by Chinese scholars is that causality can better represent a crucial value of the law, that is, to recognise and respect people's personal identity in certain subject-matters of property right. They argue that even if the transferor can get enough monetary payment from a solvent transferee under the operation of abstraction, the result might still be unfair to the transferor where the subject-matter originally conveyed by the transferor to the transferee is of sentimental value to the transferor but he could not get it back where restitution in kind (ie, specific recovery via a personal claim triggered by unjust enrichment) is impossible, because the

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<sup>725</sup> *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] AC 867, 886 (Lord Pearce). See also William Swadling, 'Restitution and Bona Fide Purchase' in William Swadling (ed), *The Limits of Restitutionary Claims: A Comparative Analysis* (UKNCCL 1997) 86–88; Ewan McKendrick, 'Sale of Goods' in Andrew Burrows (ed), *English Private Law* (3rd edn, OUP 2013) para 10.25.

third-party purchaser has acquired ownership to the very subject-matter. Under the operation of causality by contrast, the result would be more humane and compassionate in that the transferor could get the ‘emotionally special thing’ back unless there has been a bona fide purchase. Interestingly, a similar idea was also expressed in the US by Professor Radin,<sup>726</sup> though the ‘property for personhood’ theory was not used to justify causality. Admittedly, it is a reason for the law to protect property rights that certain subject-matters of property are essential to the welfare or personal identity of human beings. Examples of this kind of subject-matters could be an old house or an heirloom that passed down to the transferor from the elder generation, or a medal that the transferor took much effort to win and cherishes.

Nevertheless, it is submitted that compared to the first argument discussed above, this second argument is much weaker for a number of reasons. First, since it sometimes happened in practice that it may took a couple of years for the transferor to reclaim his property right, hypothetically during the ‘gap period’, sentimental value or personhood may well be added to the third-party purchaser. A very simple example would be that the initial third-party purchaser died during the gap period so that the property in question became an heirloom for his heir — then the third-party purchaser was in the same emotional position as the transferor. Second, not all kinds of property are of sentimental value to the transferor; the personhood of property theory only covers those that are closely tied to the owner’s identity. As pointed out by Professor Sherwin in criticising Radin’s theory, proprietary restitution such as constructive trust extends ‘far beyond what

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<sup>726</sup> Margaret Jane Radin, ‘Property and Personhood’ (1982) 34 *Stan L Rev* 957, 959–70.

could be justified as property rights necessary to individual personality,<sup>727</sup> the ambition of causality, ie the power to re-vest is the same — no jurisdiction following causality would accept the idea that the causal system only applies to transfers of property with personhood, leaving others following abstraction. Third, even if causality only applies to property with personhood cases, such argument fails to explain why the third-party purchaser deserves to give way to the transferor simply due to the fact the subject-matter has sentimental value to the transferor. By having purchased the property in question from the transferee, the third-party purchaser normally owes nothing to the transferor unless he was fully aware of the story behind and was in bad faith to hurt the transferor. Nor does he get any windfall from this, because he was not benefitted as a result of the emotional harm suffered by the transferor. Fourth, even if the third-party purchaser must owe something emotional to the transferor, the proper response of the law would be to order damages for psychiatric loss rather than re-vesting property rights, so that the liability, if any, should normally be a personal not a proprietary one, and is generally fault-based not strict. By contrast, the response under the operation of causality is proprietary and strict.

In sum, ‘sentimental value’ or ‘personhood’ must not be a valid justification for depriving the third-party purchaser of his property right acquired from the transferee and replacing it with a personal right against the transferee. Otherwise, such vague concepts of ‘sentimental value’ and ‘personhood’ would turn the law into a game between the claimant and the defendant of proving who is more miserable by hard-luck stories to seek the law’s sympathy.

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<sup>727</sup> Emily L Sherwin, ‘Constructive Trusts in Bankruptcy’ [1989] U Illinois L Rev 297, 335.

## 8.4 Detecting Opportunity

Sir Arthur Conan Doyle's fiction has been extremely popular not only in its homeland, the United Kingdom, but also in China. Lord Millett once said: '[a]s Sherlock Holmes reminded Dr Watson, when you have eliminated the impossible, whatever remains, however improbable, must be the truth.'<sup>728</sup> Such logical statement is obviously not country-specific; it is valid no matter whether it applies to an English debate or a Chinese debate. Given that the previous sections have demonstrated that it is not true that causality can be justified for many reasons, and given that the contrast between causality and abstraction is logically a complete one,<sup>729</sup> the remaining option, ie, abstraction should therefore be truly justifiable. However, because usually it sounds more persuasive to give normative arguments for something than to negatively reject the criticisms of something, and because there indeed is a theoretical proposal straddling abstraction and causality to be mentioned below, this section aims at providing a positive argument for abstraction.

In short, this argument could be labelled as 'detecting opportunity' which meant the transferor should be in a position worse than third parties because it is normally the transferor not third parties who has a better opportunity of detecting the flaw in the underlying basis between him and the transferee. In the typical scenario where the transferor conveys a property right to the transferee upon a flawed underlying contract, any third party who subsequently acquires such property right or claims to realise his personal right from such property right will usually know nothing of the underlying

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<sup>728</sup> *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [100].

<sup>729</sup> A system could logically be either causal or abstract and no third possibility, in that the validity of conveyance could only be *infected* or *not infected* by the invalidity of the underlying basis.

contract between the transferor and the transferee, not to speak of the knowledge of anything flawed in such contract. Indeed, even if they get a chance to read through the contract terms between the transferor and the transferee, it is still very difficult for them to detect flaws in the contract no matter they are laymen or lawyers. For the transferor, by contrast, sometimes he knows the flaw in eg, an illegal contract<sup>730</sup> but decides to turn a blind eye to it while conveying a property right. Admittedly, sometimes however the transferor does not know the flaw in the contract either, for instance where the transferor is a defrauded vendor who was fraudulently induced to enter into the contract of sale. Even in such cases, it is still the transferor who has a better chance than the third-party acquirers and creditors to detect the flaw, because it is the transferor (including his agent if any) who goes through the negotiation process with the transferee. Moreover, there is no reason why the law should hold any other third party responsible for the transferor's decision, however induced to make such transaction. On the one hand, no one would doubt that the fraudster transferee deserves to be in a worse position than the defrauded transferor. On the other hand, as for a third-party acquirer who get the very property right from the transferee either for value or for discharging a pre-existing debt, and as for a third-party creditor who claims to execute his judgment debt via a compulsory sale of the very property right, there is no reason why they deserve to receive 'collective punishment' and thereby be also in a worse position than the transferor merely because they have some association with the transferee. If a legal system aims to avoid collective

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<sup>730</sup> So that the unjust factor would be failure of basis.

punishment to all these third parties, then abstraction is a better choice than causality, even if the regime of bona fide acquisition receives a ‘call to arms’ from causality.<sup>731</sup>

The ‘detecting opportunity’ argument is somewhat in accordance with a broad idea in English law that ‘wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.’<sup>732</sup> Because it is the transferor who, by conveyance of the property right in question, enables the transferee to pass it on to third parties or to make it available for distribution among third parties not the other way round, it should be the transferor, not third parties, who should sustain the potential loss, ie, the risk of the transferee being impecunious.

Admittedly, a qualification of such broad general statement is that the two persons must be innocent. So far as the causality versus abstraction debate is concerned, certainly not all scenarios are fit for such qualification. A question then arises: in the case of conveyance upon a fraudulently induced contract, where the third-party acquirer knows the flaw in the contract between the transferor and the transferee, and especially where there is a conspiracy between the transferee and third-party acquirer with the transferor being the sole victim, how could abstraction be justified by the ‘detecting opportunity’ argument?

Indeed, in this kind of situations the ‘detecting opportunity’ argument could do nothing to justify abstraction because the third-party acquirer in bad faith not only has a

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<sup>731</sup> The reason why the ‘causality plus bona fide acquisition’ model cannot replace abstraction is discussed in section 2 above of this chapter.

<sup>732</sup> *Lickbarrow v Mason* (1787) 2 TR 63, 70; 100 ER 35, 39 (Ashhurst J). Although such statement, just like many other famous statements was sometimes criticised to be too wide to represent the law, it is nevertheless a guideline in viewing conflict of interests in three-party cases.

better chance to detect the flaw, but also in reality knows the flaw and takes advantage of it. However, the justification of abstraction will not be weakened by such fraudulent third-party cases because it is not the role of abstraction to protect the sole-victim defrauded transferor. In fact, there are other regimes which would help to make the transferor better off than he would be in the innocent third-party cases. Specifically, his potential loss due to the impecuniosity of the transferee could be better redressed because he may simultaneously have another liable person with a new set of assets to claim against. In English law, such third-party may be liable in tort, either conspiracy<sup>733</sup> or deceit<sup>734</sup> so that the transferor could get his loss fully compensated even if the transferee is insolvent. In Chinese law, as long as the transferor can prove that such third-party maliciously colludes with the transferee to induce him, then he can even get back the property right in question by suing such third-party for nullifying not only the subsequent conveyance between the transferee and such third-party, but also the original conveyance between the transferee and him.<sup>735</sup>

Finally, the ‘detecting opportunity’ argument might also be a persuasive one for those who do not accept that the contrast between causality and abstraction is sound. For instance, it was suggested by Professor van Vliet that causality and abstraction are two extremes, and there could be a midway solution which he called the ‘animus theory’.

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<sup>733</sup> *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435; *Lonrho Plc v Fayed* [1992] 1 AC 448.

<sup>734</sup> Statute of Frauds Amendment Act 1828, s 6; Misrepresentation Act 1967, s 2; *UBAF Ltd v European American Banking Corp* [1984] QB 713.

<sup>735</sup> General Provisions of Civil Law 2017 (China), art 154; General Principles of Civil Law 1986 (China), art 58(4). Notably however, the reason why here the transferor can upgrade his claim-right for restitution from a personal one to a proprietary one has nothing to do with the choice between causality and abstraction, because in such kind of situations, both the contract and the conveyance are void; there is no need to discuss whether a flawed contract would infect the validity of conveyance or not.

Specifically, given there are various kinds of flaws rendering an underlying contract void or voidable, where the contractual invalidating factor is defect of will, eg, impaired consent cases, the validity of the conveyance follows causality, but where the contractual invalidating factor is failure of basis, eg, illegality cases, the validity of the conveyance follows abstraction. This is because ‘in the animus theory ownership passes only if there is a genuine will to make the transfer.’<sup>736</sup> It is submitted that the problem of such midway solution is explaining why the animus theory would lay the burden of detecting the defect of will on third parties. In fact, even the transferor himself does not necessarily know whether he has a true will to convey, because at the beginning, when the contract was concluded, his state of mind was certainly willing to convey. Even if the transferor afterwards realised the contract was voidable and elected to rescind it, how can a third-party know his decision with no means of publicity? Conveyance by means of publicity and public faith such as possession and registration represent not only the transferee’s status of holding rights, but also the transferor’s prima facie true will to convey. A merit of the animus theory is its emphasis on and respect for people’s true will, yet given that in many impaired consent cases it is quite difficult for third parties to detect whether and when the transferor’s avoidance of true will actually happens, the law would be rendered quite uncertain<sup>737</sup> were it to let third parties rather than the transferor bear the risk of the

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<sup>736</sup> Lars PW van Vliet, *Transfer of Movables in German, French, English and Dutch Law* (Ars Aequi Libri 2000) 205.

<sup>737</sup> Talking about uncertainty, it needs to be clarified that indeed uncertainty alone cannot be used to criticise the animus theory, because abstraction is also accompanied by uncertain consensual proprietary dispositions such as retention of title, not to speak of proprietary remedies by operation of law which itself ‘cannot possibly be subjected to any notification system’: Sarah Worthington, *Equity* (2nd edn, Clarendon Press 2009) 291. Nevertheless, whether or not to grant proprietary remedies by operation of law is not an arbitrary decision; it needs justification. Usually a third party is a stranger to the transferor, so is the transferor a stranger to that third party. The problem of uncertainty similarly exists for both of them. Their difference does not lie in the level of certainty, but in the ability to detect the flaw in the original underlying contract. Therefore the

transferee's insolvency.

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'detecting opportunity' argument is a possible justification for not awarding the power to revest in cases where the underlying basis is flawed while the conveyance is valid.

## CONCLUSION

Conceptually speaking, *intent plus* can be either *separatist* or *unitary*. Delivery, deed and registration can be interpreted in a separatist way as a method of *conveyance* with a ‘real intent’<sup>738</sup> to convey, or in a unitary way as a mere method for *publicity* without a ‘real intent’ to convey. Given that English law is mainly intent plus, in that intent alone cannot pass title to land whether registered or unregistered, nor title to chattels where the underlying basis is not sale, and given that Chinese law is mostly intent plus save for limited kinds of lesser property rights to immovables, it is necessary to explore whether the interpretation of such intent plus follows a unitary or a separatist approach. It can be inferred from rules regarding registration, constructive delivery, symbolic delivery and others that the separatist approach is a reasonable, if not the most reasonable approach compared to the unitary approach of interpretation.

Equally, *intent alone* can also be *separatist* or *unitary*. To say in the English law of sale of goods that title passes by virtue of the ‘contract’ is an erroneous understanding among judges and academics that can be traced to Sir William Holdsworth’s analysis of an old case in the fifteenth century. His reasoning based on detinue was flawed due to an oversight of the fluid scope of exigibility in detinue. As reflected by historical materials, detinue cannot be seen as a reliable test for determining the location of title. The correct way of understanding the rule of passing title in the English law of sale of goods is that title passes by virtue of the ‘intent’ to convey, which is what the Sale of Goods Acts 1893

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<sup>738</sup> Analogous to the German term ‘real agreement’ (*dinglicher Vertrag*) or ‘real contract’, here the word ‘real’ does not mean ‘genuine’ but ‘in relation to property rights’ just like ‘property right’ is sometimes called ‘real right’ by civilian lawyers.

and 1979 literally provide. It can be inferred from the statutes that such intent to convey is conceptually distinguishable from the intent in contract to create an obligation to convey, regardless of the fact that they may factually coincide with each other. Although it can be found in the words of the draftsman of the 1893 Act that property may pass by contract according to pre-1893 authorities, it should not be taken seriously. This is because the major authority cited is not in reality a case demonstrating property passing by contract. A further implication of comparative property law could be drawn that the English law of sale of goods is a good example demonstrating that a system of transfer can be both consensual and abstract, in the sense that where property passes by intent alone, as long as the intent is a valid 'real intent' (to convey), the flawed underlying contractual basis does not infect the validity of conveyance.

Compared to the contrast of separatist and unitary, the contrast of abstraction and causality is more nuanced in both English and Chinese law. The biggest difference between English law and Chinese law in this respect is that the position in the former jurisdiction seems to straddle (but should not straddle and can be interpreted as not straddling) abstraction and causality depending on invalidating factors while the position in latter jurisdiction must be either abstraction or causality. English law is generally abstract as exemplified in cases involving invalidating factors of illegality, incapacity and informality as to validity. However, when it comes to invalidating factor of impaired consent, the answer is not so straightforward. For the sub-category of spontaneous mistake, the answer is abstract, but for the sub-category of induced mistake, especially for fraudulently induced mistake, the answer seems to be causal at first blush. Nevertheless, the English seemingly causality in this particular context has three unique

features. First, technically speaking, there is a conflicting line of cases weakening the degree of authority of causality. Second, the timing issue (ie, no power to rescind if contractual rescission happens after the transferee's subsequent conveyance) makes the meaning of English causality different from what civilian lawyers would understand about causality and retrospectivity in its orthodox meaning. Third and most importantly, by accepting the ideas of separation in sale of goods, identity of defect, and rescission of conveyance, cases commonly believed as anti-abstractionist such as *Caldwell* can well be interpreted in an abstractionist way, making English law entirely abstract regardless of the particular kind of invalidating factors involved. This can also lead to a further implication which is significant for comparative legal research, ie, the possibility of abstraction in 'intent alone' transfers.

As for analysing abstraction versus causality in Chinese law, the difficulty of interpretation lies not in uniformity but uncertainty. The puzzling word 'returned' in article 58 of the Contract Law 1999 gives no answer as to whether it is the property right or the possession that should be returned, making it difficult to understand Chinese law to be either abstract or causal. It is suggested that from clues in the law regarding limitation periods, unjustified enrichment, and the scope of rectifiable mistakes in land registration, that the abstract way of understanding is reasonable, if not more reasonable than the causal way of understanding.

Unlike the operation of abstraction in German law, a personal right being triggered by unjust(ified) enrichment is not the end of the story for English law. Equitable powers to rescind and constructive trusts make English law notionally abstract but

effectively causal. It is notionally abstract because the nature of beneficiary's right under trust is not a right *in rem*, so that title does not revert to the transferor. To say it is effectively causal is because as a right against right, the beneficiary's right under trust empowers the transferor to claim not only against the transferee, but against subsequent acquirers, and it makes the subject-matter unavailable for distribution among the transferee's creditors in the event of the transferee's insolvency. The main problem of the role of constructive trust as a proprietary response to reverse unjust enrichment is that it is difficult to find a consistent underlying rationale to explain the response of either an immediate trust or trust arising after contractual rescission. If the 'power model II', ie, reversion of title by equitable rescission of conveyance is accepted as the more reasonable explanation instead, then English law could be understood as both notionally and effectively abstract in equity just like it could be understood at common law.

Despite the inconsistency problem mentioned above, assuming English law of trust provides a well-developed effectively causal remedy, whether it could be transplanted into Chinese law is another question of reformist feasibility. Although Chinese law recognises the trust, it is based on policy-motivated considerations to facilitate commercial transactions which only help consensual trusts not constructive ones, so that it makes no room for introducing constructive trusts to reverse unjustified enrichment. The rationality of importing constructive trusts therefore needs support not from policy but principle. For the two strong candidates of institution, namely the common law 'right against right' model, and the civil law 'dual patrimony' model, it is not evident that Chinese law has embraced either of them, though it can be anticipated that if the Chinese legislature alters the specific claim (which the beneficiary under a trust

can bring against third party recipients for the return of the subject-matter of trust) from a fault-based to a strict liability, the feasibility problem could be solved.

Finally, the normative debate between causality and abstraction can be found in both English and Chinese academia, though the former is concealed under the heading of ‘proprietary restitution for unjust enrichment’. The combination of the ‘involuntary assumption of risk’ and the ‘swollen assets’ theories seems to provide a plausible justification for causality at first blush, but its Achilles heel lies in the impossibility of distinguishing involuntary from voluntary assumption of risk of the transferee’s insolvency. As for the popular ‘causality plus bona fide acquisition’ model among Chinese anti-abstractionists, it cannot balance the security of property and the security of transaction. Nor can the ‘property of sentimental value’ or ‘property for personhood’ argument justify causality. It is suggested instead that the ‘detecting opportunity’ argument provides a positive justification for abstraction.

Admittedly, policy justification is not the only criterion for a jurisdiction to consider when choosing between abstraction and causality; value judgment of a lawmaker may involve many other factors ranging from a country’s legal tradition to the consensus of laymen. This means, although the present thesis has argued that abstraction is normatively more rational than causality in distributing interests among relevant parties, this does not mean that abstraction should always be the right choice for all jurisdictions including England & Wales and Mainland China. From a reformist perspective, it is not easy to anticipate that a jurisdiction will be better off by adopting abstraction instead of causality. Using Taoist philosophy to give a full stop to the present

thesis, this to some extent just represents the idea that ‘loss might change into gain, and gain might change into loss’, as in chapter 58 of the Laozi, the ancient Chinese philosopher said:<sup>739</sup>

It is upon bad luck that good luck depends.

It is upon good luck that bad luck depends.

Who knows where it ends?

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<sup>739</sup> Hans-Georg Moeller, *The Philosophy of the Daodejing* (Columbia UP 2006) 100. The text in Chinese is ‘祸兮，福之所倚；福兮，祸之所伏。孰知其极？’ A detailed story explaining this idea was quoted in Donal Nolan, ‘Rights, Damage and Loss’ (2017) OJLS 255.

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