

PROPRIETARY CONSEQUENCES IN DEFECTIVE
TRANSFERS OF OWNERSHIP

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OF OWNERSHIP

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Dedicated to my teacher, Professor Wolfgang Ernst, with deep gratitude.

PREFACE*

This book analyses the mechanics and the scope of the English law of proprietary restitution – at common law and in equity – and inquires whether and to what extent proprietary relief is available in defective transfers of property, such as mistaken payments. Drawing on an event-based classification of rights, it seeks to offer a coherent and rationalised approach to the transfer, creation and tracing of proprietary rights in this context.

The book is divided into six chapters. Chapter 1 sets out the foundations that are fundamental to understanding the law of proprietary restitution. After briefly outlining some basic concepts of property law, including ownership, property, title, interest and possession (section 2), the law of tracing and following will be explored (section 3), notably by examining the principles of the so-called “claiming exercise”. An elementary, taxonomical debate will then be conducted in the context of restitution, unjust enrichment, obligation and property (section 4). Refining the Birksian event-based analysis of rights, it will be argued that there is – alongside the categories of “consent”, “wrongs”, “unjust enrichment” and “miscellaneous other events” – a new, fifth category of events which may create restitutionary property rights, namely “property-related events”, such as substitution and mixture (section 4.3).

Chapter 2 shall offer a general introduction to the law of defective transfers of ownership, setting out the basic doctrinal framework at a somewhat abstract level. It will be observed, in particular, that it is inevitable to strictly distinguish between three different levels at which any particular kind of defect, such as a mistake, might operate, namely property, contract and unjust enrichment.

The proprietary consequences of defective transfers of ownership are best analysed by asking the following five questions: (i) Has legal ownership passed to the transferee or has it been retained by the transferor *ab initio* (the proprietary transfer being void at common law)? (ii) Has beneficial (i.e. equitable) ownership passed to the transferee or has it been retained by the transferor *ab initio* (the proprietary transfer being void in equity)? (iii) Does the law of property (common law) impose a legal power in rem to revest legal ownership (the proprietary transfer being voidable at law)? (iv) Does the law

* This is an updated version of the author’s habilitation thesis, which has been accepted by the University of Zurich, Faculty of Law, in 2018.

of property (equity) impose an equitable power in rem to reconstitute equitable ownership (the proprietary transfer being voidable in equity)? (v) Does equity otherwise impose an equitable proprietary interest in response to the defect in the transaction?

The first of these questions (passage or retention of legal ownership) is dealt with in Chapter 3. Since the author has recently considered this issue thoroughly elsewhere, however, reference can broadly be made to that publication.¹ As such, Chapter 3 shall only provide a summary of the respective results reached in that regard.

Chapter 4 addresses the third and fourth of the above questions, namely whether and to what extent transfers of property that are not void are still voidable at law and/or in equity. This involves a thorough discussion of the law of rescission, particularly the proprietary effects of rescission, in both contractual and non-contractual transactions.

Chapter 5 is concerned with the difficult issue of equitable proprietary restitution (in a broad sense), including the second, fourth and fifth of the above questions, namely whether a pre-existing equitable interest is retained *ab initio* or whether equity imposes a new proprietary interest (vested or in the form of a power in rem). This subject will be approached by first setting out various academic theories that have been proposed in that regard (section 2), and then by considering in detail the nature, ambit and doctrinal foundations of resulting and constructive trusts as devices to effect proprietary restitution (sections 3 and 4). Following on from this, four groups of defects shall be analysed specifically as concerns their proprietary effects in equity, namely: (i) cases where the transferor lacks any intention to execute the transaction in question at all, including theft, lack of authority and fundamental mistake (section 5); (ii) cases where the transaction is vitiated by some orthodox ground of rescission, such as misrepresentation, duress or undue influence (section 6); (iii) cases where the transfer is vitiated by a non-fundamental, non-induced mistake (section 7); and (iv) cases concerned with failure of consideration (section 8).

Lastly, Chapter 6 will provide an outline of how the principles developed in this book may be applied to defective transfers of incorporeal bank money. Though transfers of bank money operate in a manner that is fundamentally different from transfers of tangible movable property, it will be demonstrated that the issue of proprietary restitution is in effect still governed by similar principles in both cases (aside from the fact that proprietary restitution in defective transfers of incorporeal money always and inevitably involves the tracing of property rights into substitute assets).

¹ ZOGG, *Effects of Mistake and Other Defects on the Passage of Legal Title*, Intersentia, Cambridge 2019, *passim*.

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Having written a book concerning the passage and retention of legal ownership,¹ which in fact only covers a rather narrow part of a much broader field of law, it emerged that another book would become equally necessary, dealing with proprietary restitution in general, particularly including equity and the law of trusts.

In spite – or exactly because – of the fiendish complexity of this area of law, Professor Wolfgang Ernst, my PhD supervisor and academic teacher, was entirely right when he kindly encouraged me to take up this subject in my habilitation thesis. For this, and for many other things, I will always be deeply indebted to him. This is why this book shall be dedicated to him.

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¹ An updated version of my doctoral thesis, accepted by the University of Zurich in 2016, has been published by Intersentia last year; ZOGG, *Effects of Mistake and Other Defects on the Passage of Legal Title*, Cambridge 2019.

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LIST OF ABBREVIATIONS

A-G	Attorney General
A&E	Adolphus & Ellis' Queen's Bench Reports
ABCA	Alberta Court of Appeal
AC	Law Reports, Appeal Cases (3rd Series)
ACT	advance corporation tax
affd	affirmed
AG	Aktiengesellschaft
AlbLR	Alberta Law Review
ALJ	Australian Law Journal
All ER	All England Law Reports
All ER (Comm)	All England Law Reports (Commercial Cases)
All ER (D)	All England Direct Law Reports (Digests)
All ER Rep Ext	All England Law Reports Reprint, Australian Extension Volumes
Amb	Ambler's Chancery Reports
App Cas	Law Reports, Appeal Cases (2nd Series)
Atk	Atkyns' Chancery Reports
B	Baron
B&A	Barnewall & Alderson's King's Bench Reports
B&Ad	Barnewall & Adolphus' King's Bench Reports
B&C	Barnewall & Cresswell's King's Bench Reports
B&S	Best & Smith's Queen's Bench Reports
BACS	Bankers' Automated Clearing Services
BC	Borough Council
BCC	British Company Law Cases
BCLC	Butterworths Company Law Cases
Beav	Beavan's Rolls Court Reports
BingNC	Bingham's New Cases, English Common Pleas
BPIR	Bankruptcy and Personal Insolvency Reports
Bro CC	Brown's Chancery Cases
Bro PC	J. Brown's Cases in Parliament
Bros	Brothers
Bulst	Bulstrode's King's Bench Reports
Burr	Burrow's King's Bench Reports tempore Mansfield
C	Chancellor

CA	Court of Appeal
Cal App 2d	California Appellate Reports, 2nd Series
Camp	Campbell's Nisi Prius Cases
CanLII	Canadian Legal Information Institute
Car & P	Carrington & Payne's Nisi Prius Reports
CB	Common Bench Reports / Chief Baron of the Exchequer
CBNS	Common Bench Reports, New Series
CBR (NS)	Canadian Bankruptcy Reports, New Series
CC	County/City Council
CCC (2d)	Canadian Criminal Cases, 2nd Series
cf	compare (<i>confer</i>)
Ch	Law Reports, Chancery Division (3rd Series)
ch(s)	chapter(s)
CHAPS	Clearing House Automated Payment System
ChD	Chancery Division / Law Reports, Chancery Division (2nd Series)
CJ	(Lord) Chief Justice
CJCP	Chief Justice of the Common Pleas
CJM	Chief Justice of Manitoba
Cl&F	Clark & Finnelly's House of Lords Cases
CLC	Commercial Law Cases
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
CLR	Commonwealth Law Reports, Australia
CLY	Current Law Year Book
CM&R	Crompton, Meeson & Roscoe's Exchequer Reports
Co	Company
Co Rep	Coke's King's Bench Reports
Corp	Corporation
Cox	Cox's Criminal Cases
Cox Eq Cas	Cox's Equity Cases
CPD	Law Reports, Common Pleas Division
CPL	Conveyancer and Property Lawyer
CR	Criminal Reports, Canada
Cr&Ph	Craig & Phillips' Chancery Reports
Crim LR	Criminal Law Review
Cro Eliz	Croke's King's Bench Reports
Ct	Court
CUP	Cambridge University Press
DC	District Council
De G F&J	De Gex, Fisher & Jones' Chancery Reports

De G&J	De Gex & Jones' Chancery Reports
De GM&G	De Gex, Macnaghten & Gordon's Chancery Reports
Dears	Dearsley's Crown Cases Reserved
Dist CA	District Court of Appeal
Dist Ct	District Court
Div Ct	Divisional Court
DLR	Dominion Law Reports
DLR (3d)	Dominion Law Reports, 3rd Series
DLR (4th)	Dominion Law Reports, 4th Series
DM	Deutsche Mark
Doug KB	Douglas' King's Bench Reports
DPP	Director of Public Prosecutions
Drew	Drewry's Vice Chancellor's Reports tempore Kindersley
e.g.	for example (<i>exempli gratia</i>)
East	East's Term Reports, King's Bench
ECJ	European Court of Justice
ed(s)	editor(s)
EdinLR	Edinburgh Law Review
edn	edition
EEA	European Economic Area
EGD	Estates Gazette Digest of Cases
El Bl & El	Ellis, Blackburn & Ellis' Queen's Bench Reports
EMLR	Entertainment and Media Law Reports
ER	English Reports
esp	especially
et al	and others (<i>et alii</i>)
et seq	and following (<i>et sequens</i>)
etc	and so forth (<i>et cetera</i>)
EU	European Union
EUA(s)	EU allowance(s)
EWCA Civ	England & Wales Court of Appeal (Civil Division)
EWCA Crim	England & Wales Court of Appeal (Criminal Division)
EWHC (Admlty)	England & Wales High Court (Admiralty Court)
EWHC (Ch)	England & Wales High Court (Chancery Division)
EWHC (Comm)	England & Wales High Court (Commercial Court)
EWHC (QB)	England & Wales High Court (Queen's Bench Division)
EWHC (TCC)	England & Wales High Court (Technology and Construction Court)
Ex	Exchequer Reports
ex p	<i>ex parte</i>
ex rel	<i>ex relatione</i>

ExD	Law Reports, Exchequer Division
f. / ff.	next / following
FamD	Family Division
FC	Federal Court
FCAFC	Federal Court of Australia: Full Court
FCR	Federal Court Reports, Australia
FLR	Federal Law Reports
fn	footnote (not this volume)
GmbH	Gesellschaft mit beschränkter Haftung
Gr	Grant's Upper Canada Chancery Reports
H&C	Hurlstone & Coltman's Exchequer Reports
H&N	Hurlstone & Norman's Exchequer Reports
HC	High Court
Hil	Hilary term
HL	House of Lords
HL Cas	Clark & Finnelly's House of Lords Reports New Series
HLR	Housing Law Reports
HMRC	Commissioners for Her Majesty's Revenue and Customs
i.e.	that is (<i>id est</i>)
ibid	in the same place (<i>ibidem</i>)
Inc	Incorporated
IR	Irish Reports
IRC	Inland Revenue Commissioners
(J)JSC	Justice(s) of the Supreme Court of the United Kingdom
J(J)	Justice(s)
JA	Justice of Appeal
JBL	Journal of Business Law
JCL	Journal of Contract Law
JoE	Journal of Equity
KB	Law Reports, King's Bench
KBD	King's Bench Division
KCLJ	King's College Law Journal
KLJ	King's Law Journal
LBC	London Borough Council
LC	Lord Chancellor
Lev	Levinz's King's Bench and Common Pleas Reports
LJ(J)	Lord Justice / Lord Justices
LJKB	Law Journal Reports, King's Bench New Series
LLC	Limited liability company
Lloyd's Rep	Lloyd's Law Reports
Lloyd's Rep Bank	Lloyd's Law Reports Banking

LLP	Limited liability partnership
LMCLQ	Lloyd's Maritime & Commercial Law Quarterly
LQR	Law Quarterly Review
LR A&E	Law Reports, Admiralty and Ecclesiastical
LR App Cas	Law Reports, Appeal Cases (2nd Series)
LR CCR	Law Reports, Crown Cases Reserved
LR Ch App	Law Reports, Chancery Appeal Cases
LR CP	Law Reports, Common Pleas
LR Eq	Law Reports, Equity Cases
LR Ex	Law Reports, Exchequer Cases
LR HL	Law Reports, English & Irish Appeals
LR Ir	Law Reports, Ireland (4th Series)
LR PC	Law Reports, Privy Council Appeal Cases
LR QB	Law Reports, Queen's Bench (1st Series)
LRC	Law Reports of the Commonwealth
LS	Legal Studies
LT	Law Times Reports
Ltd	Limited
m	million
M&G	Manning & Granger's Common Pleas Reports
M&S	Maule & Selwyn's King's Bench Reports
M&W	Meeson & Welsby's Exchequer Reports
MCT	mainstream corporation tax
Mer	Merivale's Chancery Reports
Mich	Michigan Reports
MLR	Modern Law Review
Mod	Modern Reports
Mood CC	Moody's Crown Cases Reserved
MR	Master of the Rolls
n	footnote (this volume)
NA	National association
NIQB	High Court of Justice Northern Ireland: Queen's Bench Division
No(s)	Number(s)
NPC	New Property Cases
NSWCA	New South Wales Court of Appeal
NSWLR	New South Wales Law Reports
NSWSC	New South Wales Supreme Court
NY	New York
NZ	New Zealand
NZ L Rev	New Zealand Law Review

NZLJ	New Zealand Law Journal
NZLR	New Zealand Law Reports
NZSC	New Zealand Superannuation Cases
OJLS	Oxford Journal of Legal Studies
OR (2d)	Ontario Reports, 2nd Series
Osgoode Hall LJ	Osgoode Hall Law Journal
Ottawa LR	Ottawa Law Review
OUCLJ	Oxford University Commonwealth Law Journal
OUP	Oxford University Press
Owen	Owen's King's Bench and Common Pleas Reports
P	Law Reports, Probate / President
P Wms	Peere-Williams' Chancery & King's Bench Cases
P&CR	Property & Compensation Reports
para(s)	paragraph(s)
PC	Privy Council
PCB	Private Client Business
Pens LR	Pensions Law Reports
plc	public limited company
pt(s)	part(s)
Pty Ltd	Proprietary limited company
QB	Law Reports, Queen's Bench (3rd Series)
QBD	Queen's Bench Division / Law Reports, Queen's Bench Division
QC	Queen's Counsel
R	The King / Queen (<i>Rex / Regina</i>) = The Crown
Re	In the matter of
Rep Ch	Reports in Chancery
revd	reversed
RLR	Restitution Law Review
RTR	Road Traffic Reports
Russ	Russell's Chancery Reports tempore Eldon
s(s)	section(s)
SA	société anonyme
Salk	Salkeld's King's Bench Reports
SASR	South Australian State Reports
SC	Supreme Court
SC (HL)	Session Cases, House of Lords
sch(s)	schedule(s)
SCR	Supreme Court Reports, Canada
SGA	Sale of Goods Act
SGCA	Singapore Court of Appeal

SI	statutory instrument
sic	as in the original
SJLS	Singapore Journal of Legal Studies
St R Qd	Queensland State Reports
STC	Simon's Tax Cases
Str	Strange's King's Bench Reports
sub nom	under the name (<i>sub nomine</i>)
Swans	Swanston's Chancery Reports
SWIFT	Society for Worldwide Interbank Financial Telecommunication
Taunt	Taunton's Common Pleas Reports
TCC	Tax Court of Canada
TLR	Times Law Reports
TR	Durnford & East's Term Reports, King's Bench
Trin	Trinity term
TruLI	Trust Law International
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKPC	United Kingdom Privy Council
UKSC	United Kingdom Supreme Court
UKUT	United Kingdom Upper Tribunal
US	United States
USD	US dollar
UWALR	University of Western Australia Law Review
v / vs.	against (<i>versus</i>)
V-C	Vice-Chancellor
Ves Jr	Vesey Junior's Chancery Reports
vol	volume
West t Hard	West's Chancery Reports tempore Hardwicke
WLR	Weekly Law Reports
Wm Bl	William Blackstone's King's Bench Reports
WN	Weekly Notes of Cases
WTLR	Wills & Trusts Law Reports
Y&C Ex	Young & Collyer's Exchequer in Equity Reports
YB	Yearbook
You	Young's Exchequer in Equity Reports

