Transfer by Contract at Common Law and in Equity

Stéphane Sérafin[*]

For those who adopt a "transfer"-based explanation of contract, even the act of promising to do something at some later time appears capable of effecting an immediate transfer of rights from promisor to promisee. In this article, the author argues that this conception of contract presents a strong problem of fit from the perspective of the common law tradition, particularly where the rights being transferred are framed in terms of property, ownership, or some other entitlement pertaining to things. To do so, the author examines two ideal types of transfer by contract provided by French and German law, the former corresponding to the consent-only approach to the transfer of property rights also embraced by most modern transfer theorists. By contrast, the author suggests that it is the German approach, following which the right to claim a thing by contract is clearly distinguished from the actual ownership of that thing, which presents a better way of understanding the requirement of delivery—or compliance with alternative formalities—that remains fundamental to the transfer of property in common law jurisdictions. Although the rules applicable to the sale of goods and certain historically equitable doctrines may cast doubt on this argument at first glance, the author concludes that even they are ultimately more compatible with the public nature of the formalities required to complete a transfer of real rights under the German model than they are with the consent-only approach favoured by both French law and contemporary versions of transfer theory.

[*] Assistant Professor, University of Ottawa, Faculty of Law, Common Law Section; BSocSc, JD, LLL (University of Ottawa); LLM (University of Toronto). The author acknowledges the helpful suggestions provided by two anonymous reviewers.

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Introduction

It is probably not an exaggeration to suggest that most Anglo-American contract theorists focus their work primarily, if not exclusively, on the question of why contracts ought to be binding into the future, rather than on the effects of an already-performed agreement. An apparent exception in this respect are those authors who have embraced a "transfer"-based explanation of contract, rooted in the contention that even the act of promising to do something at some later time is capable of effecting an immediate transfer of rights from promisor to promisee.[1] To answer Fuller and Perdue's challenge, they thus submit that a breach of contract gives rise to expectation damages due to the promisee having already acquired ownership in the thing that forms the object of the promise at the very moment the contract was formed.[2]

In this paper, I will argue that the particular conception of contract advanced by these authors presents a problem of fit from the perspective of the common law tradition, particularly where the rights being transferred are framed in terms of property, ownership, or some other entitlement pertaining

1. See e.g. Randy E Barnett, "A Consent Theory of Contract" (1986) 86:2 Colum L Rev 269 at 304; Peter Benson, "Contract as a Transfer of Ownership" (2007) 48:5 Wm & Mary L Rev 1673 at 1693 [Benson, "Contract as Transfer"]; Alan Brudner with Jennifer M Nadler, *The Unity of the Common Law*, 2nd ed (Oxford: Oxford University Press, 2013) at 188–89. The label "transfer"-based explanation of contract is borrowed from Stephen A Smith. See Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 97.

2. See Benson, "Contract as Transfer", *supra* note 1 at 1703; Brudner with Nadler, *supra* note 1 at 190–91. *Cf* Ernest J Weinrib, "Punishment and Disgorgement as Contract Remedies" (2003) 78:1 Chicago-Kent L Rev 55 at 68. Fuller and Perdue had considered a similar line of argument, but ultimately rejected it. See LL Fuller & William R Perdue Jr, "The Reliance Interest in Contract Damages: 1" (1936) 46:1 Yale LJ 52 at 59–60.

to *things*.[3] This is because an account of contract rooted in transfer theory must ultimately grapple with the requirement of delivery—or compliance with alternative formalities—which remains fundamental to the transfer of real rights in common law jurisdictions, and which largely corresponds to the approach taken on this issue by modern German law. Even the application of certain historically equitable doctrines, which may cast some doubt on this conclusion at first glance, ultimately reinforces the centrality of compliance with formalities as a requirement for the transfer of real rights.

My argument will proceed in three parts. In Part I, I will begin by briefly outlining the two ideal types of transfer by contract which I intend to invoke below, namely those provided by French and German law, respectively. My purpose here will be to outline how each of these models can be properly related to the idea of "transfer theory" as it appears in the work of contemporary authors. As I will suggest, most of these accounts present strong parallels with the model of transfer embodied by the French legal system, which is rooted in the ideal of consent-only transfers, even as the German model may not be per se incompatible with the broader idea of contract as a transfer of rights.[4]

Part II will then proceed to examine the approach taken towards transfer by the modern common law in light of the two ideal types supplied by French and German law. Here, I will argue that the three principal means the common law recognizes to effect a transfer of property—that is, by gift, deed under seal, and sale—each remain fundamentally tied to the requirement of delivery or an alternative means of physically handing over control of a thing. This approach to the transfer of property rights suggests a strong affinity between the common law and the German model of transfer, and it poses a problem for those accounts of the common law of contract which hope to explain its operation by reference to a transfer of rights in things.

Finally, Part III will turn to the comparatively more difficult task of conceptualizing the relationship of certain historically equitable doctrines with the two ideal types of transfer by contract outlined above. As I will argue, while the effects of equity in relation to the transfer of property rights appear largely reminiscent of the position taken by French law at first glance, the basis for relief in these cases can be anchored in the public nature of the formalities necessary to effect a transfer of real rights under the German model. What equity seems to

3. In making this argument, I am setting aside the issue of whether service contracts are per se incompatible with transfer theory. See Smith, *supra* note 1 at 101–02. My objective is instead to challenge contemporary versions of the theory in precisely those cases where they appear strongest—i.e., where the obligation undertaken pursuant to a contract is not one to perform a particular task or render a particular service (in civilian parlance, an obligation to do or *obligatio facere*), but rather to transfer legal rights by *giving* certain property (an *obligatio dare*).

4. My argument here builds on previous work. See Stéphane Sérafin, "Transfer by Contract in Kant, Hegel and Comparative Law" (2018) 31:1 Can JL & Jur 151.

allow, then, is for courts to complete the requirements inherent in the transfer of property by contract for limited purposes, in a manner that only reinforces the centrality of these formalities within the common law tradition.

I. Two Models of Transfer

Like their natural law predecessors, contemporary accounts of contract as transfer tend to explain the binding force of contractual obligation by analogizing, if not outright equating, the effects of a promise to those of a completed transfer of tangible things.[5] In the view of authors who defend such a theory, a contract is binding precisely because it effects a transfer of ownership over things—whether tangible or intangible—owned by the transferor to the transferee.[6] The right to claim a thing from another person is thus essentially equivalent to a right of ownership in that thing, and may even be enforceable against third parties in the manner typically associated with the existence of an *in rem* right.[7]

The particular version of transfer theory advanced by these authors can be compared and contrasted with the two ideal types of transfer by contract which emerge from comparative law scholarship. The first is embodied by those legal systems which follow the French Civil Code (the *Code civil*), and which embrace the principle that consent alone is sufficient to effect a full transfer of rights in things.[8] The second reflects the approach taken by the German Civil Code (the *Bürgerliches Gesetzbuch* or "BGB") and those legal systems which follow it,[9] in which consent must always be completed by another publicly recognizable act—traditionally, a physical handing over of the thing being transferred—before it can effect a transfer of property rights.[10]

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5. See especially Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* [On the Law of War and Peace Book Three], vol 2, translated by Francis W Kelsey with the collaboration Arthur ER Boak et al (Oxford: Clarendon Press, 1925) book 2 at ch 11, s IV.1.

6. See Barnett, *supra* note 1 at 304; Benson, "Contract as Transfer", *supra* note 1 at 1693; Brudner with Nadler, *supra* note 1 at 188–89.

7. See Benson, "Contract as Transfer", *supra* note 1 at 1722; Brudner with Nadler, *supra* note 1 at 128. Benson and Brudner in particular base their accounts of contract on the work of Hegel, who rejected not only the distinction between *in personam* and *in rem* rights, but also that between real and executory contracts. See Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, translated by TM Knox (Oxford: Oxford University Press, 1967) at para 79.

8. See especially art 1196 C civ; art 1138 CcF. See also arts 1454, 2941 CCQ.

9. See arts 873, 929 Civil Code (Germany) [BGB].

10. My emphasis on French and German law reflects not only their inherent value as ideal types, but also the particularly strong influence that the French and German codifications have had on subsequent codification initiatives in Europe and elsewhere.

As I will argue below, only the former is strictly compatible with the particular account of transfer theory that is advanced by most contemporary authors. That said, it may remain possible to reconcile the approach taken by German law with an alternative form of transfer theory which takes care to distinguish a properly contractual transfer of rights—that is, a transfer of a right to *performance* arising from the consent of the parties alone—from a full transfer of rights pertaining to things.

A. Transfer and the Consent-Only Principle

Of the two ideal types to transfer by contract which emerge from comparative law scholarship, it is relatively clear from the outset that the particular conception of transfer theory advanced by most contemporary authors is broadly consistent with the consent-only principle embraced by French law, and is far more difficult to reconcile, if not totally incompatible, with the additional requirements imposed by the BGB. Indeed, to the extent that contemporary authors justify the effects of voluntary legal arrangements in terms of a completed transfer of property, ownership, or some other entitlement pertaining to *things*, they appear to presuppose that such a transfer may be completed by the effects of consent alone, without the need to complete any additional formalities.[11] The German model, by contrast, begins with the existence of a valid contract, which it then uses to justify the transfer of property rights.

That said, there are deeper connections which may be drawn between contemporary transfer theories and the French legal tradition, at least some of which are useful for the purposes of the present study. Stated briefly, the approach enshrined in the *Code civil* is one in which *all* contracts, be they contracts of immediate or future performance, are potentially capable of transferring full *in rem* rights to things from the moment that they are concluded. In the view of the French codifiers, consent alone was thus understood to be sufficient in principle to effect such a transfer, without the need to complete any additional formalities.[12]

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11. For the purpose of this paper, I am largely setting aside the question of whether the idea of "consent" in French law is fully compatible with the views of the authors in question; the former is typically given a much more subjective reading than is common in English law, where it is much more common to understand consent as an objectively demonstrable, externalized act.

12. See art 1138, para 1 CcF. According to that provision, "[a]n obligation of delivering a thing is complete by the sole consent of the contracting parties" (*ibid*). See also art 1196, para 1 C civ. In the case of a sale, for example, this means that the seller's obligation to transfer property is performed at the very same moment the contract is concluded, without the need to perform an additional act. See Marcel Planiol, *Traité élémentaire de droit civil*, t 2, 9th ed (Paris: Librairie générale de droit & de jurisprudence, 1923) at para 1447.

This consent-only approach to the transfer of property rights has a number of practical implications. Perhaps the most important of these is that the parties are free to determine when title or ownership of a thing will actually pass. The immediate transfer of property rights upon the conclusion of the contract is simply a default rule, which the parties are capable of setting aside through the expression of a contrary intention.[13] Only under exceptional circumstances will such a deferral operate automatically, in the absence of any express—though perhaps not implicit—intention to that effect. These are, in essence, situations in which an immediate transfer of rights is for all intents and purposes impossible: for example, when the thing to be transferred is not yet owned by the transferor, or when the specific thing to be transferred has yet to actually be ascertained.[14]

Among contemporary transfer theorists, the consent-only principle exemplified in French law appears to find its strongest endorsement in the work of Randy Barnett, whose "consent theory" of contract may well represent the earliest contemporary attempt at analogizing contract with a transfer of property.[15] Indeed, the very name of Barnett's theory suggests that a transfer of property—or what he calls "entitlements"—can be effected by consent *alone*, and thereby obligate the transferor to give up his or her physical possession of the transferred thing to the transferee.[16] No additional formality, such as the performance of the agreement through the delivery of property, appears to be required to accomplish such a result.

That said, Barnett's account does not appear particularly preoccupied with the *limits* of consent as a means of transferring entitlements, or even how contracts effect such a transfer in the first place. His theory is thus not entirely developed as a justification for the enforcement of contracts in those cases where an actual, immediate transfer of assets is practically impossible: on his view, consent alone appears entirely sufficient to transfer entitlements save and except where they have been previously recognized as inalienable pursuant to the principles of property law.[17] We are only left to infer what treatment Barnett may give to these cases, or whether they may prompt him to abandon

13. This rule is now explicitly codified. See art 1196, para 2 C civ.

14. See Henri Mazeaud et al, *Leçons de droit civil*, t 2, vol 2, 8th ed by François Chabas (Paris: Éditions Montchrestien, 1994) at para 1618; Marcel Planiol, *Traité élémentaire de droit civil*, t 1, 9th ed (Paris: Librairie générale de droit & de jurisprudence, 1923) at para 2597 [Planiol, tome 1].

15. See generally Barnett, *supra* note 1.

16. *Ibid* at 295.

17. See *ibid* at 292–93. While these apparent omissions raise doubts as to whether Barnett is truly attempting to ground the normative force of contracts in a completed transfer of rights pertaining to things, his statements regarding the dependence of contract on property rules heavily imply that this is the case.

a purely transactional and transfer-based conception of contract in favour of some alternative model.

By contrast, both the consent-only principle and its inherent limitations appear clearly in the work of Peter Benson. Drawing inspiration from Friedrich Hegel, and to a lesser degree from Immanuel Kant, Benson has tended to present the executory contract as an immediate transfer of ownership over the thing which forms the object of a promise.[18] In his view, the performance of the agreement, by means of delivery or otherwise, is not strictly relevant to the accomplishment of such a transfer.[19] As Benson himself also recognizes, however, the conflation of what might otherwise be called the *in rem* and *in personam* aspects of the transfer creates problems in at least three distinct cases. These are, namely, those cases in which the object of a contract is properly construed as a *service* rather than a thing, as well as those cases in which the transferor does not yet own the thing to be transferred, and those cases in which the specific thing to be transferred has not yet been determined from "among a number of practically identical items".[20]

In other words, the inherent limits of the consent-only principle recognized by French law—i.e., in those cases where a transferor does not yet own property to be transferred, or where the property to be transferred has not yet been ascertained—identically mirror the latter two cases which Benson presents as specific challenges for his account of contract.[21] However, it is Benson's proposed answer to these problems, and to the broader problem posed by third party rights under a consent-only approach to contractual transfer, which perhaps presents the most striking parallel with the consent-only principle as it is applied in French law.

For Benson, a contractual transfer only effects what he calls a "relational transfer of property", and remains limited to the contracting parties until the contract is actually performed through the delivery of physical possession.[22] The *Code civil* adopts the same approach by limiting the enforcement of property rights transferred by contract against third parties until such time as the

18. See Benson, "Contract as Transfer", *supra* note 1 at 1723.

19. See *ibid* at 1693.

20. *Ibid* at 1728. See *ibid* at 1727–28.

21. Although service contracts are intentionally excluded from the scope of the present study, I note for the sake of completeness that the analogy between Benson's account of contract as transfer and French law breaks down on this point, as the *Code civil* requires a separate act of performance to satisfy an obligation arising from a non-property transferring contract (i.e., an obligation to give is performed immediately upon the conclusion of the contract, but an obligation to do is not). See e.g. art 1142 CcF.

22. See Benson, "Contract as Transfer", *supra* note 1 at 1723, 1729–30 (such performance implies that the seller has first acquired ownership of the thing being transferred, or that the specific thing being transferred has been ascertained).

transferee can acquire effective control of the thing in question in the case of movable property, or the right to the thing is published in the case of immovable property. Where a subsequent acquirer in good faith obtains such control or publishes a right before the transferee, he or she is validly granted title despite the transferee's theoretically prior interest.[23] However, the mere existence of a contractual obligation to transfer will in all other cases be sufficient on its own to claim prior title over that same subsequent acquirer.[24]

That the transferee acquires ownership of a thing prior to delivery, and not just a right to claim it from the transferor—i.e., a right to the performance of some act or prestation—means that Benson's theory in particular presents a strong incompatibility with the alternative model of contractual transfer offered by the German legal tradition. A similar conclusion can be drawn with respect to the work of Alan Brudner, who, like Benson, draws inspiration from Hegel when framing the essence of contract in fundamentally proprietary terms.

As with Benson, Brudner is also forced to draw a distinction between an actual transfer of rights in tangible things, on the one hand, and a form of relational transfer taking place only between the parties. In Brudner's case, the latter appears to correspond to what he calls a transfer of "value", which on his account is effected even—or perhaps exclusively—by means of a fully executory, exchange-based contract.[25] This distinction is again meant to preserve the core idea of contract effecting an immediate transfer of ownership, which for Brudner is successfully dissociated from material possession through the medium of an exchange.[26] As he also makes clear, the form of an exchange (i.e., mutual consent and recognition between owners) is sufficient on its own to provide the transferee with full public recognition of the rights being transferred. A contract confers an absolute right of ownership on the transferee, even when the transferor had only a relative title to the object of the transfer.[27]

Whereas we are left to infer the broader consequences of Barnett's consent theory of contract as it pertains to third party rights, it is thus relatively clear that both Benson and Brudner's accounts of contract as transfer largely echo the approach actually taken by French law. That said, to the extent that all three authors explain the normative force of contracts by reference to an already-completed transfer of rights in *things*, it stands to reason that each of them would view that transfer as operating in accordance with consent alone, without the need to comply with some other, externally imposed requirement.[28] Before

23. See art 1198 C civ.

24. See art 1196 C civ.

25. Brudner with Nadler, *supra* note 1 at 128.

26. See *ibid* at 127.

27. See *ibid* at 129–30.

28. See Barnett, *supra* note 1 at 309; Benson, "Contract as Transfer", *supra* note 1 at 1730–31; Brudner with Nadler, *supra* note 1 at 129.

turning to the core of my argument—i.e., that this particular account is largely incompatible with the approach actually taken towards the transfer of property in the common law tradition—it is worth briefly examining the alternative possibility offered by the German law in greater detail.

B. An Alternative Account of Transfer

Rather than embracing the consent-only principle, as both French law and contemporary authors do, the alternative view of transfer offered by modern German law is anchored in a full distinction between a contractual right to *claim* a thing against a specific person—a particular kind of right *in personam*, a *jus ad rem*, which may be conferred by way of consent alone—and the actual *ownership* of that thing, in the form of a right potentially enforceable against the world at large. Indeed, German law requires an additional step—beyond the mere provision of consent by both parties—in order to actually transfer the thing in question.[29] In the case of movable property, this extra step is satisfied by delivering that thing to the person acquiring it.[30] In the case of immovable property, it instead means complying with the requirement of title registration.[31] The BGB goes so far as to require a fresh agreement between the parties at the point where either of these acts is completed, amounting to a second contract of immediate performance which is separate from the original promise or undertaking to give, and which remains enforceable even if the original agreement is set aside.[32]

This distinction between contractual right and property right is partly rooted in history, as it can in all likelihood be traced back to Roman law.[33] That said,

29. In common law parlance, the distinction is typically rendered as one between "contract" and "conveyance". See e.g. Weinrib, *supra* note 2 at 64. This distinction is useful, but has the unfortunate side effect of obscuring the fundamentally consensual nature of conveyances.

30. See art 929 BGB.

31. See art 873 BGB (where the categories "movable property" and "immovable property" are largely analogous to the common law notions of "personal property" and "real property", respectively).

32. See arts 873(1), 929 BGB. The requirement of a second contract, in the sense of bilateral agreement at the moment of transfer, is explicit in the text of both articles. German law refers to the need for this second, properly dispositive contract as the "*Trennungsprinzip*"—the separation principle—while the separate validity of this second agreement is known as the "*Abstraktionsprinzip*"—the abstraction principle. See Mathias Reimann & Joachim Zekoll, eds, *Introduction to German Law*, 2nd ed (The Hague: Kluwer Law International, 2005) at 236–37.

33. See Dig 19.1.11.2 (Ulpian). See also Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Clarendon Press, 1996) at 278. *Cf* FH Lawson, "The Passing of Property and Risk in Sale of Goods—A Comparative Study" (1949)

it also appears to reflect a genuine concern for the security of transactions—particularly from the perspective of those third parties who have no say in, and in most cases no knowledge of, an otherwise purely private transaction between two contracting parties.[34] By insisting on the completion of an additional formality—i.e., delivery in the case of movable property, registration in the case of immovable property—German law thus ensures a much greater degree of protection for third parties than is possible under the consent-only principle. Only once these formalities have been complied with, and the transaction has been rendered public in a way that is known or at least knowable by all who may be affected, will the transfer have any effect whatsoever on third party rights.[35]

In other words, the particular approach embraced by German law appears to fully subject the transfer of property rights to the requirements of something approaching public law—in the sense of the law applicable only in the civil condition, by virtue of its approval by society at large.[36] The idea is that every third party who may be potentially affected by the contractual transfer must be able to learn of the transfer's existence *before* that transfer can become effective at all, even between the parties to a transaction, just as the intention to acquire must be manifested publicly in order to complete a unilateral acquisition.[37] This approach is inherently at odds with the "consent" theory of contract advanced

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65 Law Q Rev 352 at 360–61 (arguing that Roman law did not recognize a separate contractual right to demand the transfer of property). The apparent affinity between German law and Roman law on this point is not surprising given that the BGB was strongly inspired by the work of the German historical or "pandectist" school, whose members emphasized the Roman roots of the German legal system; by contrast, the consent-only principle embraced by modern French law draws its origins primarily in medieval and early modern natural law scholarship. See Mazeaud, *supra* note 14 at para 1615 (emphasizing in particular the role of Hugo Grotius and Samuel von Pufendorff in relation to this development).

34. See e.g. Max Rheinstein, "Some Fundamental Differences in Real Property Ideas of the 'Civil Law' and the Common Law Systems", Comment, (1936) 3:4 U Chicago L Rev 624 at 633–34.

35. By contrast, even the relative transfer of ownership effected under French contract law fails to fully protect the interest of third parties, for at least two reasons: first, because the rights ceded by contract can still adversely affect third party rights, even if they cannot be directly asserted before a court; second, because the validity of the transfer remains tied to that of the original contract concluded privately between the parties, and can be always challenged on that basis. See Mazeaud, *supra* note 14 at para 1619.

36. Here, I am consciously drawing on the work of Immanuel Kant. See Immanuel Kant, *The Metaphysics of Morals*, translated by and ed by Mary Gregor (New York: Cambridge University Press, 1996) at § 14.

37. See Reimann & Zekoll, *supra* note 32 at 234.

by Barnett, as well as the transfer theories of Benson and Brudner, each of whom takes the consent to transfer rights in things as the starting point for their justification of contract. Under the BGB, it is instead the public performance of an agreement immediately upon its conclusion—whether through physical delivery or otherwise—which ostensibly stands as the basis for the transfer of property, and therefore appears inadmissible to justify the enforcement of such a contract in the first place.[38]

Whether the approach of German law is nonetheless compatible with *a* theory of contract as transfer, beyond those of the authors examined above, is largely beyond the scope of this paper.[39] For now, it is perhaps sufficient to note that Kant appears to advance a substantially similar account of the relationship between contractual rights and property rights while retaining the basic idea of transfer. By contrast with most contemporary transfer theorists, he simply presents the "transfer" which gives rise to a contractual right in a manner that is distinct from the transfer of property rights which occurs upon the delivery of a thing.[40] As I will argue below, this is largely the view of property transfers that is adopted by the common law—even as certain specific cases, such as the sale of goods and the application of equitable doctrines, present a few additional complications.

II. Transfer by Contract at Common Law

It is not so easy at first glance to determine if either of the two models of transfer identified above corresponds to the underlying theory embraced by the common law. Even a casual observer might wonder whether a largely casuistic legal tradition, which typically reserves the term "contract" for particular kinds of exchange-based agreements, has any need for, or is even capable of advancing, a unified account of how property is transferred in the

38. As Helge Dedek has argued, Kant appears to have been addressing a similar form of circularity when formulating his own account of contract. See Helge Dedek, "A Particle of Freedom: Natural Law Thought and the Kantian Theory of Transfer by Contract" (2012) 25:2 Can JL & Jur 313 at 337.

39. For an argument to this effect, see *ibid*. See also Sérafin, *supra* note 4.

40. See Kant, *supra* note 36 at § 20. Kant writes, "[b]y a contract I therefore acquire another's promise (not what he promised), and yet something is added to my external belongings; I have become *enriched (locupletior)* by acquiring an active obligation on the freedom and means of the other" (*ibid* [footnotes omitted; emphasis in original]). Arthur Ripstein draws on this distinction to argue that Kant does not advance a properly transfer-based theory of contract. See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009) at 113.

first place.[41] Two particular issues emerge from the outset—namely, that the common law does not possess a truly unified conception of personal and real property rights, on the one hand, and still shows the influence of a unique historical distinction between law and equity, on the other.[42]

That said, any attempt at conceptualizing the common law of contracts in terms of an immediate transfer of rights, and in particular as an immediate transfer of something approaching a *property* right, as the authors examined above purport to do, at least presupposes the possibility of reconstructing the approach actually taken by the common law in this respect. The challenge is that such an exercise requires reference to a number of relatively distinct component pieces within the traditional domains of both the common law and equity, at least some of which are not necessarily covered by the typical contract law treatise or textbook.

I examine three of the main pieces of the puzzle below, namely the passing of title through gifts, deeds, and the sale of goods, before turning to a specific discussion of those doctrines historically associated with equity in Part III. As I will argue, at least two of these pieces are more broadly consistent with the German model of contractual transfer and stand at odds with the views of those contract theorists examined above. While the third case under consideration—the sale of goods—may constitute an exception in this respect, even it presents features which cast doubt on its affinity with the consent-only principle recognized in French law.

A. Transfer by Gift

If one follows the division commonly found in common law textbooks, gifts are a subject best dealt with as part of the domain of property law, rather than contract.[43] Nonetheless, it is the case law pertaining to gifts—and specifically, to the requirement of delivery as a precondition for the *enforcement* of gifts—which provides us with the clearest starting point for any attempt

41. A cursory review of the existing literature further supports these suspicions: perhaps the most complete attempt at understanding the approach actually taken by the common law towards the transfer of property rights is found in Lawson. See especially Lawson, *supra* note 33 (an article which deals exclusively with the passing of title in the sale of goods).

42. For treatment of the unique status of equity in the common law tradition, see generally Ralph A Newman, *Equity and Law: A Comparative Study* (New York: Oceana Publications, 1961).

43. See e.g. Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 156–66; Ray Andrews Brown, *The Law of Personal Property*, 2nd ed (Chicago: Callaghan & Company, 1955) at chs 7, 8. But see art 931 C civ (which now explicitly associates the executed gift (*donation*) with the form of a contract).

at understanding the common law's approach to contractual transfers. As the majority judges of the English Court of Appeal set out in *Cochrane v Moore*:

> In Bracton's day, seisin was a most important element of the law of property in general; and, however strange it may sound to jurists of our day and country, the lawyers of that day applied the term as freely to a pig's ham . . . as to a manor or a field . . . The law recognised seisin as the common incident of all property in corporeal things, and tradition or the delivery of that seisin from one man to another as essential to the transfer of the property in that thing, whether it were land or a horse, and whether by way of sale or gift, and whether by word of mouth or by deed under seal.[44]

The decision in *Cochrane* is often taken as a leading statement on the requirement of delivery to complete a gift across the common law world.[45] At issue in that case was whether the purported donor had effectively conveyed his interest in a horse to the plaintiff by means of a gift, such that the plaintiff could successfully claim it against him. As the majority ruled, the weight of English precedent stood against this proposition—and in favour of the alternative view that a transfer of title by gift requires that the donor physically deliver the thing in question to the donee.[46]

In other words, the majority's approach to gifts in *Cochrane* appears entirely consistent with the German model of transfer by contract. As has since been accepted as a basic principle of the common law, a gratuitous promise must be completed by delivery in order to effect a transfer of gift property, and is (almost) completely ineffective in all other cases.[47] This position can further be contrasted with the consent-only principle embraced by both French law and contemporary transfer theorists, which instead suggests that the mere

44. (1890), 25 QBD 57 at 65–66, [1886-90] All ER Rep 731 (CA (Eng)).

45. See e.g. Brown, *supra* note 43 at §§ 84–85; Ziff, *supra* note 43 at 156, n 149; *Kingsmill v Kingsmill* (1917), 41 OLR 238 at 241, 2 RFL Rep 28 (H Ct J).

46. See *Cochrane v Moore*, *supra* note 44 at 60–62, citing *Irons v Smallpiece* (1819), 106 ER 467 (KBD).

47. See e.g. *Dalhousie College v Boutilier Estate*, [1934] SCR 642 at 645, [1934] 3 DLR 593 [*Dalhousie College*]. In that case, the Court stated that "the deceased's subscription can be sustained as a binding promise only upon one basis, viz.: as a contract, supported by a good and sufficient consideration" (*ibid*). The main exception here is the doctrine of estoppel, the strictly proprietary variant of which is admitted as a cause of action in Canadian (and English) law. See *Cowper-Smith v Morgan*, 2017 SCC 61 at para 17 [*Morgan* SCC].

act of promising to transfer something, even gratuitously, should at least presumptively be sufficient to actually effect such a transfer.[48] Since the common law only enforces gifts as completed transfers of property conferring full *in rem* rights once delivery has occurred, it is apparent that it does not even provide the donee with a contractual right to compel the transfer to occur—even if the parties may have been in full agreement on this particular point.[49]

A number of subsequent cases have completed and refined the basic approach set out in *Cochrane*, and in so doing permit us to further unpack the relationship between the common law gift and the German model of contractual transfer. In particular, decisions from the mid-nineteenth century onward have stressed that the act of delivery must entirely divest the donor of control over the gift property before the gift can be effective.[50] As the case law sets out, this fundamental requirement may be respected even where the donor delivers the gift property to a third party acting for the donee's benefit.[51] A transfer by gift may similarly be effective even if the donee is already in possession of the gift property, or where the donor retains physical possession

48. This is the position taken in theory by French law, though in practice it and related legal systems subordinate the creation of a donative *contract* (rather than the transfer of gift property) to the use of a notarial deed or the immediate delivery of the gift property on ostensibly evidentiary grounds. See art 931 C civ; art 1824 CCQ. Barnett in particular appears to adopt a similar approach to gratuitous contracts when he posits that "[t]he voluntary use of a recognized formality by a promisor manifests to a promisee an intention to be legally bound in as unambiguous a manner as possible." See Barnett, *supra* note 1 at 311. Benson's position on the role of delivery in gifts is more nuanced, though he too appears to have initially adopted an evidentiary reading. See Benson, "Contract as Transfer", *supra* note 1 at 1718. Contrast his more recent work, in which he presents the requirement of delivery for gifts as an "external act that can cancel *now* the donor's present exclusive control over her object". See Peter Benson, "The Idea of Consideration" (2011) 61:2 UTLJ 241 at 260 [emphasis in original].

49. See e.g. *Dalhousie College*, *supra* note 47 (holding that unperformed promise to give was unenforceable for want of consideration). That said, the actual result in *Cochrane*, where the majority judges found that the plaintiff had been constituted a trustee of the defendant, suggests that a promise to give may be sufficient on its own to complete a transfer in equity. See *Cochrane v Moore*, *supra* note 44 at 73. I examine this issue further in Part III below.

50. See *Murphy Estate, Re* (1998), 169 NSR (2d) 284 at 290–92, 508 APR 284 (SC) (transfer of control over sums placed in safety deposit box held to create effective gift).

51. By contrast, delivery is not effective where the donor attempts it through a third party acting as her agent or trustee, as the donor has conserved a discretion to revoke the gift until the donee actually receives the gift property. See *Walker v Foster* (1900), 30 SCR 299 at 301, 1900 CanLII 83.

of the gift property after the delivery pursuant to a bailment or some other kind of legal relationship, rather than as its owner.[52]

These refinements, including the possibility of completing a gift through a third party intermediary, are in keeping with the basic approach recognized by the modern German legal system. Article 931 of the BGB in particular allows a transferor to complete the transfer of movable property through a third party intermediary, provided that he or she assign to the transferee the right to claim that thing from that designated third party.[53] Other provisions in turn recognize the possibility of completing a transfer where the transferee is already in possession of the transferred property, as well as where the transferor retains such possession pursuant to a contractual right after the transfer is completed.[54] As with the common law gift, the approach taken in such cases thus appears to require that the transferor fully divest himself or herself of (legal) control over the property before the transfer will be considered complete.

Going further still, post-*Cochrane* case law has also confirmed the fundamental bilateralism of the agreement which underlies the completion of a gift, even as the existence of such an agreement is insufficient to actually effect a transfer of the gift property on its own.[55] Here too, the form of the common law gift strongly parallels the contract to transfer property recognized in German law, which as previously mentioned requires an immediate agreement

52. See *Woodard v Woodard* (1991), [1995] 3 All ER 980, [1991] Fam 470 (CA (Civ Div)) (delivery of a second set of car keys to son already in possession of car and a first set of keys held to be effective for the purpose of *donatio mortis causa*); *Rayner v Read*, [1943] 4 DLR 803, 1943 CanLII 389 (SCC), aff'g [1943] 2 DLR 225, 16 MPR 554 (PEI Sup Ct) (return of gift property by donee to donor for safekeeping does not invalidate gift).

53. See art 931 BGB. The official translation reads: "If a third party is in possession of the thing, delivery may be replaced by the owner assigning to the acquirer the claim to delivery of the thing" (*ibid*).

54. See arts 929, 930 BGB.

55. See e.g. *Dewar v Dewar* (1975), 1 WLR 1532 at 1538–39, [1975] 2 All ER 728 (ChD); *McNamee v McNamee*, 2010 ONSC 674 at paras 210–15; *McNamee v McNamee*, 2011 ONCA 533 at paras 24–25. *Cf* Mary Jane Mossman & Philip Girard, *Property Law: Cases and Commentary*, 3rd ed (Toronto: Emond Montgomery Publications, 2014) at 447. "The common law's theory of gift as a unilateral act compels it to treat 'acceptance' as a less than essential requirement" (*ibid* at 447). In my view, the necessity of acceptance to complete a gift at common law necessarily implies that the gift amounts to a bilateral act, even if the acceptance of a gift can generally be presumed on the basis of the common law's own objective theory of intention. An important distinction which appears to be overlooked by Mossman and Girard here is that between the unilateral nature of the transfer which the gift *effects* and the (bilateral) *consent* which is required to ground the gift itself.

between the parties to the transfer at the precise moment in which that transfer is set to occur.[56] The common law donor must similarly couple an intention to immediately transfer the gift property with the immediate performance of that intention by means of delivery.[57] The donee must then accept delivery of the gift property as an embodiment of that intention to transfer—and thus complete the underlying agreement—before that transfer can actually take effect.[58]

In other words, the very form of the common law gift suggests that it amounts to a self-contained, "contractual" arrangement by which the donor offers to immediately divest himself or herself of ownership over the gift property, and by which the donee in turn accepts it at the point of delivery. Following the German model of contractual transfer, it should further be possible to conclude that the basic form of the gift performed through delivery is at least theoretically capable of transferring *any* kind of property right recognized at common law, save perhaps for those rights which relate to property that is completely incapable of physical delivery.[59] Even in such cases, however, it should still be possible to complete the transfer by alternative means—a possibility that the BGB also expressly recognizes through the notion of "indirect" possession.[60]

Such is precisely the attitude that the common law actually takes towards the gift in practice. In particular, it recognizes that a total divestiture of control over gift property can be accomplished by means other than its actual, physical delivery—particularly in cases where the gift property in question is impossible, or at least difficult, to physically deliver. In such cases, the "symbolic" or "constructive" delivery of something else which serves to *represent* the gift

56. See arts 873(1), 929 BGB.

57. Among other things, this requirement implies that the conditions which may validly be attached to an *inter vivos* gift must be outside the donor's control; in the *donatio mortis causa*, the gift is not effective until the donor actually dies. See *Brown v Rotenburg* (1945), [1946] 1 DLR 135 at 138, 1945 CanLII 350 (Ont HC). In the gift made in contemplation of marriage, the transfer has instead become irrevocable upon delivery, but the donor has conserved a reversionary interest that is also subject to conditions outside of her control. See *Robinson v Cumming* (1742), 26 ER 646 at 646–47 (Ch).

58. The common law will infer such an acceptance unless the donee expresses a contrary intention. See *Standing v Bowring* (1885), 31 Ch D 282 at 286, [1881-5] All ER Rep 702 (CA (Eng)), Lord Chancellor Halsbury; *Dewar v Dewar*, *supra* note 55 at 1538–39.

59. This is because, as previously mentioned, the manner in which property rights are transferred under the German model directly mirrors the unilateral acquisition of property rights. See Reimann & Zekoll, *supra* note 32 at 234.

60. Art 931 BGB. This provision allows the transferor to complete the transfer of movable property while retaining physical possession under an arrangement akin to the common law bailment (*ibid*).

property is considered sufficient for the gift to be made effective.[61] The fact that the gift property has remained in the donor's physical possession is largely immaterial: for all intents and purposes, the donor has performed the act of transferring it to the donee in a way that can legitimately be recognized by all who may be concerned with the transaction.

The possibility of using symbolic or constructive delivery to complete a gift at common law even extends to the transfer of completely intangible assets. Perhaps the most straightforward example of such a move is in the use of a bill of exchange as a means of conferring a right to receive payment upon the donee. The rights embodied in the bill can of course be enforced by whoever happens to be in possession of the written instrument, provided only that the individual in question has obtained it through legitimate means.[62] This can be accomplished, for instance, where the bearer has been given possession of the bill by means of delivery, at the conclusion of a gift.[63] In such a case, the bill instrument amounts to a physical representation of the intangible right being transferred. It can thus be treated as a "good" in its own right—which is to say, as an object which is capable of free use and alienation in accordance with the rules of property law—even as the right it embodies—namely the right to receive payment—would otherwise constitute an intangible asset.[64]

A similar, though somewhat more difficult example of a written instrument being used to transfer an otherwise undeliverable thing is provided by the use of a deed under seal as a means of completing a conveyance of real property. This scenario presents a number of particularities, however, which should be examined in greater detail in order to provide a complete account of the transfer of property rights at common law. I turn to this exercise next.

B. Transfer by Deed

As I have argued above, the form of the common law gift is almost entirely consistent with the approach to the transfer of property rights adopted in German law, in which consent alone is insufficient to actually transfer title to property. Not only must the donor deliver the gift property in order for the gift to be effective as a completed transfer, but the agreement which underlies

61. The delivery of keys is a common example. See *Walker v Foster*, *supra* note 51; *Woodard v Woodard*, *supra* note 52.

62. For codifications of this rule, see e.g. *Bills of Exchange Act, 1882* (UK), 45 & 46 Vict, c 61, s 38; *Bills of Exchange Act*, RSC 1985, c B-4, s 73.

63. See e.g. *Lumsden v Miller* (1980), 110 DLR (3d) 226, 25 AR 359 (Alta QB) (holding that cheque given to daughter by deceased constituted valid *donatio mortis causa*).

64. See *Marfani & Co Ltd v Midland Bank Ltd* (1967), [1968] 1 WLR 956 at 970, [1968] 2 All ER 573, Lord Diplock (CA (Eng)).

the gift further appears to correspond with the German ideal of a contract to transfer property rights: the donor must couple her donative intention with immediate performance through delivery of the gift property. The donee must then accept the gift property as the embodiment of the donor's intention, again at the point of delivery.

The question that now arises is whether, and to what extent, the form of the sealed instrument—or "deed", as I will refer to it below—is consistent with this same overarching thesis.[65] The question is all the more relevant given that the form of the deed at least superficially resembles that of the executory (i.e., unperformed) contract or promise. Many authors will thus typically refer to the seal in relation to the act of promising, rather than in relation to the instrument on which the seal is traditionally imprinted.[66] At the same time, it is also widely recognized that a deed can be used to pass title to property—and, subject to the registration requirements now applied in some jurisdictions, title to real property in particular.[67] In this, it amounts to an alternative to the actual, physical delivery of the thing being transferred—including in cases where the real property is being conveyed gratuitously, as a gift.[68] It may therefore be queried whether the deed—as an apparent executory contract capable of conferring immediate title to real property—more properly accords with the French rather than German model of contractual transfer.

Further complications arise when one examines the historical genesis of the deed's title-transferring effects. As was noted by the judges in *Cochrane*, the conclusion of a deed appears to have initially been insufficient to effect a full

65. The term "deed" is used here as a neutral shorthand for all formal agreements which have historically required the application of a seal, since the form of the deed remains viable in some jurisdictions even as the application of a seal is no longer required. See e.g. *Law of Property (Miscellaneous Provisions) Act 1989* (UK), s 1(1)(b).

66. A "promise made under seal" is said to be enforceable without consideration. See e.g. Lon L Fuller, "Consideration and Form" (1941) 41:5 Colum L Rev 799 at 820; SM Waddams, *The Law of Contracts*, 6th ed (Aurora, ON: Canada Law Book, 2010) at para 168.

67. The transfer of real property is now subject to additional title registration requirements in most Commonwealth jurisdictions. See e.g. *Land Titles Act*, RSO 1990, c L.5; *Land Transfer Act 2017* (NZ), 2017/30. It has been suggested that the Torrens system, which is the prevailing approach to title registration in these jurisdictions, was based on a precursor of the modern German title registration system. See Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto: University of Toronto Press, 2008) at 27–30.

68. See e.g. *McGee v Lewis* (1966), 59 DLR (2d) 362, 57 WWR 705 (Alta CA), aff'd 65 DLR (2d) 672, 62 WWR (NS) 616 (SCC) (holding that the gift of a house was incomplete because the deed had never been delivered); *Royal Trust Co v Eldridge*, [1923] 2 DLR 689, [1923] 2 WWR 67 (SCC) [*Eldridge*] (holding that the father's purchase of property in the son's name, without the son's knowledge and without registering the interest, was effective as a gift upon the son's acceptance of the deed even after the father's death).

transfer of title in property.[69] The deed-maker—that is, the person making the deed—would thus need to deliver the thing contemplated in the deed, before the transfer of that thing to the deed-recipient—the person in receipt—would be effective. In the case of real property, the substitute for physical delivery was not the use of a deed instrument, as would be the case today, but rather a special ceremony by which the parties would publicly proclaim the transfer in front of members of their community—and particularly their superiors within the feudal hierarchy. It was only later, as an unintended effect of the *Statute of Uses*, that the deed came to be effective on its own as a means of transferring real property.[70]

Taking these issues on their face, it nonetheless remains proper to conclude that the deed's title-transferring effects are more broadly consistent with the German, rather than French, model of contractual transfer. This is so even if we accept the apparent implications of the modern rule—i.e., by accepting that the conclusion of a contract in the form of a deed is sufficient to effect a full transfer of rights *in rem*, without the need to complete any additional formality—and even if we accept the modern rule's origins as an unintended statutory exception. The reason, in short, is that the basic form of a validly concluded deed is entirely consistent with that of the common law gift completed by means of the symbolic—rather than actual—delivery of the gift property.[71] Where a deed is used as a means of transferring real property, it is the deed instrument itself which serves the role of symbolic representation, and the delivery of the deed instrument by the deed-maker to the deed-recipient which serves to actually complete the transfer.[72]

That the form of the deed is consistent with the basic structure of the common law gift is further supported by the limited kinds of conditions that can validly be attached at the moment of its conclusion. As in the case of a valid gift, an agreement formed by means of a deed must be intended to produce its effects immediately, upon delivery of the gift property or its symbolic representation, or else have no effect at all.[73] The exception to this rule is where

69. *Cochrane v Moore*, *supra* note 44 at 65–66.

70. *Statute of Uses* (UK), 1536, 27 Hen VIII, c 10. But see AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1987) at 371–72 (suggesting, *contra* modern usage, that the transfer of a full fee simple interest by deed after the *Statute of Uses* nonetheless required the support of something like the modern notion of consideration).

71. On this point, I am largely in agreement with Alan Brudner. See Brudner with Nadler, *supra* note 1 at 199.

72. See *McGee v Lewis*, *supra* note 68; *Eldridge*, *supra* note 68.

73. See *Exchange Bank of Yarmouth v Blethen* (1885), 10 App Cas 293 at 298, CR [9] AC 113 (PC); *Wilkinson v The Anglo-Californian Gold Mining Company* (1852), 118 ER 275 at 276–78 (QB).

the deed can be considered to have been delivered as an escrow—that is, as a deed delivered subject to conditions under which it will take effect and become binding upon the parties.[74] However, these conditions remain subject to the same underlying rationale as those narrow cases of conditional gift admitted by the common law, in that they are only validly admissible for the creation of an escrow if they are based on the occurrence of future events that are outside the deed-maker's control.[75] Where the latter conserves the power to revoke the escrow, that power may invalidate the escrow as a whole.[76]

In other words, the ultimate criterion applied by the common law to determine the validity of a deed appears to be one of control. As is the case with a donor making a gift, the deed-maker must immediately divest herself of control over the rights set in the deed instrument, even if that deed does not take effect until the occurrence of some specified future event.[77] Only under these circumstances will the deed validly take effect as a deed or an escrow. If the effects of the deed instrument instead remain contingent on the deed-maker's subsequent performance, then the underlying agreement will not be enforceable as a valid escrow, let alone a valid deed.[78]

Framed in these terms, it is apparent that the form of the deed corresponds to a necessarily executed agreement, in that its enforcement depends on the immediate performance of an intention to transfer the rights contained in the deed instruments through the delivery of that document. Where the deed is meant to transfer property, and particularly real property, this means that the deed must be framed in such terms that the delivery of the deed instrument stands in for the actual, immediate delivery—and thus transfer—of the real property itself.[79]

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74. See *Foundling Hospital v Crane*, [1911] 2 KB 367 at 374, [1911-13] All ER Rep Ext 1567 (CA (Eng)), Vaughan Williams LJ.

75. See the text accompanying note 57.

76. *Foundling Hospital v Crane*, *supra* note 74 at 375, 379, 381. See also *Graham v Graham* (1791), 30 ER 339 (Ch), Lord Chief Baron Eyre; *Hebert v Gallien*, [1931] 2 DLR 150, 3 MPR 67 (NBSC (AD)).

77. See *Doe on the Demise of Garnons v Knight* (1826), 108 ER 250 (KB) [*Knight*]. *Cf Walker v Foster*, *supra* note 51 at 301.

78. Such a condition would imply that the deed-maker has retained the power to revoke the deed made in escrow, contrary to the rule set out in *Crane* and *Knight*. See *Foundling Hospital v Crane*, *supra* note 74 at 374; *Knight*, *supra* note 77 at 692.

79. In those common law jurisdictions which have adopted a title registration system (but not a deed registration system), the requirement of delivery is replaced by a requirement of registration at the land register. See e.g. *Land Titles Act*, *supra* note 67, s 78(4).

Finally, the conclusion that the form of the deed complies with that of the common law gift—and with the German model of contractual transfer—is also supported by its use as a means of completing a transfer of real property contemplated in an already-existing agreement between the same parties. This effect of the deed, known as a "merger", allows the deed to replace at least part of the existing, executory agreement by actually effecting a transfer of real property.[80] Since the existing agreement is itself insufficient to achieve this purpose, the transferor has no real choice but to rely on a deed—as a separate agreement concluded for the purpose of immediately transferring real property—to actually perform his or her already-existing contractual obligation.

As already outlined above, German law requires that such a transfer of real rights be effected by means of an entirely separate agreement which is coupled with an immediate, simultaneous act of delivery or registration. That the deed may be used as a means of completing an existing agreement to transfer property strongly suggests a parallel with this second, property-transferring contract recognized under the German model. By contrast, the added requirement of a deed to actually complete a transfer of real property appears substantially incompatible with the French approach, in which the use of a second agreement is both completely unnecessary—since the first agreement should be sufficient to transfer the property—and potentially inadmissible as a contract which lacks a sufficient cause or object.[81]

A similar argument can be made with respect to the last piece of the common law puzzle under study—namely, the transfer of title to goods by means of sale. The picture in that case, however, is even more complicated. In the end, it is not so much the structure of the sale as the relative transfer of title which it effects that appears to pose the greatest problem for an explanation based on the consent-only principle. I turn to this last issue below.

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80. See *Knight Sugar Co v Alberta Railway & Irrigation Co* (1937), [1938] 1 DLR 321 at 324, [1938] 1 All ER 266 (PC). There is some controversy as to whether the use of a deed actually replaces the pre-existing agreement entirely, or only serves to perform *some* of the existing obligations. See Waddams, *supra* note 66 at para 326. The answer to this question is not strictly important for present purposes, as it is clear that the deed serves at a minimum to perform the already-assumed obligation to transfer property.

81. This is because the fundamental operation contemplated by the parties—i.e., to transfer real rights—has or will be automatically completed by the effect of the parties' consent alone; an analogy can be made here with the common law rule against past consideration. See e.g. *Stilk v Myrick* (1809), 170 ER 1168. That said, the French legal tradition also recognizes the notion of "*dation en paiement*" (giving in payment), allowing a party to an existing transaction to satisfy his or her obligations by transferring a particular thing instead. See arts 1799–1801 CCQ. See also art 1342-4 C civ.

C. Transfer by Sale of Goods

As with the deed, the sale of goods at common law presents at least one specific feature which suggests a greater affinity with the French—rather than German—model of contractual transfer on its face: i.e., a contract by which a seller has agreed to sell goods unconditionally appears sufficient on its own to transfer ownership of the goods in question, without the parties having to comply with any additional formalities.[82] This rule would seem to be an exception to the general approach taken at common law, which, in accordance with my broader argument set out above, typically requires a separate act of delivery before a transfer of property rights can be deemed complete.[83]

Further parallels with the French model can be found in the distinction drawn in sale of goods legislation between an unconditional "sale" and an "agreement to sell", the latter of which merely obligates the seller to do so at a later date.[84] While the parties to a transaction are largely free to determine whether a contract will take one or another of these forms, there are a set number of circumstances in which they may only conclude an agreement to sell. As in French law, such is most notably the case where the seller has not yet acquired ownership of the goods in question, or where the specific goods to be sold have not yet been ascertained.[85] In all other cases, the common law will presume the existence of a sale—and thus the intention to immediately transfer—unless a contrary intention has been expressed, in a manner that is also highly reminiscent of the approach taken under the *Code civil*.[86]

This apparent problem for my broader argument—i.e., that the common law follows the German model of contractual transfer, rather than the French model in which consent alone is sufficient to transfer ownership of property—is not without importance. Indeed, it is probably not an exaggeration to suggest that the sale of goods serves as the cornerstone of contemporary transfer

82. For statutes generally understood to have codified most of the existing rules of the common law sale of goods, see e.g. *Sale of Goods Act*, RSO 1990, c S.1, s 18 [*Sale of Goods Act* RSO]; *Sale of Goods Act 1979* (UK), s 17 [*Sale of Goods Act* UK 1979]; *Sale of Goods Act 1893* (UK), 56 & 57 Vict, c 71, s 17.

83. See *Sale of Goods Act* RSO, *supra* note 82, s 2(3); *Sale of Goods Act* UK 1979, *supra* note 82, s 2(5).

84. See Mazeaud, *supra* note 14 at para 1618. See also Part I.*A*, *above*.

85. See *Sale of Goods Act* RSO, *supra* note 82, s 19; *Sale of Goods Act* UK 1979, *supra* note 82, s 18.

86. The apparently exceptional nature of sale in this regard is noted, for example, by Weinrib. See Weinrib, *supra* note 2 at 64.

theorists' accounts of contract.[87] If I am right that these theories generally present a problem of fit with the modern common law approach to the transfer of property, then the sale of goods would thus appear to significantly relativize the impact of this conclusion.

That said, it is not quite so clear that the possibility of effecting an immediate transfer of title to goods by means of a sale necessarily supports a conclusion that the common law is more consistent with the French model on this point. Even German law, which normally maintains a strict separation between contractual obligations and property rights, admits the possibility of transferring ownership of movable property without the need to actually deliver the thing in question, provided that the parties have provided as much by way of a contractual stipulation.[88] A seller who wishes to divest himself or herself immediately of ownership over the goods may thus provide, in a contract, that the purchaser will be granted immediate, indirect possession of these goods, even as their physical possession remains with the seller until the goods are actually delivered.[89]

At the same time, an argument for greater compatibility between the common law gift and the German model of contractual transfer can also be made out through reference to yet another rule now codified in sale of goods legislation. Namely, this is the rule according to which a seller who has retained physical possession of goods remains capable of conveying them to a third party in good faith.[90] That this possibility remains open to the seller (or rather, that a subsequent acquirer in good faith can still claim the benefit of a sale of goods already sold to another) suggests that the common law sale is in fact incapable of effecting a full, immediate transfer of *in rem* rights in favour of a purchaser

87. See especially Benson, "Contract as Transfer", *supra* note 1 at 1677, 1720, 1729–30. Compare Brudner, who, by insisting on the realization of value through the medium of an exchange puts the form of the sale—i.e., an exchange of specific property for money—at the centre of his account of contract. See Brudner with Nadler, *supra* note 1 at 191. See also Barnett, *supra* note 1 at 313–14.

88. In German law, this possibility arises most notably through the granting of "indirect possession" to the transferee. See art 930 BGB. This notion is further defined as the possession that the owner retains even while another has a temporary entitlement to the property by way of a usufruct, pledge, etc. The seller can thus transfer title to the purchaser while retaining physical possession of the thing on the basis of an arrangement akin to the common law bailment. See art 868 BGB.

89. This rule remains compatible with the German model, since the BGB constrains the cases and manner in which such a transfer can be effected without compliance with additional formalities.

90. See *Sale of Goods Act* RSO, *supra* note 82, s 25(1); *Sale of Goods Act* UK 1979, *supra* note 82, s 24.

until the seller has relinquished physical possession of the goods through an act of delivery. Instead, it appears capable of granting only an *in personam* right to *performance* of the contract. Otherwise, the seller would divest himself or herself of title to the goods immediately upon concluding the sale and would thus be unable to convey ownership even to a subsequent purchaser in good faith.[91]

This approach to third party rights is of course consistent with the provisions of the *Code civil*, according to which a third party acquirer in good faith may nonetheless acquire title provided he or she obtains delivery or registers his or her interest first.[92] It is also consistent with the relative transfer devised by Peter Benson as a solution to the problem posed by undetermined and unowned goods to his own theory of contract as a transfer of property.[93] However, the actual basis for such a relative acquisition of ownership—which remains confined to the parties to a transaction until delivery is made, even as it purports to be more than a simple transfer of rights *in personam*—is not quite clear.

French authors in particular have struggled to provide an adequate explanation for their version of the rule, which appears on its face to contradict the consent-only principle of contractual transfer that is otherwise embraced in their legal tradition.[94] This is because, if the transfer were truly complete upon the sole exchange of consents between its parties, then the act of physical delivery should not matter at all. The possibility of a successive acquisition in double-sale cases is thus typically explained as an exception to the general rule in French law—according to which a contract effects a full transfer of *in rem* rights immediately upon its conclusion—based upon the maxim that the possession of movable property is equivalent to its ownership.[95] Benson offers a similar explanation for the effects of delivery vis-à-vis third parties in general.[96] In neither case, however, are we given a full explanation as to why

91. See *Sale of Goods Act* RSO, *supra* note 82, s 22; *Sale of Goods Act* UK 1979, *supra* note 82, s 21. This rule is often expressed through Latin maxims such as *nemo dat quod non habet* and it is a fundamental feature of both common law and civilian legal systems.

92. See art 1198 C civ.

93. See Benson, "Contract as Transfer", *supra* note 1 at 1723, 1729–30.

94. For example, Mazeaud anchors the effects of this apparent exception to a form of acquisitive prescription (i.e., a means of acquiring property rights which is similar in its operation to adverse possession), but elsewhere affirms that the rule is properly understood as *sui generis* since acquisitive prescription cannot operate instantly. See Mazeaud, *supra* note 14 at paras 1540, 1623.

95. See Planiol, tome 1, *supra* note 14 at para 2598. See also art 2279 CcF (enshrining the maxim verbatim).

96. See Benson, "Contract as Transfer", *supra* note 1 at 1697, 1707. "Vis-à-vis [third parties] first possession is the basis of entitlement" and "[w]hen performance takes place and

delivery should have any bearing on the enforcement of property rights against third parties if consent alone is sufficient to complete their transfer: we are simply left to infer that the transfer of property rights remains subject to the general rules of property acquisition, much as would be the case under the German model.[97]

Given the essentially Germanic framework embraced elsewhere by the common law, the absence of a satisfying theoretical basis for the third party rule suggests that any transfer effected upon the conclusion of a sale of goods should be understood only as an *in personam* right to demand the *performance* of the contract, in the fully limited sense that has historically been given to that expression.[98] To the extent that a sale not completed by delivery remains enforceable against third parties in a limited sense—i.e., where the subsequent acquirer is not in good faith—this result may instead be explained by reference to other, traditionally equitable considerations which seek to remedy a failure to complete the formalities requisite to actually transfer full ownership of the goods in question.

Indeed, the ostensibly relative transfer of ownership effected by means of sale at common law sale—as well as under the *Code civil* in practice—is strikingly reminiscent of the approach taken towards the enforcement of equitable interests against third parties. Pursuant to the doctrine of equitable conversion in particular, the interest acquired by a purchaser of certain types of property (traditionally, real property) pursuant to a contract is potentially enforceable against all third parties, save for a purchaser for value in good faith without notice, from the moment the contract is concluded.[99] Both the third party rule under sale of goods legislation and this rule would thus appear to operate according to a substantively identical rationale, and thus require a similar explanation if my broader argument in favour of an affinity between the common law and the German model of contractual transfer is to be successful.

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the promisee gains physical possession of the object of ownership, the promisee does have a protected interest against third parties in virtue of this physical possession in accordance with the principle of first acquisition" (see *ibid* at 1697, 1707).

97. *Contra* Planiol, tome 1, *supra* note 14 at para 2598. Despite Planiol's insistence to the contrary, we can thus further doubt whether French law properly recognizes the consent-only principle at all.

98. See e.g. *Dunlop Pneumatic Tyre Company, Limited v Selfridge & Company, Limited*, [1915] AC 847 at 853, [1914-15] All ER Rep 333 (HL (Eng)), Viscount Haldane LC.

99. See *Pilcher v Rawlins* (1871, 1872), 7 Ch App 259, (1872) 20 WR 281. See also *Midland Bank Trust Co Ltd v Green*, [1981] AC 513 at 526–32, [1981] All ER 153 (HL (Eng)), Lord Wilberforce (adding that the requirements of good faith and lack of notice are cumulative). But see art 1198 C civ. Pursuant to article 550, article 1198's "good faith" requirement is typically understood to mean only a lack of notice. See art 550 C civ.

III. Transfer by Contract in Equity

In the first part of this paper, I argued that contemporary transfer theorists typically espouse views which are highly reminiscent of the French model of contractual transfer, in which the consent of the parties alone is sufficient to fully convey property rights. In the second part of this paper, I then suggested that the common law approach to transfer is generally inconsistent with this conception of contract and is more properly in keeping with the alternative model exemplified by German law. The sole exception in this regard may be the sale of goods—though even it presents features which suggest a deeper incompatibility with the spirit of the consent-only principle embraced by contemporary contract theorists.

In the third and final part of this paper, I will now complete my argument by examining the relationship between both models outlined above and two particular doctrines traditionally associated with the jurisdiction of equity—namely, equitable conversion and proprietary estoppel.[100] As I will argue, both appear broadly consistent with the French model of contractual transfer at first glance, in that they seemingly grant *in rem*-like effects to a contract or promise from the moment it is made. That said, the actual operation of these doctrines also leaves much doubt as to their ultimate compatibility with the consent-only principle. Instead, the basis for relief in these cases can be anchored in the fundamentally public nature of the formalities required to complete a transfer of real rights under the German model, with which a court of justice may legitimately dispense for certain, limited purposes.

A. Equitable Conversion

The first doctrine under consideration in this last part of my argument is specific performance—or rather, the particular device which courts of equity have historically used to justify and protect the right to specific performance, namely the constructive trust imposed pursuant to the doctrine of equitable conversion. My objective is accordingly to focus on those cases in which courts have recognized a constructive trust in respect of a *contract*, in accordance with

100. In examining these doctrines, it is not my intention to draw conclusions on the nature of equitable interests generally, and the beneficiary's interest under an express trust in particular; it is also not my intention to comment on whether courts should be empowered to create trust interests in a purely remedial fashion, particularly in light of the divergent views taken on the subject in different common law jurisdictions. See Graham Virgo, "The Genetically Modified Constructive Trust" (2016) 2:2 Can J Comparative & Contemporary L 579.

the equitable maxim that "equity treats as done that which ought to be done".[101] These are the cases in which a seller of real property rights under an executory contract is recognized as a constructive trustee of the property for the benefit of the purchaser, such that the latter is entitled to demand specific performance and claim the property against the original seller—as well as against any subsequent acquirer other than a purchaser for value in good faith without notice.[102]

The question which arises at this stage, and which must be confronted to defend my broader thesis on the incompatibility between the account of contemporary transfer theorists and the common law tradition, is whether these cases in any way affect the conclusions I have drawn in the second part of this paper. Indeed, it would appear that the recognition of a constructive trust in favour of a purchaser under an executory contract is compatible with, and may well require reference to, the underlying rationale of the French model, according to which the consent of the parties alone is sufficient to constitute the purchaser as the owner of a thing being transferred from the moment a contract is concluded.

This argument, however, misses the broader point inherent in the application of the constructive trust device in relation to an order for specific performance. The purpose of the equitable rule remains primarily focused on the preservation of the purchaser's contractual interest to obtain *performance*, by forcing the seller to complete the transfer in question. This is, of course, the essence of the order of specific performance itself, which remains subsidiary to an award of damages as a remedy for contractual breach at common law.[103] The only additional wrinkle presented by the imposition of a trust to achieve

101. *Cf Attorney General for Hong Kong v Reid* (1993), [1994] 1 All ER 1 at 5, [1994] 1 AC 324 (PC) (where this maxim was invoked against a fiduciary who had improperly disposed of property).

102. Two sets of cases can potentially be lumped into this category; they are, specifically, those cases which apply the principle set out in *Lysaght v Edwards* and those which follow the principle set out in *Walsh v Lonsdale*. See *Lysaght v Edwards* (1876), 2 Ch D 499, 24 WR 778 (ChD) (a contract for the sale of land gives rise to an equitable interest in favour of the promisee); *Walsh v Lonsdale* (1882), 21 Ch D 9, [1881-5] All ER Rep Ext 1690 (CA) (part performance of a contract relating to an interest in real property results in the creation of an equitable interest in favour of the promisee). For a much more recent example case, see *Simcoe Vacant Land Condominium Corporation No 272 v Blue Shores Developments Ltd*, 2015 ONCA 378.

103. See *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* (1997), [1998] AC 1, [1997] All ER 297 (HL (Eng)); *Semelhago v Paramadevan*, [1996] 2 SCR 415 at 428–30, 136 DLR (4th) 1. As with other forms of equitable intervention, the subsidiary nature of specific performance orders can be tied to the limited jurisdiction historically enjoyed by the courts of equity. See FW Maitland, *Equity: Also the Forms of Action at Common Law—Two Courses of Lectures* (London, UK: Cambridge University Press, 1910) at 238.

this end is in the enforceability of the interest against all third parties, save for a purchaser for value in good faith without notice. This effect would seem to transform what would otherwise be a remedy focused on the enforcement of an obligation into something approaching the Roman law *vindicatio*.[104]

What the intervention of equity appears to achieve in relation to an order of specific performance, then, is a partial waiver of the formalities normally required to complete a transfer of property. Courts rendering an order for specific performance are granted discretion—based most notably on the fundamental good faith of the parties involved—to treat the purchaser *as though* she were already the owner of the property in question, but only for the limited purpose of protecting her right to actually obtain title to it. This conclusion is supported by the fact that the person in possession of the property subject to a specific performance order, whether the original seller or a third party, must still actually complete the transfer in question before the purchaser's interest can be transformed into a full *in rem* right at common law. Only then does that purchaser gain something more than just a right to *claim* the thing and become the full and proper *owner* of the thing.[105]

A similar logic can be applied to the purchaser's assumption of the risk of loss pertaining to the real property being transferred. As is the case under sale of goods legislation, this risk is assumed immediately upon conclusion of the contract, regardless of whether the seller has retained physical possession of the thing in question.[106] At least one author has argued that such a transfer of

104. See e.g. art 953 CCQ. "The owner of property has a right to revendicate it against the possessor or the person detaining it without right, and may object to any encroachment or to any use not authorized by him or by law" (*ibid*). Stated differently, this right corresponds to an action to claim property, as its owner, against any third party, and can as such be understood as the foundation of the modern distinction between *in personam* and *in rem* rights. See G 4.2, G 4.3. The action has no proper equivalent at common law, however, since an owner is normally limited to claiming against a person who has infringed his or her rights (i.e., through a claim in tort for trespass) and can only incidentally demand that a person return possession of the thing. See e.g. *Minaker v Minaker*, [1949] SCR 397 at 400–07, [1949] 1 DLR 801, Rand J, dissenting in part, Kellock J, dissenting in part.

105. My argument in this respect echoes that set out by Maitland. See *supra* note 103 at 251–52. This conclusion is further supported by the way in which equitable remedies are typically enforced—i.e., *in personam*, directly against the person of the judgment debtor by means of a contempt order—which is much more consistent with the forced performance of a transaction than the recognition or creation of a right of ownership.

106. The rule in English law can be traced back at least as far as the late seventeenth century. See *Cass v Rudele* (1692), 23 ER 781 (HC Ch). Its civilian equivalent can be traced back even further. See Dig 18.6.8 (Paul). Consistent with the views critiqued in the previous section,

risk implies an immediate transfer of full ownership—and thus an affirmation of the consent-only approach embodied by the French model.[107] However, an alternative, contractual explanation is probably more satisfying here. This is because the transfer of risk effected immediately by such an operation, like the transfer of ownership, remains limited between the parties to the transaction. From the perspective of a third party, the seller is still the legal owner of the thing in question—meaning that he or she is able to claim against third parties for its loss and can be sued by third parties for the risks arising out of its use or occupation. Only the risk of loss as it pertains to the specific transaction—i.e., the risk vis-à-vis the vendor in the context of the contractual relationship—is actually assumed by the purchaser until legal title passes.[108]

Both the manner in which equitable conversion appears to effect a transfer of ownership, and the manner in which it appears to effect a transfer of risk, thus appear to favour a primarily contractual explanation for its operation. This conclusion suggests an incompatibility with the fundamental premise of the French model of contractual transfer, according to which the consent of the parties alone should at least theoretically be sufficient to transfer a full *in rem* right. The question which remains to be answered, then, is why courts should legitimately feel empowered to enforce contractual interests by recourse to a partially proprietary mechanism, and whether this power can instead be reconciled with the German model.

The answer, I want to suggest, can be found in the fundamentally public nature of the formalities required to complete a transfer of property rights under the German model. These are primarily designed to protect the legitimate interests of third parties, particularly when those third parties have no real way of knowing the content of a private contractual transaction. To borrow the terminology used by some contemporary transfer theorists, the transfer of real rights under this model is not a function of abstract right or corrective justice, but rather of the civil condition and distributive justice—even as corrective

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the chief difference between the sale of real property and the sale of goods is that the latter is typically understood to transfer ownership immediately upon the conclusion of the contract as well. See *Sale of Goods Act* RSO, *supra* note 82, s 21; *Sale of Goods Act* UK 1979, *supra* note 82, s 20.

107. See Lawson, *supra* note 33 at 360.

108. See *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd*, [1986] AC 785, [1986] 2 WLR 902 (HL (Eng)). To answer Lawson's argument, the passing of risk is not necessarily an indication of a transfer of ownership between the parties to a transaction, but instead remains limited to, and appears to be a function of, the contractual relationship between seller and purchaser.

justice may potentially serve as an explanation for the enforcement of a contractual obligation to transfer real rights at a later date.[109]

This being the case, it is conceivable that a court, as a public forum dispensing justice in accordance with the civil condition, should be able to intervene to modify or waive the formalities designed to protect third party interests in certain cases.[110] Indeed, the exercise of discretion in this way is all the more justified when the specific third parties involved in a dispute were acting in bad faith, or were at least aware of an existing prior transaction.[111] In those cases, such a judicial modification or waiver of the formalities required to transfer property can be viewed as a corollary of the court's general power to refuse to enforce a contract which would otherwise produce illegal or unconscionable results—i.e., because the recognition of a prior purchaser's contractual right to claim property potentially means invalidating a completed contract which conferred an *in rem* right upon a subsequent acquirer.[112]

While the specific operation undertaken by courts pursuant to the doctrine of equitable conversion is not contemplated per se by the German model of contractual transfer, the operation of this doctrine is therefore in accord with the basic premise of that model—according to which a transfer of property rights remains subject to the completion of formalities required by the civil condition. Rather than contradict their role in completing such a transfer, equitable conversion only reinforces the centrality of such formalities to the relationship—and demarcation—between contract and property. A similar conclusion can be drawn with respect to the next equitable doctrine under consideration, namely the doctrine of proprietary estoppel.

B. Proprietary Estoppel

The second equitable doctrine which appears to challenge my broader thesis—according to which the common law is broadly consistent with the

109. See especially Peter Benson, "The Basis of Corrective Justice and Its Relation to Distributive Justice" (1992) 77:2 Iowa L Rev 515. See also Brudner with Nadler, *supra* note 1 at 170–74.

110. See Hegel, *supra* note 7 at para 219. See also Kant, *supra* note 36 at § 36.

111. See arts 892, 932 BGB (codifies rules which can be used to this effect). While some Canadian jurisdictions have attempted to abolish the third party notice rule, these efforts appear to have been largely thwarted by judicial construction. See generally Douglas C Harris & May Au, "Title Registration and the Abolition of Notice in British Columbia" (2014) 47:2 UBC L Rev 535.

112. In this sense, the effects of equitable conversion can be viewed as a common law analogue of the Paulian action. See Dig 42.8 (Ulpian); Inst 4.6.6. See also art 1167 CcF.

German model of transfer—is proprietary estoppel.[113] Briefly stated, the problem posed by proprietary estoppel emerges from a traditional equitable maxim, according to which equity is not supposed to complete an incomplete gift.[114] The ostensibly contractual, promissory variant of estoppel serves as an exception to this rule by transforming an otherwise gratuitous promise into an enforceable obligation.[115] Proprietary estoppel, by contrast, appears to resolve a gratuitous promise to transfer property completely, by recognizing the promisee as the holder of an equitable interest in the thing at issue.[116]

As with the equitable conversion cases, the question which arises with proprietary estoppel is thus whether—and to what extent—its application might undermine my argument that the common law tradition follows an essentially German, rather than French, approach to contractual transfers. The answer here, however, is much the same as that given above: while proprietary estoppel may appear at first glance to effect something like a transfer of ownership in favour of a promisee at the point where a promise is made, these appearances are fundamentally misleading.

Indeed, the cases in which this doctrine arises are instead treated in a manner which heavily recalls the order of specific performance. In finding the existence of a proprietary estoppel interest, a court is simply compelling the promisor-transferor to complete the transfer and constitute the promisee as legal owner of the thing in question, in accordance with the terms of the original promise.[117]

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113. See *Morgan* SCC, *supra* note 47 at para 15. The Supreme Court of Canada explained that:

> [a]n equity arises when (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all the circumstances; and (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word.

Ibid. See also *Thorner v Major*, [2009] UKHL 18.

114. See e.g. *Fraser v Imperial Bank of Canada* (1912), 47 SCR 313 at 344, 10 DLR 232. "[C]ourts of equity will not aid a mere volunteer in any case to enforce a gift failing in anything essential to its completion" (*ibid*).

115. This argument assumes that promissory estoppel can in fact be used to ground a cause of action in addition to serving as a defence. See *Rosas v Toca*, 2018 BCCA 191 at paras 45–47. *Cf Morgan* SCC, *supra* note 47 at para 17.

116. See *Morgan* SCC, *supra* note 47 at para 15.

117. See e.g. *ibid* at para 58.

The only substantial difference with the specific performance cases is to be found in the fact that the promise which forms the basis of the court order would not have otherwise constituted an enforceable contract at common law.[118]

In theory, the enforcement of the "equity" which arises in a case of proprietary estoppel against third parties is limited by precisely the same rule which applies in a case of equitable conversion—i.e., a subsequent acquirer will not be bound by the interest where she is a purchaser for value in good faith without notice.[119] The same rationale which underlies this rule in the case of equitable conversion can reasonably be extended here: rather than viewing the promisee-transferee as the owner of the thing in question, it is thus conceivable that a court may feel compelled to treat the promisee *as though* she were its owner from the date the promise was made or the reliance suffered, as a means of providing redress against both the promisor and any subsequent acquirers.[120]

That said, there is a broader problem here which casts doubt on whether the apparent problem posed by equitable conversion—i.e., the enforcement of the purchaser's right against third parties, even before the contract to transfer is performed—can truly arise in proprietary estoppel cases at all. These are after all cases in which a defendant has made an otherwise unenforceable promise to transfer property, and the court has found it just to issue an order analogous to the specific performance of that promise in response to the reliance loss suffered by the plaintiff. The ostensibly remedial nature of the interest being recognized in such cases—and the tort-like nature of the breach—make it difficult to see how a proprietary estoppel interest may be successfully set up against a third party acquirer, save perhaps for a third party who has acquired the property gratuitously, since such a third party may be unable to gain knowledge of the promisee's interest until judgment is rendered in her favour.[121]

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118. But compare the part performance rule which arises out of *Walsh v Lonsdale*, a variant of which is often invoked to defeat the application of section 4 of the *Statute of Frauds* and obtain the specific performance of an otherwise unenforceable contract. See *Walsh v Lonsdale*, *supra* note 102; *Statute of Frauds* (UK), 1677, 29 Car II, c 3, s 4. See e.g. *Erie Sand and Gravel Ltd v Seres' Farms Ltd*, 2009 ONCA 709 (defeating the application of section 4 of Ontario's *Statute of Frauds*). The historical influence of canon law on equity jurisprudence is likely on display in both of these cases, as the courts appear to intervene for the purpose of upholding the canon law (and civil law) maxim *pacta sunt servanda*.

119. See *Pilcher v Rawlins*, *supra* note 99.

120. At the very least, the equity which arises in a case of proprietary estoppel appears to be enforceable against third parties with similar equitable rights. See e.g. *Morgan* SCC, *supra* note 47 at para 69, Brown J, dissenting in part.

121. But see *Thorner v Major*, *supra* note 113 at para 20, Lord Scott (suggesting that an institutional constructive trust is a more appropriate remedy in cases where the representation

Setting this last issue aside, it is at least clear that the interest recognized pursuant to a finding of proprietary estoppel is not—and should not be viewed as—the result of a transfer of property which was effected immediately at the point the original promise was made. By intervening in proprietary estoppel cases, courts are not affirming the existence of an immediate transfer of real rights in favour of the promisee, but are instead simply exercising a relatively broad discretion to protect the enforcement of a contractual—or tort—remedy, on the apparent basis of the equities of the case. Moreover, as with an order of specific performance, the interest ultimately conferred upon the promisee in such a case is an equitable interest only: contrary to the French model and the consent-only principle it exemplifies, the promisor must still comply with the formalities required to effect an actual transfer before the promisee can be properly constituted as the legal owner of the thing in question.

This approach is again consistent with the spirit—though perhaps not the letter—of the German model of contractual transfer, according to which the formalities required to complete an effective transfer of property remain fundamentally tied to the civil condition. Rather than protecting the promisee's right to performance per se, however, the waiver of formalities in proprietary estoppel cases is limited to—and appears to be specifically crafted for—the narrower purpose of redressing the harm actually suffered by the promisee. It is the promisee's reliance interest, and not the expectation of performance, which appears to be the proper object of proprietary estoppel.[122]

Conclusion

As I have argued above, the particular view of contractual transfer embraced by most contemporary transfer theorists presents a strong problem of fit from the perspective of the common law. While these authors largely embrace an approach to the transfer of property rights by contract which echoes that found in the *Code civil*—according to which consent alone is sufficient to effect a full transfer of *in rem* rights—the common law instead requires compliance with certain formalities before such a transfer can occur, as is the case under the alternative German view.

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relates to a transfer set to occur in the future, ostensibly because third party interests may become entangled with those of the promisor and promisee in the interim). See also *Cowper-Smith v Morgan*, 2016 BCCA 200 at para 83.

122. Whether this means that proprietary estoppel operates according to properly contractual principles is largely irrelevant here; what matters is again that the finding does not fully dispense with the requirements normally applicable to the transfer of property, but merely allows a court to treat the transfer which would have been the eventual consequence of a transaction *as though* it has already occurred.

Even the sole apparent exception in this regard—the contract for the sale of goods—presents features which cast doubt on its ultimate compatibility with a consent-only approach to the transfer of real rights. As with the various equitable doctrines which seemingly confer immediate ownership rights upon a promisee, without the need to complete delivery, the rights conferred upon the purchaser, both in terms of ownership and risk, remain constrained to the parties to the transaction. Compliance with formalities remains essential to constitute the purchaser as the owner of the goods in question from the perspective of third parties—i.e., in the only true sense in which the notion of *in rem* rights may well matter, at least to someone trained in the common law.[123] At the same time, courts remain vested with a relatively broad discretion when crafting remedies to ensure the protection of the contractual right to demand performance, and, in some cases, to compensate the detrimental reliance suffered by a promisee.[124]

This conclusion has broad implications for the accounts of many contemporary proponents of contract as transfer, as it casts doubt on their fundamental equation between a promise to transfer property *in the future* and the right of *ownership*. That said, it does not necessarily discount the relevance of transfer theory completely, at least from the perspective of the common law. Rather, and as already alluded to above, the conclusion that consent alone is not sufficient to complete a transfer of property at common law or in equity suggests that any attempt at explaining their operation through a transfer-based lens must take care to properly distinguish *in rem* rights pertaining to *things*—which are only transferred in accordance with the civil condition, when the requisite formalities have been met—from the *in personam* right to the *performance* of a contract, which does not directly affect third parties, and which may legitimately be conferred upon a promisee by the sole consent of the parties involved.

123. See Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26:8 Yale LJ 710 at 718. See also Lawson, *supra* note 33 at 360–61. In Roman law, "a relation arising out of a contract and limited in its effects to the parties to it was completely expressed in terms of obligation, and the language of ownership was confined to cases where a third party might be affected; the Roman law of property was exclusively concerned with *iura in rem*" (*ibid*). By contrast, the expression "real right" is often used in French doctrine to designate any kind of right acquired over an external object (rather than against a person) regardless of whether that right is enforceable against one person or an indeterminate class.

124. This is true even in respect of the sale of goods. See *Sale of Goods Act* RSO, *supra* note 82, s 50; *Sale of Goods Act* UK 1979, *supra* note 82, s 52.