Legal Studies (2023), **43**, 259–277
doi:10.1017/lst.2022.36

S·L·S
The Society of Legal Scholars

RESEARCH ARTICLE

Revisiting property transfer theory: English law and Chinese law compared

Zhicheng Wu[1] and Lei Chen[2]*

[1]Renmin University of China, China and [2]Durham University, Durham, UK
*Corresponding author. e-mail: lei.chen@durham.ac.uk

(Accepted 23 September 2022)

Abstract

The relationship between a conveyance's validity and its underlying contract has been a classic but unsettled topic for comparative private lawyers over the past three decades. This paper attempts to add positivist and normative observations drawn from property transfer theories and practices in English and Chinese law. A jurisdiction adopting an 'intent plus' model does not necessarily recognise a separate intent to convey distinct from the intent in the underlying contract, as exemplified by Chinese law, while a jurisdiction adopting the 'intent alone' model does not necessarily deny the separate intent to convey, as exemplified by English law. One advantage for a jurisdiction that takes the separatist approach is its flexibility, so that it can still choose between pure causality, pure abstraction, or context-based abstraction at a later stage. Recent developments show that English and Chinese law are moving towards this approach. As to whether flaws in the underlying contract infect the validity of the conveyance, the English position depends on vitiating factors, whereas the mainstream Chinese judgments tend to be pro-causal. Justifications favouring causality provided in the English and Chinese academia are different, though neither can stand up to scrutiny. The detecting opportunity argument submitted in this paper helps to justify abstraction.

Keywords: property transfer; underlying contract; separation; abstraction; proprietary restitution

Introduction

This paper purports to revisit the theoretical foundation of the consensual transfer of title (or ownership in civil law terms) by drawing on comparative studies of English and Chinese law. A transaction between A and B, which may involve a sale, loan, service, gift, or any other basis, is unsound due to a defect, for example, a mistake. The distinction between contract and conveyance becomes important as soon as the rights of a third party become involved. At the outset, we do not intend to develop an omnipotent theory in finding a value preference that underlies the whole field of transfer of rights. In our view, there are sufficient differences between different claims regarding transfer of rights to make it implausible that there is a single underlying theory of transfer of rights that accounts for all the scenarios in real life – for example, claims for the return of a car which has been bought in good faith by a non-trade buyer (ie non-consensual property transfer), claims for a company share where a share has been promised to the seller in a pre-incorporation arrangement, and claims for restitution of a mistaken payment using money in a bank account (ie strictly speaking the transfer of personal rights not property rights).[1] In addition, given the breadth of this area of the law, this

[1]*Foley v Hill* (1848) 2 HL Cas 28 at 36; 9 ER 1002 at 1005 (Lord Cottenham); W Swadling 'Property: general principles' in A Burrows (ed) *English Private Law* (Oxford: Oxford University Press, 3rd edn, 2013) para 4.20; J Penner 'We all make mistakes: a "duty of virtue" theory of restitutionary liability for mistaken payments' (2018) 81 MLR 222.

paper does not extend the analysis to the issue whether the transferee is liable to hold the subject-matter on a constructive trust for the transferor,[2] in order to avoid the debate over the nature of the so-called 'equitable property'[3] and to facilitate meaningful comparison with Chinese law.

Any legal system that distinguishes between property and obligation will conceptually distinguish between a promise to alienate property and the alienation itself. Nevertheless, when it comes to a defective property transfer, divergence occurs between systems first inquiring whether the 'contract is void' and those first inquiring whether the 'proprietary transfer is void at law'.[4] Furthermore, from the perspective of a third party, the question of cardinal importance is whether the remedy for the transferor is proprietary or personal so that the transferor can be awarded at the expense of the insolvent transferee's third-party creditors and purchasers. Neither English nor Chinese law draws such a distinction with great clarity. The recently enacted Chinese Civil Code, effective on 1 January 2021, does not provide an explicit theoretical basis for property transfer, leaving persistent scholarly debates unsettled.[5] In English law, *Shogun Finance Ltd v Hudson*[6] attracted controversy as the distinction between the written contracts and face-to-face transactions has been labelled 'artificial and unfair'.[7] Moreover, academics hold different views on whether current English law can be interpreted as unitary and causal,[8] as separatist and causal,[9] or as separatist and abstract,[10] along with arguments that English law is context-based in this regard.[11] There are also disagreements as to whether English law should normatively be causal or abstract.[12] Hence, there is a pressing need to consider a fresh perspective on the theoretical foundation of property transfer. Examining property transfer rules using a comparative perspective from causal and abstract theories, theorising property transfer provides a rich legal map of the dimensions of the civil/common legal system divide. It raises important theoretical issues about how legislators and courts adapt to these changes.

The rationale for using the comparative methodology in this paper is threefold. First, while there are considerable differences in property law regarding normative values and doctrinal rules between English law and Chinese law, the divergence is not as vast as one may conceive from a first impression. Specifically, the hallmark of Chinese private law, including property law – namely the Chinese Civil Code – is largely influenced by Roman law.[13] Within the modern civilian models, Chinese property law is predominantly German-inspired, as one would realise from a cursory glance at the Property Law 2007.[14] Although comparative property law has not gained the same level of popularity as the

[2]Eg *Lonrho Plc v Fayed* [1992] 1 WLR 1; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669.

[3]B McFarlane and R Stevens 'The nature of equitable property' (2010) 4 J Eq 1.

[4]S Zogg *Proprietary Consequences in Defective Transfers of Ownership* (Cambridge: Intersentia, 2020) p 133.

[5]For very recent papers in Chinese, see L Wang 'The principle of separation under personal right formalism: a focus on article 215 of the Chinese Civil Code' (2022) 3 Tsinghua University LJ 5; Y Wang 'The principle of separation: what are separated?' (2022) 4 Oriental L 181.

[6][2003] UKHL 62, [2004] 1 AC 919.

[7]C Elliot 'No justice for innocent purchasers of dishonestly obtained goods: Shogun Finance v Hudson' (2004) JBL 381 at 385.

[8]Eg M Bridge et al *The Law of Personal Property* (London: Sweet & Maxwell, 2nd edn, 2017) paras 18-030, 30-037.

[9]Eg J Cartwright *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Oxford: Hart Publishing, 3rd edn, 2016) pp 55, 161.

[10]Eg W Swadling 'Rescission, property and the common law' (2005) 121 LQR 123.

[11]Eg D Fox 'The transfer of legal title to money' (1996) RLR 60; L van Vliet *Transfer of Movables in German, French, English and Dutch Law* (Nijmegen: Ars Aequi Libri, 2000) ch 4; B Häcker 'Rescission of contract and revesting of title: a reply to Mr Swadling' (2006) RLR 106. For an insightful account, see D Sheehan *The Principles of Personal Property Law* (Oxford: Hart Publishing, 2nd edn, 2017) ch 7.

[12]W Swadling 'Policy arguments for proprietary restitution' (2008) 28 LS 506; C Rotherham 'Policy and proprietary remedies: are we all formalists now?' (2012) 65 CLP 529.

[13]C Crea and O Diliberto 'The Chinese Civil Code and "fascination" with Roman law: a conversation with Oliviero Diliberto' (2021) 7 Italian LJ 1 at 10–13.

[14]L Chen 'The historical development of the civil law tradition in China: a private law perspective' (2010) 78 Leg Hist Rev 159 at 177–179. While the 2007 Law has been repealed by the Book on Property Rights of Chinese Civil Code, their structure and the majority of the rules remain the same: Chinese Civil Code, art 1260. For an English translation of the Code, see L Chen and others (eds) *The Civil Code of the People's Republic of China: English Translation* (Nijhoff: Brill, 2021).

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

law of obligations,[15] a few notable projects compare common law and civil law to map the similarities and differences.[16] Moreover, in some aspects, Chinese property law is closer to English law, exemplified by accepting mortgage but rejecting hypothec,[17] and the recognition of floating charge as distinct from fixed charge.[18] This is by no means to deny that the legal systems differ in various ways. But over-exaggeration of the common law/civil law divide could defeat the purpose of the comparison and result in a refusal to reflect jurisprudential concepts and borrow ideas. Secondly, this paper employs a 'deep-level' comparative law method[19] that is different from the traditional approach. It does not just focus on the similarities between the two jurisdictions but also identifies and explains the differences with underlying reasons. Fundamentally, property law concerns legal relationships between people regarding objects. Much attention is paid to the principles, concepts and reasoning underpinning foreign legal rules.[20] It is hoped that this comparative analysis between Chinese law and English law enriches the comparative property law literature by providing taxonomy nuisances, as illustrated in sections 1 and 2. Thirdly, there is a strong economic justification for such a comparative analysis. The increasing UK-China bilateral investment and trade despite the impact of Covid[21] prompts a deeper understanding of each other's property law. For any British investor in the Chinese market, whether in the retail, hotel or built environment sector, this will engage real property transactions under Chinese law. Likewise, for any Chinese investor in the British market, particularly in real estate industry, understanding property transfer theory under English law from a Chinese law perspective is valuable.

The remainder of this paper is structured as follows. Section 1 revisits the logical overlap between the 'intent alone versus intent plus' contrast and the 'unitary versus separatist' contrast, and the crucial difference between separation and abstraction, in order to avoid fundamental misunderstandings in comparative research. Section 2 argues for the importance of recognising a separate intent to convey distinct from the underlying contract, and elaborates the trend of recognising such a conceptual distinction in both English and Wales and in post-codification China. Section 3 explores the current position in both English and Chinese law regarding the question whether the nullity of the underlying contract leads to the nullity of the conveyance if all constituent elements of a valid conveyance are met in light of its own determinant rules in property law, and argues for a negative answer to this question from a normative perspective, followed by a conclusion.

1. Three sets of opposing concepts revisited

From the perspective of comparative property law, the relationship between contract and conveyance concerns three sets of fundamental contrasts, namely: (i) 'intent alone' system versus 'intent plus' system; (ii) a unitary approach versus a separatist approach; and (iii) causality versus abstraction. The three sets relate to each other, though their conceptual differences are not yet universally shared. Therefore, this section intends to discover the genuine relationships among the three to make it viable for further comparative analysis.

[15]S van Erp 'Comparative property law' in M Reimann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2nd edn, 2019) p 1032.

[16]See multiple volumes in AN Yiannopoulos (ed) *International Encyclopedia of Comparative Law*, vol 6, property and trust; U Mattei *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Westport: Greenwood Press, 2000); multiple volumes in *Modern Studies in Property Law*.

[17]Chinese Civil Code, arts 388, 401, 428; Judicial Interpretation of the Supreme People's Court of the Application of the Relevant Guarantee System of the Civil Code of the People's Republic of China (Supreme Court Interpretation No 28, 2020) art 68.

[18]Chinese Civil Code, arts 396, 404, 411.

[19]M Siems *Comparative Law* (Cambridge: Cambridge University Press, 2014) p 98.

[20]H Collins *The European Civil Code: The Way Forward* (Cambridge: Cambridge University Press, 2008) p 178.

[21]ONS report, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1094983/china-trade-and-investment-factsheet-2022-08-01.pdf.

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

(a) Distinguishing the intent plus system from the separatist approach

Many comparative lawyers depict property transfer systems as consisting of two dividing lines. The first is the consensual system versus the delivery (*traditio*) system, the second being the abstract system versus the causal system.[22] Considering that the use of the term 'delivery' is limited to the context of movables rather than all tangibles,[23] it is more reasonable to employ the word 'intent plus' instead, referring to a system where the conveyance is completed by an additional, separate stage with various methods prescribed by law no matter what the 'plus' precisely denotes; it could be delivery, deed or registration. The opposite of the 'intent plus' system is the 'intent alone' system, referring to a system where property rights generally pass automatically on the conclusion of the contract, save for agreements to the contrary (or strictly speaking, when the parties so intend in English law). As a result, usually, no additional stage other than the parties' intent in a contract is needed to complete the transfer.

The principle of separation (*Trennungsprinzip*) derives from this intent plus notion in German civil law. At its core is 'the separation of the obligation from the performance of the obligation'.[24] Although the two may factually coincide, conceptually they are always viewed as two separate stages of a transaction. This was not only adopted in German law[25] but also by some other continental European jurisdictions such as the Netherlands, Switzerland, Austria, and Greece, where ownership does not pass unless there is an effective delivery (in cases of movables) or registration (in cases of immovables).[26] However, the Germans went further in the 1800s, led by Pandectist jurists drawing a conceptual distinction between 'obligatory' juridical acts (*Verpflichtungsgeschäft*) and 'dispository' juridical acts (*Verfügungsgeschäft*),[27] the latter of which can also be called 'real contract' or 'real agreement' where the subject-matter is a property right.[28] Put differently, registration and delivery are not merely formalities but are juridical acts, with the transferor's intent to convey embodied in the real contract. This makes German law different from many other aforementioned 'intent plus' jurisdictions. The former interprets property transfers in a separatist way, while the latter interprets property transfers in a unitary way. Specifically, following the separatist approach, the intent to convey is conceptually different from the intent to create an underlying obligation to convey. In contrast, following the unitary approach, there is no independent intent to convey. Such intent must be on the underlying contractual basis so that there is only one intent throughout the whole transaction.

Whether Chinese law takes a unitary intent plus or separatist intent plus system has long been debated in China. The conventional viewpoint held by Chinese legal academics rejects the German principle of separation, while it contends that Chinese law does have a 'separation' in property transfers, namely the cause of a conveyance is separate from the result of that conveyance.[29] This looks

[22]Eg S van Erp and B Akkermans (eds) *Cases, Materials and Text on National, Supranational and International Property Law* (Portland: Hart Publishing, 2012) ch 8; V Sagaert 'Consensual versus delivery systems in European private law: consensus about tradition?' in W Faber and B Lurger (eds) *Rules for the Transfer of Movables* (Munich: Sellier, 2008) p 10.

[23]Delivery used to be a way of transferring fee simple to land in English legal history before 1925, where there was a symbolic ceremony called 'livery of seisin' taking place on the very land where the transferor placed a clod of earth into the hands of the transferee. This was abolished as a way of conveyance by the Law of Property Act 1925, s 51(1), which means that 'delivery' is no longer suitable to represent land conveyance.

[24]JT Füller 'The German property law and its principles' in W Faber and B Lurger (eds), *Rules for the Transfer of Movables* (Munich: Sellier, 2008) p 200.

[25]German Civil Code, ss 873, 925, 929. Similar provisions can also be found in Greek Civil Code, arts 1033, 1034.

[26]Dutch Civil Code, arts 3:4, 3:84; Austrian General Civil Code, ss 425, 431; Swiss Civil Code, arts 656, 714; Spanish Civil Code, art 1473.

[27]For a detailed introduction in English on von Savigny's contribution to the German principles of separation and abstraction, see L van Vliet 'Iusta causa traditionis and its history in European private law' (2003) 11 ERPL 342.

[28]Note that real agreement is merely a sub-species of dispository juridical acts in German law, as the principle of separation in German law not only applies in dispositions of property rights, but also in assignment of debts: BS Markesinis et al *The German Law of Obligations, vol I* (Oxford: Clarendon Press, 1997) p 20.

[29]See H Liang 'Is juridical act of real rights recognised in Chinese Civil Law?' (1989) 6 Chinese JL 56; L Wang 'On several issues concerning juridical act of real right' (1997) 3 China Leg Sci 58; J Cui 'Dingliches rechtsgeschäft and Chinese civil law

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

logically contradictory at first blush, though a closer look reveals that what these mainstream academics are referring to by saying 'separation' is in reality 'intent plus' in the sense that the transfer of ownership to movables and immovables requires not only the contract but also delivery or registration respectively.[30] Notably, they contend that while conveyance involves an act additional to contract (thus intent plus not intent alone), such an additional act of delivery or registration is not regarded as containing an intent to convey, therefore not constituting a juridical act, but merely a factual act (*Realakt*).[31] This does not count as 'separation' in the sense of the principle of separation. The gist is that the conveyance constitutes a distinct juridical act including a distinct intent specifically aimed at the conveyance. Therefore, such a mainstream interpretation shows that Chinese law is an example of how a jurisdiction adopts the 'intent plus' system while rejecting the separatist approach.

(b) Distinguishing the intent alone system from the unitary approach

The unitary intent alone approach was adopted by France, Belgium, Italy and some non-European civil law jurisdictions such as Japan.[32] It means the contract is effective to transfer property rights when the parties stipulate, which usually equals to, leaving formality requirements (in writing) aside, the reaching of consensus by which the parties agree to bring about the contract. Therefore, it is also called the principle of *solo consensu*. As a result, a separate act of conveyance is not necessary to pass property rights; conveyance is described as a proprietary effect of the contract. Failure to deliver or register does not affect the validity of the property transfer, but merely its binding effect against third parties.[33] Of course the party can, by party autonomy, agree not to complete the obligation to transfer merely at the moment of entering into the contract, which gives rise to the obligation, as exemplified by the conditional sale of goods (retention of title) and sale of unspecified goods, but this does not diminish the unitary intent alone system.

Unlike the intent plus systems in civil law jurisdictions, which can be interpreted in both separatist and unitary ways, the intent alone systems in civil law jurisdictions, by contrast, are all interpreted in a unitary not separatist way, at least from a mainstream viewpoint.[34] Quite the reverse, English law can demonstrate how a jurisdiction can adopt the intent alone system while rejecting the unitary approach.

English law does not have a uniform system as to the transfer of title. It generally has an intent plus system, with registration and deed as the methods of conveyance in the case of real property,[35] and delivery and deed as the methods of conveyance in the case of personal property outside sale.[36] The only exceptional scenario is the context of sale of goods,[37] where the intent alone suffices to

from the viewpoint of hermeneutics' (2004) 2 J Comp L 60. Cf X Sun 'the principle of separation between the reason and the result of the alteration of property rights' (1999) 5 Chinese JL 28; Y Li, 'Does the juridical act of real rights not exist in Chinese civil law?' (1998) 4 Sci L 55.

[30]Chinese Civil Code, arts 209, 224.

[31]Both the German-inspired terms 'juridical act' and 'factual act' are explicitly recognised in China: Chinese Civil Code, art 129. For their distinction in English, see J Schmidt 'Juridical act' in J Basedow et al (eds) *The Max Planck Encyclopedia of European Private Law, vol II* (Oxford: Oxford University Press, 2012).

[32]French Civil Code, arts 938, 1196, 1583; Belgian Civil Code, Book 3 Property, art 3.14; Italian Civil Code, arts 1376, 2643, 2644, 2684; Japanese Civil Code, arts 176–78.

[33]French Civil Code, art 1198; the décret of 4 January 1955. For a brief introduction, see G Helleringer 'The proprietary effects of contracts' in J Cartwright and S Whittaker (eds) *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms* (Oxford: Hart Publishing, 2017). Japanese Civil Code, arts 177–78 are clearer provisions.

[34]Cf V Sagaert and J Del Corral 'Acquisition of ownership of goods in the DCFR: a Belgian perspective' in V Sagaert et al (eds) *The Draft Common Frame of Reference: National and Comparative Perspectives* (Cambridge: Intersentia, 2012) pp 343–385, arguing that 'the concept of real agreement in the sense of a "property transfer agreement" is also used in the Belgian and French transfer system'.

[35]Law of Property Act 1925, s 52; Land Registration Act 2002, s 27.

[36]*Cochrane v Moore* (1890) 25 QBD 57 at 72–73.

[37]As opposed to other contexts such as gift, barter, payments for a service, payments of taxes, satisfaction of judgment debts, conveyances to mortgagees, transfers to trustees, etc: W Swadling 'Unjust delivery' in A Burrows and A Roger (eds) *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: Oxford University Press, 2006) p 287.

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

transfer title. Section 17(1) of the Sale of Goods Act 1979 provides '[w]here there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred'. Despite the fact that the word used in the statute is 'intent' not 'contract', section 17(1) is understood by many English textbook writers to mean that property passes by virtue of the contract itself.[38]

Nevertheless, it is possible to conclude that the 'intent' referred to in section 17(1) of the 1979 Act is not the parties' contractual intent, but a notionally separate intent to convey. To give a relatively brief account,[39] first, the wording of section 17(2) and section 18 rules 2 and 5 implies the possibility of a conveyance by the transferor's subsequent intent to convey manifested after the creation of the contractual intent. Secondly, even if one confines the discussion to the case where there exists no subsequently manifested intent distinct from the intent in the contract of sale, the method of conveyance can still be interpreted in a separatist not unitary way based on the following reasoning. Given that sections 17 and 18 of the 1979 Act generally restated the two corresponding sections in the Sale of Goods Act 1893, and that the 1893 Act did not create but merely represented the previous common law rules, a survey of pre-1893 cases inconsistently shows that some described the method of conveyance to be the contract,[40] while others described it to be the intent.[41] Exploring the history going all the way back to the fifteenth century reveals a judgment by Fortescue CJ allowing a buyer of a horse to claim detinue against the seller when the contract of sale is entered into,[42] whereas beforehand buyers could not sue detinue before delivery; this case was explained by some legal historians, including Sir William Holdsworth, as the cornerstone when contract started to become a method of conveyance in English law.[43]

Nevertheless, this is incorrect, mainly because the action of detinue had come to be multi-causal, in the sense that it could be brought not only by title-holders out of possession to assert their right to possession, but also by non-title-holders to assert their right to possession, and thereby acquire title. The fluctuating scope of eligibility of detinue throughout English law, as has already been found by other legal historians,[44] renders it impossible to determine the passing of property through the law of detinue. Notably, on the one hand, the draftsman of the 1893 Act, Sir Mackenzie Chalmers, stated that it is an 'undoubted' rule as old as the yearbooks that 'by English law, the property may pass by the contract itself' can be tested.[45] On the other hand, however, the very case *Dixon v Yates*[46] cited by him as the proof does not help at all, not only because this case was a matter of delivery as a method of changing possession rather than a method of passing property, but also because Parke J's statement of law in this case regarding the passing of property points to 'intent' not 'contract'. Considering the fact that at the time of drafting the 1893 Act, the draftsman was influenced by both the pro-French (ie it is the contract that passes property) jurist Benjamin[47] and the anti-French jurist (ie it is the

[38]See ELG Tyler and NE Palmer *Crossley Vaines' Personal Property* (London: Butterworths, 5th edn, 1973) p 325; M Bridge *Personal Property Law* (Oxford: Clarendon Press, 4th edn, 2015) p 153; Bridge er al, above n 8, para 30–037.

[39]For a detailed analysis, see Z Wu 'Transfer of title to goods by intent in English law' in C Rupp et al (eds) *Property Law Perspectives VI* (The Hague: Eleven International Publishing, 2019) pp 129–147.

[40]YB 20 Hen VI Trin pl 4. Translation from legal French to modern English is in JB Ames *Lectures on Legal History and Miscellaneous Legal Essays* (Cambridge: Harvard University Press, 1913) p 77.

[41]*Tarling v Baxter* (1827) 6 B & C 360 at 364; 108 ER 484 at 486; *Cochrane v Moore*, above n 36.

[42]*Gilmour v Supple* (1858) 11 Moo PC 551 at 566; 14 ER 803 at 809; *Cundy v Lindsay* (1877–78) LR 3 App Cas 459 at 466.

[43]WT Barbour 'The history of contract in early English equity' in P Vinogradoff (ed) *Oxford Studies in Social and Legal History, vol IV* (Oxford: Clarendon Press, 1914) pp 114–15; WS Holdsworth *A History of English Law, vol III* (London: Sweet & Maxwell, 5th edn, 1942) pp 353–56.

[44]SFC Milsom 'Sale of goods in the fifteenth century' (1961) 77 LQR 257 at 273–74, citing YB P 21 Ed III pl 2; CHS Fifoot *History and Sources of the Common Law: Tort and Contract* (London, Stevens & Sons, 1949) pp 25–28.

[45]MD Chalmers *The Sale of Goods Act 1893, Including the Factors Acts, 1889 & 1890* (London: W Clowes, 1894) p 37.

[46](1833) 5 B & Ad 313, 110 ER 806.

[47]JP Benjamin *A Treatise on the Law of Sale of Personal Property: With References to the American Decisions and to the French Code and Civil Law* (London: H Sweet, 1868).

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

intent, not the contract that passes property) Blackburn,[48] it is submitted that it is reasonable to assume that when Sir Mackenzie Chalmers talked of 'contract passing property', the distinction between contract and intent in the sense of their roles in conveyance was arguably not in his mind; to use intent and contract interchangeably was just his loose talk, and therefore one cannot make very much of it to deny the existence of a separate intent to convey which passes title in the context of sale of goods.

This being the case, the English law of sale of goods significantly contributes to the comparative law matrix. Specifically, it has been argued that the *intent alone versus intent plus* contrast is not strictly speaking a synonym for the *unitary versus separatist* contrast; they overlap entirely to form a matrix by sub-division: (i) unitary intent plus; (ii) unitary intent alone; (iii) separatist intent plus; and (iv) separatist intent alone. Comparative property lawyers can find continental European jurisdictions as representatives of the sub-divisions (i) to (iii), the Netherlands, France and Germany, respectively. However, it is difficult to find a representative of sub-division (iv). The English law of sale of goods can be interpreted to complete the quadrant of separatist intent alone.

(c) Distinguishing separation from abstraction

Having distinguished the intent plus from the separatist approach, and the intent alone from the unitary approach, the next one is the difference between the principle of separation and the principle of abstraction. The distinction between the two principles has occasionally been neglected by some German scholars, describing abstraction as no more than the product of precise thinking that naturally follows the recognition of separation. This was also the case when it was suggested that abstraction be applied in English law.[49] While it is true to say that the principle of abstraction flows from the principle of separation, they nevertheless carry different meanings.

Suppose a conveyance is valid according to the rules of property law. Will a flawed underlying obligation infect its validity? For instance, if a transferee acquires property rights by the transferor's act of delivery (with an intent to convey), but the underlying contract, later on, turns out to be a voidable one, will the transferor's property be seen as never having been passed to the transferee when the transferor elects to rescind the contract? This is a question that the principle of separation cannot answer. As long as a jurisdiction recognises that its own set of rules determines the validity of the underlying contract and that of the conveyance (eg on capacity, manifestation of intent, legality of content, and formality),[50] that jurisdiction can be said to recognise the principle of separation, but not necessarily the principle of abstraction. The principle of abstraction can only be said to exist in a jurisdiction where a defect in the validity of the underlying contract does not infect the validity of conveyance;[51] if, on the contrary, the former does infect the latter, then such jurisdiction is said to recognise the principle of causality. Most civil law (and mixed) jurisdictions are causal, with a few being abstract, namely Germany, Scotland, Greece, Estonia, South Africa, and Taiwan.[52]

[48]C Blackburn *A Treatise on the Effect of the Contract of Sale on the Legal Rights of Property and Possession in Goods, Wares, and Merchandise* (London: Stevens & Sons, 1845) pp 147, 172.

[49]Swadling, above n 10, at 139, citing K Zweigert and H Kötz *An Introduction to Comparative Law* (Tony Weir tr, Oxford: North-Holland Publishing, 1977) pp 177–189.

[50]The two sets of rules may overlap, but not in their entirety, even leaving aside the contentious 'separate intent to convey distinct from the contractual intent'. For instance, in many jurisdictions, the capacity rule for a valid conveyance has an element of 'power of disposition' which is usually absent in the capacity rule for a valid contract.

[51]Though the principle of abstraction does not prevent the parties from adding a resolutive condition that the conveyance (at least of movables) is valid on the condition that the underlying contract remains valid: German Civil Code, ss 158, 925(2).

[52]See E Cohn *Manual of German Law, vol I* (New York: Oceana Publications, 2nd edn, 1968) paras 134, 305, 360; K Kullerkupp 'Transfer of ownership in recent reform projects: Estonia' in W Faber and B Lurger (eds) *Rules for the Transfer of Movables* (Munich: Sellier, 2008); P Schutte 'The characteristics of an abstract system for the transfer of property in South African law as distinguished from a causal system' (2012) 15 Potchefstroom Electronic LJ 120; T Wang *Civil Law: Property Rights* (Beijing: Peking University Press, 2009) pp 59–69.

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

2. The role of intent in the principle of separation

(a) Why recognise a separate intent to convey?

Many Chinese lawyers believe that whether property transfers should be understood in a *separationist* or *unitary* way is merely a question of *interpretive choice*, because whether or not a conveyance is conceptually interpreted as a juridical act distinct from the underlying contract, applying a different set of rules determining its validity, they can both explain why parties' consent leads to the result of the transfer of property; it does not cause conflicts of interest among parties. In contrast, whether property transfers should operate in an *abstract* or *causal* way is a question of value judgement, because the choice between abstraction and causality leads to entirely different results as to whether the invalidity of the underlying basis infects the validity of conveyance; it normally does cause conflicts of interest among parties.[53] Zero-sum games exist in numerous contexts,[54] though the most commonly mentioned context is the transferee's insolvency. Specifically, if a jurisdiction goes causal, then a property right acquired under a rescinded or void underlying contract will be vindicated and seen as never been passed to the transferee, therefore not constituting part of the transferee's assets available for distribution among the transferee's unsecured creditors. If a jurisdiction goes abstract, such a property right will not automatically revest to the transferor, and therefore it will be available for insolvency distribution among the transferee's unsecured creditors.

Nevertheless, it is submitted that the separatist versus unitary contrast is not merely a matter of interpretive choice but also a matter of value judgement. Logically, a jurisdiction that takes a separatist approach at the first stage (ie the stage in which the jurisdiction shall decide whether its own set of rules determines the validity of the underlying contract and that of the conveyance) can go abstract or causal at the second stage (ie the stage in which the jurisdiction shall decide whether a flawed underlying contract infects an otherwise valid conveyance). In contrast, a jurisdiction can only go causal if it takes a unitary approach in the first place. Put differently, the unitary approach and the principle of abstraction are mutually exclusive. This is because the unitary approach denies the existence of a separate intent to convey conceptually distinct from the intent in the underlying contract promising to convey. Since there is only one intent in the contract throughout the whole transaction, the validity of the transfer is dependent on a valid intent in the contract. It must be seen as retrospectively void simply because its underlying obligation is void *ab initio* or subsequently rescinded.

In contrast, in a jurisdiction taking a separatist approach by recognising a separate intent to convey, since there are two sets of rules determining the validity of the conveyance and the underlying contract respectively, this makes room for that jurisdiction to make a policy-based decision on whether a flawed underlying contract infects the validity of the conveyance. As a result, a jurisdiction deciding to take a unitary rather than a separatist approach must also decide a logically subsequent issue: does it have enough policy-based justifications to embrace causality, and thereby block the possibility of abstraction? Moreover, taking the unitary approach blocks the possibility of a jurisdiction to be flexible towards the question of causality or abstraction so that it can choose to be abstract in some scenarios (eg transfers outside sale, money transfers, or immovable transfers, etc), while causal in other scenarios.

(b) Convergence of recognising separation in English and Chinese law

(i) English law

Unlike in many civil law jurisdictions, the phrase 'juridical act' is not a term of art in English law. Nevertheless, this by no means indicates that English law does not effectively have a separation between the underlying contract (as an obligatory juridical act in civil law terms) and the conveyance

[53]See Y Wang *Principles and Research Methods of Civil Law* (Beijing: Law Press, 2009) ch 1. See also Y Wang 'Substantive rules of reasoning for value judgment in civil law' (2004) 6 Soc Sci China 104; Y Wu 'The abstraction principle: logical consequence or value judgment' (2009) 4 Pol Sci & L 120.

[54]For details, see Swadling, above n 12, at 512–514; Liang, above n 29.

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

(as a dispository juridical act in civil law terms). As will be seen in the following paragraphs, it is submitted that the English law approach of recognising the principle of separation without its civil law conceptual premise of a juridical act is to recognise a separate intent to convey in the conveyance.

In English law, the act of delivery for the purpose of the transfer[55] is not a mere possessory fact of physical change of custody from one to another;[56] rather, it must be an act with (and not just evidencing) the transferor's intent to vest the title in the transferee. In other words, the delivery itself does not necessarily pass title unless the act of delivery entails the transferor's intent to convey, regardless of whether there is already a contractual or gratuitous promise between the parties to pass property rights. Such an intent cannot be the underlying gift promise, as it makes no sense in English law to say 'gift contract'. It follows that it is impossible for an effective gratuitous transfer to be based on intent in the gift promise that is not even binding. Having eliminated the impossible, whatever remains must be the truth – hence, the binding intent effecting the gift is the intent to convey embodied in the act of delivery.

One may argue that a gift promise may exceptionally be enforceable and thus effective in triggering a personal right in some instances in English law, such as a promise in the form of a deed or a promise bound by promissory estoppel.[57] This, however, cannot be used to argue that it is the intent in the 'underlying obligational basis' that transfers title. Estoppel does not create an underlying obligational basis as the cause of action but merely estops the donor from denial.[58] The case of a gift by deed is relatively more complex to handle, for it concerns the nature of the deed itself. One may argue that the deed can be seen as just another kind of contract in writing (or a consensual 'instrument' in writing in cases of gift) so that a transaction 'could very easily be collapsed into a single, uniform requirement'[59] of a 'deed-like' instrument serving both as a deed and a contract to make the entire transaction unitary rather than separatist.

Nevertheless, in modern days it has become increasingly clear that a deed can never be conceptually replaced by the underlying contract, no matter in how formal a way the contract is made. An instrument is not a deed unless it clarifies on its face that it is intended to be a deed, whether by describing itself as a deed or expressing itself to be executed and signed as a deed.[60] It follows that a deed does contain the executor's manifestation of intent when writing the document. Furthermore, while a civil law scholar may understand a deed in English law as merely a special formality requirement of a 'gift contract', this understanding has already been explained to be wrong by common lawyers on the basis that a deed is not to strengthen the contract; the deed on its own has independent legal effects which sometimes go beyond stipulations in the contract and rules of contract law.[61] As a result, it is submitted that a deed cannot be seen as a sub-species of any underlying contract; similarly to conveyance by delivery, conveyance by deed, including gift by deed follows the separate approach too, with the intent effecting the conveyance being the intent to convey, not the contractual intent.

Registration wise, generally 'in England and Wales the sale of registered title to land is essentially a two-step process: first contract of sale, then transfer of title'.[62] As far as the second stage is concerned, it is not a mere act of publicity or formality, but an act with the transferor's intention to convey.

[55]Delivery can be done for the purpose of bailment, for instance, without the bailor's intent to convey title to the bailee: *Glaister-Carlisle v Glaister-Carlisle* (1968) 112 SJ 215.

[56]*Cartwright v Green* (1803) 8 Ves 405, 32 ER 412; *Merry v Green* (1841) 7 M & W 623, 151 ER 916. These are criminal cases, so no reasoning was given by the judges as to why title to the hidden money in the drawer did not pass to the recipient, though as McFarlane points out, at least it could be inferred that the recipient did not acquire the title, for otherwise no crime would have been committed: B McFarlane *The Structure of Property Law* (Oxford: Hart Publishing, 2008) p 166.

[57]*Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

[58]*Combe v Combe* [1951] 2 KB 215.

[59]S Gardner *An Introduction to Land Law* (Oxford: Hart Publishing, 2007) p 69.

[60]Law of Property (Miscellaneous Provisions) Act 1989, s 1(2)(a).

[61]Cartwright, above n 9, p 127.

[62]K Gray and S Gray *Elements of Land Law* (Oxford: Oxford University Press, 5th edn, 2009) p 1034.

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

This can be inferred from technicalities in the form of transfer used in the Land Registry.[63] Box 12 of the form provides a space for the transferor to execute the transfer as a deed, so that the transferor's intent to convey is not represented by the underlying obligation to convey in the contract, but by a separate manifestation of intent when filling the deed in box 12.[64] Such a separatist approach is not only confined to the case of sale, but nearly all cases of acquisition of title to land under English law, which 'insists on formality above all at two crucial points in the acquisition of real rights, contract and conveyance'.[65]

(ii) Chinese law

It has been said in section 1 of this paper that the conventional viewpoint in the late twentieth century to early twenty-first century Chinese academia favours the unitary rather than the separatist approach. Notably, however, there are increasing pro-separatist voices among younger academics in China.[66] Such a trend in secondary sources emerged with the changes of primary sources in Chinese private law during this decade.

The story began with article 72 of the General Principles of Civil Law of 1986 which at that time governed the formality rules under Chinese law for the acquisition of ownership. This provision stated that unless the law stipulates otherwise or the parties concerned have agreed on other arrangements, the ownership of a thing obtained by contract or other lawful means shall be transferred upon the delivery of the thing itself. While this rudimentary provision did not provide a detailed rule on conveyance, it laid a foundation that property transfer not only requires an underlying contract, but also additional formality, namely delivery. What did 'delivery' entail then?

Over a decade later, article 132 of the Contract Law 1999 provided that 'the subject-matter to be sold shall be owned by the seller or of that the seller shall have the power of disposition', otherwise such a contract entered into by a seller with no power of disposition would be a validity-pending contract in accordance with article 51 of the 1999 Law. Such a validity-pending contract is void unless the owner ratifies such contract, or the seller acquires the power of disposition after entering into the contract. It can be inferred from these provisions that the contract of sale contains both the underlying obligational basis and the conveyance. This represented the conventional pro-unitary notion that contract and conveyance are conceptually not two juridical acts but one juridical act; conveyance is seen as an integral part of the contract.

Such a validity-pending rule was substantially undermined in Property Law 2007 regarding immovables, where article 15 provided that the validity of the contract in relation to the creation or the transfer of a property right to immovables is independent from the fact that the 'transferor' is in reality not a registered proprietor. Later on, the Chinese Supreme People's Court (the SPC) affirmed this new position in 2009 and 2012 in its two judicial interpretations of contract law, providing that a contract of sale, whether of movables or immovables, is not void due to the mere fact that the seller does not have the ownership. Instead, the proper remedy is that the buyer can claim damages for breach of contract.[67] While, in theory, one may say that this strictly speaking merely clarifies the relevance of the transferor's power of disposition to the validity of conveyance as opposed to the validity of a contract,

[63]For a specimen of the form, see S Bridge et al *Megarry & Wade: The Law of Real Property* (London: Sweet & Maxwell, 9th edn, 2019) para 6-149.

[64]Forms of execution are given in Land Registration Rules 2003, Sch 9.

[65]P Birks 'Before we begin: five keys to land law' in S Bright and J Dewar (eds) *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998) p 482.

[66]See Y Ge 'The real juridical act: a legendary phoenix' (2007) 6 ECUPLJ 102; Q Zhu 'The normative structure of dingliches rechtsgeschäft and the transfer of ownership in China' (2013) 6 Jur 62; L Huang 'the practical reception of discrimination between verpflichtungsgeschäft and verfügungsgeschäft' (2015) 5 Hebei L Sci 144; Z Zhang 'The legislative research of the real right section of General Provisions of Civil Code' (2018) 10 Jinan J (Phil & Soc Sci) 74 at 81–83; S Mao 'A doctrinal analysis of ownership transfer mode in the context of Chinese Civil Law codification' (2020) 2 J Nanjing University (Phil, Human & Soc Sci) 107 at 113–117.

[67]Judicial Interpretation II of the Supreme People's Court of Several Issues Concerning the Application of the Contract Law 1999 (Supreme Court Interpretation No 5, 2009) art 15; Judicial Interpretation of the Supreme People's Court on

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

in practice such a change brought by the two judicial interpretations nevertheless did influence Chinese judges, and even encouraged some of them to begin to explicitly recognise the principle of separation in the dicta of their judgments.[68]

Articles 51 and 132 of Contract Law 1999 were finally abolished in 2020 by the promulgation of the Chinese Civil Code, which absorbed with modifications and therefore repealed most of the major civil law statutes, including General Principles of Civil Law 1986, Contract Law 1999, Property Law 2007 and General Provisions of Civil Law 2017.[69] Article 51 of the 1999 Law has been completely deleted and is nowhere in either the Book on General Provisions or the Book on Contracts in the Chinese Civil Code. Article 132 paragraph 1 of the 1999 Law has also been replaced by article 597 paragraph 1 of the Chinese Civil Code, which provides:

> Where the ownership of the subject matter cannot be transferred for want of the power to dispose on the part of the seller, the buyer may terminate the contract and demand that the seller bear liability for breach of contract.

Moreover, article 15 of Property Law 2007 was reproduced word for word in article 215 of the Chinese Civil Code. Hence, it is now clarified that the transferor's power of disposition is a determinant of the validity of the conveyance but not of the underlying contract.

Arguably, none of the aforementioned provisions explicitly recognises the existence of a separate intent to convey distinct from the contractual intent. However, those provisions can still be said to have recognised the gist of separation in the sense that the determinants for a valid contract are not the same as the determinants for a valid conveyance, in particular, because the seller's power of disposition is a determinant for the latter but not one for the former. This entails a comparative observation that, unlike the analysis of English law, where one finds a separate intent to convey in the first place and then deduces the principle of separation, the way many Chinese lawyers argue the existence of such a principle is not by searching a separate intent to convey,[70] but by demonstrating two sets of rules determining the validity of the conveyance and that of the underlying contract by explaining the aforementioned provisions, thereby proving the existence of a dispository juridical act distinct from an obligatory juridical act, which naturally demonstrates the principle of separation, together with the existence of a separate intent to convey. A possible explanation for such divergence is that English has no concept of a juridical act, whereas China has, so it is impossible for the English approach to demonstrate the existence of a dispository juridical act; rather, one has to find a separate intent to convey as the premise of proving separation.

Consequently, Chinese academics in favour of the separatist approach argued that all the developments from 1999 to 2020 lead to the same conclusion that Chinese law has certainly – albeit impliedly – recognised the principle of separation in the post-codification era.[71] In contrast, academics

Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts (Supreme Court Interpretation No 8, 2012) art 3.

[68]*Chengdu Xunjie Communications Chains Co Ltd v Chendgu Shudu Industrial Co Ltd* [2013] Supreme People's Court, MTZ No 90; *Guo Wenjun v Lu Guie* [2014] Beijing High People's Court, GMSZ No 03542; *Zhang Hongjie v China City Construction Holding Group Co Ltd* [2015] Supreme People's Court, MSZ No 1342; *Wang Zhongchang v Fu Weixin* [2016] Supreme People's Court, ZGFMZ No 75; *Yun Zhixin v Tan Fucai* [2016] Jiangsu High People's Court, SMS No 3587.

[69]Chinese Civil Code, art 1260.

[70]Nevertheless, it by no means indicates that one cannot find contexts where a separate intent to convey clearly exists so that the principle of separation can be proven. For instance, where C voluntarily transfers ownership of C's thing to A in order to discharge an unpaid debt between A and A's debtor B, C's intent to convey is clearly separate, as C is not performing any contractual obligation between C and B, nor there is any underlying contract between C and A. The juridical act of conveyance is based on such a separate intent to convey, and hence C cannot sue A for restitution of unjust enrichment even though there is no legal basis (ie underlying contract) for A's enrichment by obtaining ownership from C: Chinese Civil Code, art 985 item 3.

[71]X Sun 'The background and significance of adopting the principle of separation in Chinese Civil Code' (2020) 4 Res RL 3; 'On the understanding and application of the Chinese Civil Code from the perspective of courts' adjudication' (2020) 15 Journal

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

favouring the unitary approach argued that such a change merely entails that a valid transfer of ownership by sale, except in the case of good faith purchase,[72] requires: (i) a valid contract of sale containing the unitary intent to transfer under the contract, whether or not the seller has got the power of disposition at the moment of entering into the contract; plus (ii) the factual act of delivery or registration; plus (iii) the seller having or subsequently acquiring the power of disposition (either being the owner or authorised by the owner).[73]

Scholarly debates apart, the SPC extrajudicially interpreted such a change in the Chinese Civil Code in a pro-separatist way.[74] In the past four years, judgments given by higher courts (ie the SPC and provincial high courts) show a trend that there are substantially more cases explicitly recognising the principle of separation[75] than those explicitly denying the principle of separation.[76]

3. Arguments in favour of abstraction

Once a jurisdiction has chosen the separatist approach, the next normative decision for it to make is to choose between going abstract or going causal. The principle of causality is the mainstream position of both English law and Chinese law. However, as illustrated in this section, there are judgments in favour of the principle of abstraction in both jurisdictions, and the latter principle is more justified in both jurisdictions from a systemic viewpoint.

(a) Status quo

(i) English law

Authorities in English law show the lack of a consistent attitude toward abstraction versus causality; its answers vary depending on which particular vitiating factor is concerned, namely impaired consent, informality, incapacity, and illegality.

As far as impaired consent is concerned, it was held in *Load v Green*[77] and the more well-known case *Car and Universal Finance Co Ltd v Caldwell*[78] that if the seller elects to rescind the underlying contract that the seller entered into due to a fraudulently induced mistake (especially as to the creditworthiness of the buyer), the title automatically and retrospectively revests in the seller. Probably due to the fame of *Caldwell*, it is widely seen as a piece of decisive evidence which suffices to support the

of Law Application 18 at 38; M Yao 'Private autonomy and legal acts from a systematic perspective of the Chinese Civil Code' (2021) 3 Oriental L 140 at 147–148.

[72]Chinese Civil Code, arts 311–313.

[73]Y Wang '"Changes" in the Chinese Civil Code' (2020) 4 Oriental L 40 at 45; J Cui 'Reconsideration on the unauthorised disposition' (2020) 4 Peking University LJ 865 at 865–868. For English cases delivering a similar idea, see *Thornborow v Whitacre* (1705) 2 Ld Raym 1164 at 1165; 92 ER 270 at 271; *Eurico SpA v Phillip Brothers (The Epaphus)* [1987] 2 Lloyd's Rep 215 at 218.

[74]Enforcement of Civil Code Group of the Supreme People's Court (ed) *Understanding and Applying the Book on Contracts of the Chinese Civil Code* (Beijing: People's Court Press, 2020) p 861.

[75]*Henan Jinshi Lianke Engineering Project Technology Co Ltd v China Construction Bank Co Ltd Zhoukou Branch* [2018] Supreme People's Court, ZGFMS No 5669; *Guizhou Wanhailong Mining Industry Co Ltd v Ma Shangfu* [2018] Supreme People's Court, ZGFMZ No 15; *Chen Wei v Xu Guangwen* [2018] Guizhou High People's Court, QMZ No 1025; *Bank of Communications Co Ltd Shaanxi Branch v Wang Jumei* [2018] Supreme People's Court, ZGFMS No 4883; *Tianji Tianhai Group Co Ltd v Tianjin Ruiyin Microcredit Co Ltd* [2019] Supreme People's Court, ZGFMS No 6819; *Yining Dehong Investment Management Co Ltd v Mao Hongming* [2021] Xinjiang Uygur Autonomous Region High People's Court, X40MZ No 591.

[76]*Hu Xizhu v Xing Lei* [2018] Hebei High People's Court, JMZ No 737; *Hu Jianjun v Gao Youlin* [2019] Jiangxi High People's Court, GMZ No 705; *Han Gaowei v Qinghai Yihai Real Estate Development Co Ltd* [2020] Qinghai High People's Court, QMZ No 83.

[77](1846) 15 M & W 216, 153 ER 828.

[78][1965] 1 QB 525.

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

mainstream viewpoint that English law is causal, not abstract,[79] without fully considering the fact that if one looks at spontaneous mistake cases as opposed to induced mistake cases, the principle in operation in the former set of cases is abstract, not causal,[80] and the fact that there were persuasive academic critiques on anti-abstractionist authorities themselves.[81]

Notably, however, the principle applied in cases of the vitiating factors of capacity and formality is quite the reverse. As to formality, *Tootal Clothing Ltd v Guinea Properties Management Ltd*[82] and *Sharma v Simposh Ltd*[83] show that a conveyance pursuant to an underlying contract which is void due to failure to comply with formality requirements regarding the contract[84] is not rendered void too as long as the conveyance has been done with all constituent elements of its own having been met. As to capacity, the authority regarding a natural person is *Stocks v Wilson*,[85] and the authority regarding a legal person is *Ayers v South Australian Banking Co*,[86] both showing that the revesting of title under a void contract involves the violation of a mandatory rule regarding a contractual party's capacity is not available as long as such a rule does not render the conveyance void too.

The case of illegality is somewhat complex. On the one hand, cases like *Singh v Ali*[87] and *Ayerst v Jenkins*[88] demonstrate that title passes by conveyance and does not retrospectively revest under an illegal contract. On the other hand, there are seemingly opposite authorities such as *Bowmakers Ltd v Barnet Instruments Ltd*[89] and *Amar Singh v Kulubya*.[90] At the end of the *Bowmakers* judgment, notably, du Parcq LJ stated that:[91]

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

[79]Bridge et al, above n 8, paras 18-030, 30-036; L van Vliet 'The transfer of moveables in Scotland and England' (2008) 12 Edin LR 173; J Cartwright *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Oxford: Hart Publishing, 3rd edn, 2016) p 161.

[80]*Chambers v Miller* (1862) 3 F & F 202, 176 ER 91 (Nisi Prius); (1862) 13 CB NS 125, 143 ER 50 (Court of Common Pleas and Exchequer Chamber); *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677.

[81]Swadling, above n 10. Cf Häcker, above n 11, where Häcker questioned Swadling's thesis in that title to goods can pass twice over, first by intent and then again by delivery. Note that she later modified her view and recognised the possibility of an abstract transfer inside sale: B Häcker 'Causality and abstraction in the common law' in E Bant and M Harding (eds) *Exploring Private Law* (Cambridge: Cambridge University Press, 2010) pp 210–211.

[82](1992) 64 P & CR 452. Followed by *Lotteryking Ltd v AMEC Properties Ltd* [1995] 2 EGLR 13; *Mirza v Mirza* [2009] EWHC 3, [2009] 2 FLR 115; *North Eastern Properties Ltd v Coleman* [2010] EWCA Civ 277 [2010] 1 WLR 2715.

[83][2013] Ch 23 [27] at [43]–[44].

[84]Eg Law of Property (Miscellaneous Provisions) Act 1989, s 2.

[85][1913] 2 KB 235. See also *Pearce v Brain* [1929] 2 KB 310, where the Court also confirmed that it is a wrong proposition that no property passed under a contract of exchange for non-necessities involving a minor which violates the Infants Relief Act 1874. However, this latter case is not a pure abstractionist case, because it was also contentiously said there that if such contract amounts to a total failure of consideration, then no property passes.

[86](1869–71) LR 3 PC 548.

[87][1960] AC 167, followed by *Kingsley v Sterling Industrial Securities Ltd* [1967] 2 QB 747. See also *Aratra Potato Co Ltd v Taylor Joynson Garrett* [1995] 4 All ER 695 (note although the position regarding the legality of the solicitor contract in *Aratra* was overruled by *Thai Trading Co v Taylor* [1998] QB 781, it did not change the position that property passes under an illegal thus void contract). In addition, Lord Denning gave a similar abstractionist decision in *Belvoir Finance v Stapleton* [1971] 1 QB 210.

[88](1873) LR 16 Eq 275. The transaction here was a transfer of shares, rather than transfer of title to tangible property, though the abstractionist gist of this case was confirmed by Lord Goff and Lord Jauncey in *Tinsley v Milligan* [1994] 1 AC 340 at 355, 366. Note that this part of the ratio in *Tinsley* was not overruled in *Patel v Mirza*. It is the reliance rule in *Tinsley* that was overruled. See especially *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 [110] (Lord Toulson): 'Unless a statute provides otherwise (expressly or by necessary implication), property can pass under a transaction which is illegal as a contract'. See also [189] (Lord Mance), [236] (Lord Sumption).

[89][1945] KB 65.

[90][1964] AC 142.

[91]*Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 at 72 (emphasis added).

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

It is submitted that this alleged 'exception' is nevertheless not genuine; it does not negate the principle of abstraction. Here, by saying that 'it is unlawful to deal in obscene books at all', it not only means that no contract (whether in the form of sale, exchange, or other transactions) can be made concerning obscene books but also means that no conveyance (whether in the form of registration, deed, or delivery) can be made with respect to obscene books. Both the validity of the contract and the validity of the conveyance were tainted due to a violation to the invalidating rule of illegality. The conveyance was void not because the underlying contract was void due to illegality and then infected the validity of the conveyance, but because the conveyance *itself* was void due to illegality. Similarly in *Amar Singh*, given that the invalidating rule of illegality rightly *pointed to* the transfer of title or to the grant of leasehold out of such title (ie the leasehold in question barred from being carved out from the freehold title to the 'mailo' land to be granted to a non-African), it is incorrect to say that the conveyance was void because of the void underlying contract.

Indeed, the homeland of abstraction, Germany also recognises this distinction as an exception to the principle of abstraction, calling it 'identity of defect', referring to the situation where a specific defect in a contract coincidentally happens to be the same defect in the conveyance. For instance, if the fraud or mistake[92] involved in the contract relates to the transferee's identity, or the subject matter of the property, and such contract is rescinded, then such defect will also invalidate the conveyance due to lack of a valid intent to convey. This could similarly happen in illegality or immorality cases, where both contract and conveyance are void due to statutory prohibition or public policy.[93] However, this exception has been characterised as a false one,[94] because the voidness of the conveyance is attributed not to the 'mirror effect' of the voidness of the underlying contract but its own determinant rules in property law.

(ii) Chinese law

The answer to whether Chinese law adopts an abstract or a causal system cannot be directly found in the civil code or other statutes, thus making it impossible to determine the status quo from primary sources. Worse still, unlike the Netherlands and Austria, where scholars claim that there are widely-recognised pro-causal judgments,[95] Chinese law does not have an equivalent landmark case handed down by the SPC. Nevertheless, the prevalent position held by Chinese courts can be inferred to be pro-causal, based on the fact that among the judgments that can be found in mainstream databases,[96] all those delivered by High People's Courts with a direct response to the causality versus abstraction issue are pro-causal,[97] and the fact that there are substantially more judgments delivered

[92]German Civil Code, ss 119, 123. For the English counterparts, see Sheehan, above n 11, pp 153–155.

[93]German Civil Code, ss 134, 138.

[94]Or it could be called an 'apparent' exception: B Häcker *Consequences of Impaired Consent Transfers: A Structural Comparison of English and German Law* (Tübingen: Mohr Siebeck, 2009) p 62.

[95]*Damhof v De Staat*, HR 5 May 1950, NJ 1950/1 (the Netherlands); *Oberster Gerichtshof (OGH)*, 30 August 2000, 6 Ob 325/99h, Immolex 2001/11 (Austria). For English translation of these two case briefs, see van Erp and Akkermans, above n 22, pp 833–835.

[96]Namely, China Judgments Online, Faxin, PKULaw, Wolters Kluwer.

[97]*Tan Wanxing v Lei Guangzhi* [2009] Guangdong High People's Court, YGFMYZZ No 158; *Shenzhen Juqiang Import and Export Trade Co Ltd v Chun Yip Plastics (Shenzhen) Co Ltd* [2012] Guangdong High People's Court, YGFMYZZ No 136; *Sun Liang v Wu Huantang* [2015] Guangdong High People's Court, YGFMYSZ No 1187; *Agricultural Bank of China Jingdezhen Xinxing Branch v Zhan Lifang* [2016] Jiangxi High People's Court, GMZ No 31; *Kunming City Xishan District Rural Credit Cooperatives Union Dianchi Branch v Wang Liyu* [2017] Yunnan High People's Court, YMZ No 785; *Beijing Jinghua Trust and Investment Co Ltd v Wang Huiwen* [2019] Beijing High People's Court, JMZ No 145; *Wuhan Zhileye Property Development Co Ltd v PLA Naval University of Engineering* [2019] Hubei High People's Court, EMZ No 1109. Notably, the SPC has not yet explicitly chosen its side judicially.

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

by Intermediate People's Courts explicitly denying the principle of abstraction[98] than those explicitly recognising the principle of abstraction.[99]

(b) A possible reorientation?

At the normative level, the justificatory debates on causality versus abstraction in Chinese law functionally correspond to the justificatory debates on proprietary restitution in English law, the most challenging issue of the two being the same: where an innocent transferor conveys title to the transferee under a flawed (including a void or rescinded) underlying contract, whether it is justifiable for the law to empower the transferor to have the title revested at the expense of innocent third-parties such as those pre-existing unsecured creditors of the transferee, and a subsequent transferee (or grantee) to whom the title was transferred on (or collateralised) by the transferee, especially in the event of the transferee's insolvency (making personal monetary awards inadequate for both the transferor and the third-parties).

There is abundant scholarly discussion in favour of and against proprietary restitution in English law.[100] Among those, the most persuasive argument put forward by anti-abstractionists is that the reason why the innocent transferor deserves priority in insolvency over the transferee's pre-existing innocent creditors who had supplied goods to the transferee on credit without receiving the bargained-for payment, is that the transferor had swollen the transferee's assets available for insolvency distribution *and involuntarily* assumed the risk of the transferee's insolvency. In contrast, the creditor had only swollen assets *but voluntarily* assumed the risk of the transferee's insolvency. This looks reasonable at first blush, as a supplier of goods who should have bargained but did not bargain for security interests in order not to be a mere unsecured creditor can be said to deserve the consequence of joining the queue of pari passu distribution.

However, such an anti-abstractionist argument cannot stand up to scrutiny. A defrauded transferor who conveyed title due to a mistake as to the transferee's creditworthiness can also be said to have had legally recognised means to bargain for a functionally secured transaction as a prudent transferor, eg by insisting on a retention of title clause. Moreover, often in commercial practice, not all unsecured creditors can be said to be 'at fault'; some of them, in fact, could not have done anything to avoid the insolvency risk due to the imbalance of the bargaining power between them and the transferee. An unsecured creditor with low bargaining power is therefore in the same *commercially involuntary* position as the defrauded transferor in the sense that, whilst *theoretically* they should have done something about it, *practically* there was nothing they could do to avoid the insolvency risk.

Since the 1980s there has been a long debate among Chinese scholars over whether Chinese law should adopt abstraction[101] or causality.[102] Among those, the strongest anti-abstractionist argument

[98]*Gui Lin v Zhao Baoquan* [2013] Jilin Intermediate People's Court, JZMYZZ No 672; *Huiyang Motor-cycle Sales and Repair Centre v Guo Wuxin* [2014] Huizhou Intermediate People's Court, HZFMYZZ No 330; *Beijing Jinghua Trust and Investment Co Ltd v Liu Jiuhai* [2016] Beijing No 2 Intermediate People's Court, J02MC No 217; *Cheng Minyu v Wei Cailian* [2019] Shenzhen Intermediate People's Court, Y03MZ No 21735; *Wang Shanfu v Geng Ke* [2019] Linyi Intermediate People's Court, L13MZ No 2730; *Beijing Yatong Real Estate Development Co Ltd v Qiao Lei* [2016] Ordos Intermediate People's Court, N06MC No 132; *Daye City Baoan County Urban Construction Investment Development Co Ltd v Liu Jiping* [2021] Guangan Intermediate People's Court, C16MZ No 10;

[99]*Peng Yongbiao v Li Yanzhong* [2014] Shaoxing Intermediate People's Court, ZSSZZ No 500; *Li Hanyang v Zuo Liang* [2017] Nanjing Intermediate People's Court, S01MZ No 1869.

[100]Eg G Jones 'Remedies for the recovery of money paid by mistake' (1980) 39 CLJ 275; S Worthington *Equity* (Oxford: Clarendon Press, 2nd edn, 2006) pp 290–294; Swadling, above n 12; C Rotherham *Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights* (Oxford: Hart Publishing, 2002) pp 77–86.

[101]X Sun *General Principles of Real Rights Law of China* (Beijing: Law Press, 2nd edn, 2009) pp 412–456; S Tian *Study on the Theory of Juridical Act of Real Rights* (Beijing: CUPL Press, 2002) chs 7, 8; Y Ge 'Study on the theory of real juridical act' (2004) 6 Peking University LJ 702; D Xu 'A teleological explanation of the abstraction principle' (2005) 2 China Leg Sci 84.

[102]Liang, above n 29; Y Wang *On the Transfer of Property Rights* (Beijing: Renmin University Press, 2001) pp 311–332; L Wang *Studies on Civil and Commercial Law vol 3* (Beijing: Renmin University Press, 2001) pp 206–226; T Yin *Comments and*

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

is that the 'causality plus bona fide acquisition' model strikes a perfect balance between security of property and security of transaction, in that such model excludes bad faith purchasers while protecting good faith purchasers, so that the latter are prioritised over the transferor as long as all constituent elements of bona fide acquisition are met, whereas the former are not.

The central problem is the accuracy of the line drawn by such a model: whether all those kinds of people who do not have to give way to the transferor under the abstract system deserve to be placed outside the scope of protection under this model. Challenges lie in the types of people who do not count as good faith purchasers because they have paid out value long before acquiring the subject-matter in question but subsequently accepted the subject-matter simply to make good their loss. Specifically, why should the transferee's creditors who have their debts settled by conveyance of the subject-matter originally from the defrauded transferor instead of monetary payment from the transferee be inferior to the defrauded transferor? Similarly, such a model cannot explain why those creditors of the transferee who have not yet materialised their claims by acquiring the ownership of the subject-matter but whose claims could be partially realised by liquidating the same subject-matter do not deserve similar preferential treatment. Put differently, if a subsequent creditor who has paid value to the transferee in good faith deserves protection at the expense of the original transferor, there is no reason why a pre-existing creditor who has paid value to the transferee in good faith should not receive the same level of protection. After all, as argued above, those innocent unsecured creditors who supplied goods on credit to a transferee who later on goes into insolvency are essentially in the same position as the defrauded transferor by the tests of swollen assets and assumption of risk.

Anti-abstractionists may further contend that the 'causality plus bona fide acquisition' model can be improved by expanding the scope of bona fide acquisition to cover the aforementioned types of people, and hence more justified. Nevertheless, this hypothetical reform does not –and is not likely to – occur in China. It should also be noted that English law takes a far narrower approach to good faith purchase than Chinese law. Doctrinally, Chinese law views the bona fide acquisition as an independent type of acquisition by operation of law, especially regarding transactions involving movables.[103] In contrast, doctrinally, English personal property law considers the good faith purchase as a mere exception to the *nemo dat* starting point[104] and only allows such exception to apply in limited scenarios, namely, estoppel,[105] seller remaining in possession after sale,[106] buyer in possession after sale with the consent of the seller,[107] and sale by mercantile agents.[108] Likewise, compared to the position in English land law where the *nemo dat* exception of good faith purchaser without notice has very little role to play in registered conveyancing,[109] the position in Chinese law is that bona fide acquisition is generally possible in transactions involving immovables.[110] An English lawyer may wonder how it is possible for a bona fide acquisition of immovables to take place in a jurisdiction recognising the publicity and public faith of immovable registration, as it seems that a disposition made by the registered proprietor is unlikely to be ultra vires (a prerequisite to trigger bona fide acquisition). While Chinese scholars have disputes over how far a purchaser's duty of investigating information

Thoughts on Property Law Theories (Beijing: Renmin University Press, 2004) 180–235; J Cui 'A positivist analysis of the concept of juridical act of real rights and Chinese civil law' (2004) 2 J Comp L 60.

[103]Chinese Civil Code, arts 311, 313; X Sun and G Zhu (eds) *Commentaries of the Civil Code: Book on Property Rights vol 1* (Beijing: China Legal Publishing House, 2020) p 476; L Chen 'Land registration, property rights and institutional performance in China: progress achieved and challenges ahead' (2014) 44 Hong Kong LJ 841 at 845–848.

[104]For an analysis of good faith purchase in English law, see W Swadling 'Restitution and bona fide purchase' in W Swadling (ed) *The Limits of Restitutionary Claims: A Comparative Analysis* (London: UKNCCL, 1997).

[105]Sale of Goods Act 1979, s 21(1).

[106]Ibid, s 24.

[107]Ibid, s 25; Consumer Credit Act 1974, Sch 4, para 22.

[108]Factors Act 1888, ss 8, 9.

[109]Land Registration Act 2002, ss 11(4)(c), 31, 86(5).

[110]Judicial Interpretation I of the Supreme People's Court of the Application of the Book on Property Rights of the Civil Code of the People's Republic of China (Supreme Court Interpretation No 24, 2020) art 15.

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

beyond the register should go, the consensus is that there do exist scenarios where dispositions made by the registered proprietor are ultra vires and may trigger bona fide acquisition.[111] These scenarios are, for instance, where the registered owner transfers a flat to a bona fide purchaser for value without notice, though: (1) the flat is co-owned by the owner and his spouse (who knows nothing about the transfer in question) due to the community property regime;[112] (2) the owner became the registered proprietor of the flat by a forged conveyance with a previous owner;[113] or (3) another person has acquired the flat by virtue of a judgment order, though that person has not yet made an application to the immovable registry for alteration.[114] Therefore, based on the comparison between the two jurisdictions regarding the scope of good faith purchase, if the 'causality plus bona fide acquisition' model is not justified in Chinese law, more likely than not, it is not justified in English law a fortiori.

The above paragraphs have raised critiques over the two prevailing pro-causality arguments by English and Chinese lawyers respectively. One may still point out that, just because the principle of causality lacks effective justification does not necessarily mean that the principle of abstraction can be justified self-evidently. In response to such a point on negative justification, it is submitted that the 'detecting opportunity' argument can serve as a positive justification for abstraction. Specifically, the transferor should be in a position worse than third parties because it is usually the transferor, not third parties, who have a better opportunity of detecting the flaw in the underlying basis between him and the transferee. In the typical scenario where the transferor conveys title to the transferee upon a flawed underlying contract, any third party who subsequently acquires such title or claims to realise his pre-existing personal right from such title will usually know nothing of the underlying contract between the transferor and the transferee, not to speak of the knowledge of anything flawed in such a contract. Admittedly, however, sometimes the transferor did not know the flaw in the contract either – for instance, where the transferor is a defrauded vendor who was fraudulently induced to enter into the contract of sale. Even in such cases, the transferor still had a better chance than the third-party acquirers and creditors to detect the flaw, because it is the transferor who had gone through the negotiation process with the transferee.

The 'detecting opportunity' argument in a way follows a broad idea in English law that 'wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it'.[115] Because it is the transferor who, by conveyance of the property right in question, enables the transferee to pass it on to third parties or to make it available for distribution among third parties not the other way round, it should be the transferor, and not third parties, who should sustain the potential loss, ie the risk of the transferee being impecunious. Notably, a similar statement can be found in the discussion of whether the wider or the narrower version of change of position (the need for detrimental reliance) is in the law of unjust enrichment. In a hypothetical example given by Lord Burrows extrajudicially, an innocent bank mistakenly pays money to an innocent recipient, and the money is stolen immediately after receipt. In explaining the reason why the recipient should be allowed to raise the change of position defence against the bank's claim for restitution of unjust enrichment, his Lordship says:[116]

> Even though the subsequent loss of the benefit cannot be blamed on the bank, the fact remains that the bank started the chain of events by first making the mistaken payment.

[111]J Cui *Commentaries of the Chinese Civil Code: Book on Property Rights vol 1* (Beijing: Renmin University Press, 2020) pp 503–507; cf X Cheng 'Error of right issues of immovable register and bona fide acquisition of immovables' (2017) 2 Jur 44.

[112]Chinese Civil Code, art 1062.

[113]Ibid, art 143 item 2.

[114]Ibid, art 229.

[115]*Lickbarrow v Mason* (1787) 2 TR 63, at 70; 100 ER 35, at 39 (Ashhurst J). Although such statement, just like many other famous statements, was sometimes criticised as being too wide to represent the law, it is nevertheless a guideline in viewing conflict of interests in three-party cases.

[116]A Burrows *The Law of Restitution* (Oxford: Oxford University Press, 3rd edn, 2011) p 529.

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

Given that the Chinese Civil Code also recognises the change of position defence,[117] with a value judgement similar to Lord Burrows' statement quoted above,[118] the 'detecting opportunity' argument should also work in Chinese law.

Conclusion

Just because the homeland of separation and abstraction is Germany does not mean that these two concepts cannot be borrowed as a useful tool for comparative property law research. Indeed, if we reduce these two concepts to two questions (ie whether the validity of the underlying contract and that of the conveyance depend on their own determinant rules, and whether any vitiating factor in the underlying contract infects the validity of the conveyance) respectively, we will find that this is what comparative lawyers have been doing for the past three decades. Nevertheless, scholars sometimes caused confusion by mistakenly mingling the aforementioned two questions into one, or mistakenly blurred the contrast between 'intent plus versus intent alone' models and the contrast between 'separatist versus unitary' approaches.

Revisiting property transfer theories and practices shows that English law has made at least three contributions to the comparative legal community. First, by recognising a separate intent to convey in various methods of conveyance, the English law of sale of goods infers how a system taking the 'intent alone' model can retain the possibility of going abstract. Secondly, English law demonstrates how a jurisdiction can be separatist and abstract without conceptually recognising 'juridical act' and 'real agreement'. Thirdly, English law elaborates on how a jurisdiction can straddle causality and abstraction; more specifically, the system is causal where the vitiating factor is induced mistake, whereas it is abstract where the vitiating factors are spontaneous mistake, incapacity, illegality, and informality. Chinese law has also made two contributions. First, a conventional interpretation shows how a jurisdiction can claim itself, albeit counterintuitively, to be separatist and unitary at the same time, which is in reality 'intent plus' and unitary. Secondly, it demonstrates how a jurisdiction can gradually shift from the unitary approach to the separatist approach by legislative changes over the past four decades as well as judgments in recent years.

Turning to the way forward normatively, the prevailing justification of causality among English lawyers – namely involuntary assumption of risk plus swollen assets – neglects the commercial imbalance that those third-party unsecured creditors with low bargaining power can also be said to have involuntarily assumed the risk of the transferee's insolvency, the same way as the defrauded transferor involuntarily assuming the same risk. The prevailing justification of causality among Chinese academics – namely the argument of 'causality plus bona fide acquisition' – cannot explain why there is any difference in terms of morality between the transferee's subsequent creditor (ie a good faith purchaser who gives value to the transferee in exchange of the goods in question after the conveyance from the original transferor and the transferee is done) and the transferee's pre-existing creditor (ie a person who has already given value to the transferee in credit before the conveyance from the original transferor and the transferee and subsequently accepts the goods in question by way of accord and satisfaction to discharge the pre-existing debt, or subsequently applies for the execution of the judgment debt by way of a compulsory sale of the goods in question) so that the system excludes the latter while including the former into the scope of preferred protection over the transferor. In contrast, the 'detecting opportunity' argument submitted in this paper, which has its roots in commercial law and has application in the law of unjust enrichment, can help to explain why abstraction is more justified than causality.

Apart from the aforementioned contributions made by English and Chinese laws to comparative law in terms of property transfer, there are aspects that English law and Chinese law can learn

[117]Chinese Civil Code, art 986.

[118]Z Wu and W Swadling 'Unjustified enrichment in the Chinese Civil Code: questions from the common law' (2021) 29 APLR 402 at 415–417.

https://doi.org/10.1017/lst.2022.36 Published online by Cambridge University Press

from each other. A lesson that English law may draw from Chinese law is that separation and abstraction are two radically different principles and hence should not be used interchangeably in an oversimplified way, as many scholars did in the past. The reason Chinese law does better in this respect is possibly because, as a jurisdiction whose private law is mainly inspired by continental European jurisdictions, Chinese scholars naturally stay close to great debates among European civilian lawyers, separation and abstraction being one of those debates. A lesson that Chinese law may draw from English law is that when carrying out justification debates regarding abstraction versus causality, one should better focus on the balance of interests between specific types of parties (ie the contest between the transferor and third-party creditors/successors of the transferee), instead of making sweeping arguments at a macro level, such as that abstraction is unfair to the transferor, or that causality operates more coherently with the doctrine of bona fide acquisition. English law does better in this respect because of its individualistic legal culture compared to the collectivist legal culture in China.

Cite this article: Wu Z, Chen L (2023). Revisiting property transfer theory: English law and Chinese law compared. *Legal Studies* **43**, 259–277. https://doi.org/10.1017/lst.2022.36