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Transfer by Contract in Kant, Hegel, and Comparative Law

Stéphane Sérafin

Introduction

Transfer theory, the idea that posits that the binding force of contracts can be attributed to the transfer of some right from the promisor to the promisee, has a long history within the natural law tradition.[1] In recent years, this theory has been suggested as a possible answer to the problem posed by the entitlement to expectation damages for breach of contract, which Fuller and Perdue famously argued could not be justified on the basis of traditional private law principles alone.[2] As Helge Dedek has argued, however, traditional accounts of contract as a transfer of rights have often suffered from at least one major flaw, namely that they conceived of contract as transfer through analogy to the transfer of property rights, without truly explaining—let alone justifying—how these rights were transferred in the first place.[3]

It is towards resolving this difficulty, Dedek suggests, that the German philosopher Immanuel Kant directed his discussion of contract in *The Metaphysics of Morals*.[4] Unlike the earlier transfer theorists, who had begun with an account of property, Kant's innovation was to start with an explanation of contract as a transfer of *in personam* rights enforceable between the parties *before* explaining the transfer of property rights potentially enforceable against everyone.[5] This approach distinguishes Kant not only from earlier transfer theorists, but also from the later version of the theory put forward in Georg Wilhelm Friedrich Hegel's *Philosophy of Right*.[6] Indeed, Hegel explicitly rejects Kant's insistence on the

1. See Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*, translated by Francis W Kelsey (Clarendon Press, 1925) bk 2 at ch 11, para 4.
2. LL Fuller & William R Perdue Jr, "The Reliance Interest in Contract Damages: 1" (1936-1937) 46 Yale LJ 52 at 62; with respect to the use of transfer theory as an alternative explanation for the expectation damages rule, see most notably Peter Benson, "Contract as a Transfer of Ownership" (2006-2007) 48 Wm & Mary L Rev 1673 at 1674-75, 1693 [Benson, "Contract as Transfer"].
3. Helge Dedek, "A Particle of Freedom: Natural Law Thought and the Kantian Theory of Transfer by Contract" (2012) 25 Can J L & Juris 313 at 319-20; here, Dedek refers to the arguments put forward by Theodor Schmalz, who argued that natural law scholarship had confused the acceptance of the promise with the physical acceptance of a thing, when a proper transfer-based theory of *contract* would require that the effects ostensibly attached to the acceptance of a promise be explained on their own merits: see Theodor Shmalz, *Reines Naturrecht* (Königsberg: Nicolovius, 1792) at 63f, para 96.
4. Dedek, *ibid* at 337; Immanuel Kant, *The Metaphysics of Morals*, translated by Mary J Gregor, 2nd ed (Cambridge University Press, 1996).
5. Dedek, *supra* note 3 at 339.
6. Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, translated by TM Knox (Oxford University Press, 1967); it is primarily on Hegel, rather than Kant, that Benson bases his own account of contract as transfer: see Benson, "Contract as Transfer", *supra* note 2 at 1723; see also generally Peter Benson, "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory" (1988-1989) 10 Cardozo L Rev 1077.

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division between *in rem* and *in personam* rights.[7] Like the earlier natural law scholars, Hegel's account of abstract right also begins with the acquisition of property, which then forms the basis for his transition to the transfer of rights effected by contract.[8]

These differences between Kant and Hegel's versions of transfer theory are not without theoretical—and practical—consequence. As this paper aims to show, each of their conceptions of contractual transfer finds its respective application in one of two major real-world approaches to the intersection between contractual obligation and the transfer of property rights. Namely, these are the approaches embodied by the German legal system, according to which the transfer of property occurs independently of the original contractual obligation to transfer it, and the French legal system, in which property is transferred by the contract alone. As I will argue, only the German approach and Kantian transfer theory properly conceive of contract as an obligation in the full sense of the term. By contrast, both the French approach to contractual transfer and Hegelian transfer theory reveal a conception of contract centred on the transfer of property. As a result, the underlying contractual obligation faces a risk of total erasure.

My argument will proceed in three parts. Part I will begin by examining the two main models of transfer of property by contract—that is, those provided by French and German law, respectively. As I will argue, the German model of transfer by contract is a proprietary one, in the sense that it prioritises the *erga omnes* dimension of the property rights being transferred by subordinating them to strict publication requirements. By contrast, the French model is properly contractual, in that it is animated primarily by a desire to give effect to the intent of the parties even with respect to the transfer of property rights.

Part II of this paper will turn to the transfer theories put forward by Kant and Hegel, outlining their respective relationships with German and French law. Here, I will argue that Kant's transfer theory presents a strong demarcation between contract and property rights that is largely reminiscent of German law. As in German law, his theory requires that contract must be explained first—and separately—from the passing of the *in rem* rights themselves. By contrast, Hegel's transfer theory is largely consistent with the position taken in practice by French law. Accordingly, it is possible to explain the binding force of contract through the transfer of property itself.

Finally, Part III of this paper will attempt to relate the insights provided by both Kantian and Hegelian transfer theories to these respective real-world approaches to transfer by contract. While the German conception of transfer of property by contract is a proprietary one, it also allows for the emphasis on the obligational nature of contract itself. By contrast, the French conception of

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7. Hegel, *supra* note 6 at para 40.
8. See especially *ibid* at para 71, where Hegel discusses the transition from property to contract; for his part, Grotius presents the perfect, enforceable promise as "manifested by an outward sign of the intent to confer the due right upon the other party", which "has an effect similar to the alienation of ownership": see Grotius, *supra* note 1.

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transfer by contract—though following a contractual model that gives primacy to the parties' intent—paradoxically undermines the centrality of agreement in favour of a view of contract that largely amounts to a means of transferring property. By way of conclusion, I will then present some brief comments on the difficulty presented by the Anglo-American common law within this proposed classification scheme.

I. Two Models of Transfer by Contract in the Civilian Legal Tradition

Comparative law scholarship has generally divided the modern civilian legal tradition into two major sub-families. On the one hand are those legal systems that have followed the French *Code civil* of 1804. On the other, we find those that follow the German civil code, the *Bürgerliches Gesetzbuch* (the "BGB") of 1900.[9] Broadly speaking, each of these sub-families presents its own approach to the transfer of property by contract. Those systems that follow German law distinguish the contractual obligation from the transfer of property, with the latter being made subject to the additional requirement that it be completed in a way that is publicly knowable.[10] By contrast, legal systems that follow the French *Code civil* conceive of contract as operating an immediate *in rem* transfer rights alongside the creation of *in personam* obligations.[11]

As I hope to show in this part, these differences are properly the concern of legal theory, not just legislative choice. Indeed, they represent two alternative solutions to an apparent dilemma, namely the one presented by the possibility that parties may bilaterally agree to transfer rights that are potentially binding against the world at large.[12] My argument in this respect will proceed in two parts. First, I will consider the German solution to the transfer of property by contract, arguing that this model corresponds to a properly proprietary conception of the transfer of these rights. I will then contrast this position with the one taken in French law, which I will argue presents a contractual model of property transfer—that is, a model in which mutual consent is sufficient to effect a transfer of property rights.

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9. This classificatory scheme reflects the particularly strong historical importance of the French and German codifications; for present purposes, however, it is worth noting that some continental jurisdictions present hybrid approaches to transfer by contract, as would appear to be the case of Austria: see Christian von Bar and Ulrich Drobnig, eds, *The Interaction of Contract Law and Tort and Property Law in Europe* (Sellier European Law Publishers, 2004) at para 483.

10. In this respect, the transfer of property can be said to "follow the same pattern" as its original acquisition: see Joachim Zekoll & Mathias Reimann, eds, *Introduction to German Law*, 2nd ed (Kluwer Law International, 2005) at 234.

11. Henri Mazeaud et al, *Leçons de droit civil*, t 2, vol 2, 8th ed by François Chabas (Montchrestien, 1994) at para 1612.

12. The apparent problem created by unilateral acquisition of *in rem* rights with *erga omnes* effects is discussed, e.g., in NW Sage, "Original Acquisition and Unilateralism: Kant, Hegel and Corrective Justice" (2012) 25 Can J L & Juris 119; see also Arthur Ripstein, "Private Order and Public Justice: Kant and Rawls" (2006) 92 Va L Rev 1391 at 1423-24; Ernest Weinrib, "Poverty and Property in Kant's System of Rights" in Corrective Justice (Oxford University Press, 2012) 263 at 279-80; as Alan Brudner seems to recognise, the same basic difficulty applies to contractual transfers as well: see Alan Brudner with the collaboration of Jennifer M Nadler, *The Unity of the Common Law*, 2nd ed (Oxford University Press, 2013) at 127.

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A. The Property Model in German Civil Law

Beginning with the approach taken by German law, it is worth noting from the outset that the distinction it draws—that is, the distinction between the contract as an obligation to transfer property, and the actual transfer of property itself—is largely reminiscent of that recognised by Roman law.[13] Indeed, most scholars understand Roman law to have drawn a similar distinction between the obligations created by contract, on the one hand, and the transfer of property, on the other.[14] In the case of a sale, the only right that could be conferred upon a purchaser in Roman law was thus a personal one for breach of performance—by which was meant, in effect, failure to physically deliver the thing in question.[15]

In other words, Roman law can be said to have obeyed a largely proprietary conception of the transfer of property by contract, in which the contract itself was never sufficient on its own to pass title from a vendor to a purchaser. The actual transfer of property rights required that the parties comply with an entirely separate mechanism—in most cases the *traditio*, by which the property to be transferred was delivered to its intended recipient.[16] To the extent that it conforms to this general Roman approach, German law can thus be understood to reflect a proprietary conception of transfer by contract in its own right, thereby limiting what the parties to a contract can accomplish by the effect of their consent alone.

An agreement to transfer property under German law will thus require an additional step in order to actually transfer the property in question. In the case of movable property, this means essentially complying with the Roman law notion of *traditio* by delivering the property in question to the person acquiring it.[17] As article 929 of the BGB, which deals with the transfer of movable property, provides:

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13. As Reinhard Zimmermann explains, "Roman law was an actional law… only where there was a remedy was there a right", adding that "[t]his remedy, in the case of obligations, was always an actio in personam: the plaintiff was not asserting a relationship between a person and thing… but rather a relationship between two persons": see Reinhard Zimmermann, *The Roman Law of Obligations* (South Africa: Juta & Co, 1996) at 6-7.

14. This reading is usually based on Dig 19.1.11.2 (Ulpian); it can be contrasted with the view expressed in FH Lawson, "The Passing of Property and Risk in Sale of Goods—A Comparative Study" (1949) LQ Rev 352 at 360 (arguing that since Roman law recognised the passing of risk immediately upon the perfection of a contract of sale, it must have preceded French civil law and the common law in granting some proprietary effects to contracts).

15. Zimmermann, *supra* note 13 at 278.

16. Classical Roman law recognised three forms of conveyance, namely the *traditio*, *mancipatio*, and the *in iure cessio*; besides the latter category, which can be understood as essentially a court order recognising the transfer of any type of property, the *mancipatio* was a special form of ceremonial transfer required for particularly valuable things (*res mancipi*): see G 2.14a, 2.22.

17. The categories "movable property" and "immovable property" are largely analogous to the Anglo-American common law notions of "personal property" and "real property", respectively, though civilian legal systems have tended to emphasise unitary approaches to the transfer of both types of property: see Max Rheinstein, "Some Fundamental Differences in the Real Property Ideas of the 'Civil Law' and the Common Law Systems" (1935-1936) 3 U Chi L Rev 624 at 635 (explaining that the "outspoken end of the German codifiers was to assimilate land transactions as far as possible to the transactions in chattels or in stocks").

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> For the transfer of the ownership of a movable thing, it is necessary that the owner delivers the thing to the acquirer and both agree that ownership is to pass. If the acquirer is in possession of the thing, agreement on the transfer of the ownership suffices.[18]

Following this provision, only a real contract, in which agreement *and* delivery have occurred at the same time, can ever have the effect of properly transferring movable property.[19] Indeed, German law goes so far as requiring an *additional* real contract to complete the transfer where the original agreement between the parties is purely executory.[20] Where the intended acquirer is already in possession of said property, however, the existence of an agreement between the acquirer and the original owner is sufficient to constitute such a contract, and thus effect a valid transfer of the property in question.

The requirement of a real contract is even more explicit in the approach that German law takes towards the transfer of immovable property, which instead mandates compliance with title registration. While different from delivery, this requirement is meant to ensure essentially the same thing, namely that the transfer of property is completed in a way that is at least knowable by all parties potentially concerned. As article 873 BGB, which sets out the requirements pertaining to immovable property transfers, provides:

> (1) The transfer of the ownership of a plot of land, the encumbrance of a plot of land with a right and the transfer or encumbrance of such a right require agreement between the person entitled and the other person on the occurrence of the change of rights and the registration of the change of rights in the Land Register, except insofar as otherwise provided by law.
>
> (2) Before the registration, the parties are bound by the agreement only if the declarations are notarially recorded, or made before the Land Registry, or submitted to the Land Registry, or if the person entitled has delivered to the other person an approval of registration that satisfies the provisions of the Land Register Code [Grundbuchordnung].[21]

As per the provision above, the agreement to perform the transfer of immovable property is not binding unless the parties have at least taken steps towards the registration of the property transfer. German law thus provides the parties little choice but to conclude two separate contracts, only the second of which actually results in the transfer being completed. The first amounts to an executory agreement that binds the seller to transfer the property in question at some point in the future.[22] The second, real contract is then concluded

18. Art 929 BGB; this particular provision can be contrasted with art 433 BGB, according to which "the seller of a thing is obliged to deliver the thing to the buyer and to procure ownership of the thing for the buyer".

19. Zekoll & Reimann, *supra* note 10 at 234; the notion of a "real" contract, which is shared to various extents by all modern civilian legal systems, can be traced back to the Roman notion that referred to a contract concluded by one party's delivery of property: see Inst 3.14.

20. German law refers to the need for this second, properly dispositive contract as the "*Trennungsprinzip*"—the separation principle.

21. Art 873 BGB.

22. Art 433 BGB.

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at the same moment that registration—and thus the transfer of the immovable property—occurs.[23]

In other words, German law requires that the transfer of both movable and immovable property be accomplished by completing what are essentially formalities pertaining to the publication of rights. In both cases, a purely executory contract is never sufficient to accomplish this, and will need to be supplemented (where such an executory contract has intervened between the parties) by an additional agreement to actually transfer the property by complying with the requisite transfer requirement—that is, with delivery in the case of movable property, and registration in the case of immovable property.

This approach to the transfer of property by contract offers at least two distinct advantages, one practical and the other theoretical. On the practical side, its main advantage is to render the actual transfer of property separate from the original contract, and thus potentially valid even if the latter is struck down.[24] This approach bears at least superficial similarities to the Torrens title registration systems that have been adopted across much of the Commonwealth.[25] In fact, it is arguable that at least two of the main innovations of Torrens title systems—that is, the guaranteed security of title and the purging of any existing defects in the title chain—effectively require the recognition of something like the German separation and abstraction principles.[26]

Meanwhile, the main theoretical advantage presented by the German approach to the transfer of property by contract lies in its being effectively *proprietary*, and thus fully cognisant of the *in rem* dimensions of the property being transferred. Accordingly, the existence of an agreement does not dispense with the need to account for the potentially *erga omnes* effects of the transfer itself. Just as these effects require that the unilateral acquisition of property be accompanied by an

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23. In the case of immovable property, German law goes even further by conceptualising the act of registration as effecting the transfer of title independently of the agreement to register: see Zekoll & Reimann, *supra* note 10 at 236; accordingly, it is possible to speak of German law requiring three separate steps to effect the transfer of immovable property, namely the agreement to purchase and sell, and the agreement to transfer, and the actual transfer by registration.

24. Zekoll & Reimann, *supra* note 10 at 236 (explaining that "all changes of rights in land… do not depend on an underlying obligatory contract as far as their existence and validity is concerned"); this is known in German law as the *Abstraktionsprinzip*—the abstraction principle; in theory, this principle also applies to the validity of transfers of movable property, which remains independent of the original contract by which the parties undertook to perform their respective obligations: see Mazeaud et al, *supra* note 11 at para 1619.

25. See, e.g., Ontario's *Land Titles Act*, RSO 1990, c L.5 and New Zealand's *Land Transfer Act 1952* (NZ), 1952/52; at least a few authors have argued that the South Australian inventor of the system, Sir Robert Richard Torrens, effectively copied the approach to title registration that was already being practiced in Hamburg: see the discussion in Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (Osgoode Society for Legal History, 2008) at 27-30.

26. The first of these innovations is encapsulated by the so-called "mirror" principle, according to which the register book, not the purchase agreement, constitutes the source of the owner's title to land, while the latter refers to the effect of the Torrens register as a "hospital" that cures existing defects: see *ibid* at 10, 12; the argument that these principles require the adoption of the German approach to transfers by contract is proposed in Gaële Gidrol-Mistral & Thuy Nam Tran Tran, "Publicité des droits et prescription acquisitive : des liaisons dangereuses?" (2016) 46:2 R Gen D 303 at 309.

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objective demonstration of the intention to acquire it, so too must an acquisition by way of agreement be manifested in a way that is knowable by all parties who may be concerned—even those who are outside the agreement.[27] In principle, German law thus treats this secondary form of acquisition in the same way as the unilateral acquisition of ownerless property.[28]

By contrast, the main disadvantage of the German model is a mirror image of its main benefit, namely that it limits what can actually be accomplished by way of contract. Indeed, the parties to a contract can never actually transfer ownership or even lesser property rights except through compliance with either delivery or registration, as the case may be. This poses an important theoretical difficulty from the agreement-based perspective of French law, which conceives of the contract as essentially a law devised by the parties themselves.[29] It also creates a similar problem from the perspective of property law itself, in the sense that these ostensibly public law requirements appear at first glance to restrain the free disposition of property.[30]

Beyond these more theoretical issues, German law itself also recognises a number of practical difficulties that are also created by this arrangement. Accordingly, it allows the parties to a transfer of movable property—though not immovable property—to stipulate that delivery has been effected even if it has not actually occurred in practice.[31] In so doing, the parties to the transfer of movable property are thus allowed to effectively circumvent compliance with requisite formalities in a manner that echoes similar developments in the later stages of Roman law.[32] However, the broader theoretical framework remains intact, and the parties continue to be constrained in the manner and circumstances in which they can properly stipulate the completion of delivery in this way.

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27. Zekoll & Reimann, *supra* note 10 at 234.

28. In respect of unilateral acquisition, art 958, para 1 BGB provides that "[a] person who takes proprietary possession of an ownerless movable thing acquires the ownership of the thing"; art 854, para 1 BGB, for its part, clarifies that "[p]ossession of a thing is acquired by obtaining actual control of the thing".

29. Art 1134, para 1 CcF (1804) provided that "[a]greements lawfully entered into take the place of the law for those who have made them"; almost identical text is now found in art 1103 C Civ.

30. Art 544 C Civ defines the right of ownership (*la propriété*) as "the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations"; this definition largely reproduces the three categories of right that medieval commentators had derived from the Roman law notion of *dominium*, namely the *usus*, *fructus* and *abusus*.

31. Art 930 BGB; this article recognises that property can be transferred by granting the transferee "indirect" possession, a notion that is defined at art 868 BGB as the possession that the owner retains even while another has a temporary entitlement to the property by way of a usufruct, pledge, etc.; another way of accomplishing such a transfer without actual delivery is provided by art 931 BGB, which allows the transferor to complete the transfer of property by assigning to the transferee the right to claim delivery from a third party.

32. Such a development occurred with respect to the Roman *stipulatio*, for example, which was originally a verbal contract that required the promisee to ask a specific question, and the promisor to offer a specific response—and thus required that the parties be in physical proximity to one another at the time that the promise was made; over time, it became usual to record that the question had been asked and received the proper response in a written agreement, even if this had not actually taken place: see Zimmermann, *supra* note 13 at 80.

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B. The Contractual Model in French Civil Law

Having argued that German law takes a largely proprietary approach to the transfer of property by contract—according to which the actual transfer of property is subordinated to the completion of external, publicly knowable formalities—my focus now shifts to the second of the two major models of transfer by contract known in the civilian legal tradition. This second model, which is represented first and foremost by the approach taken in the French legal system, can instead be understood to emphasise the contractual dimensions of the transfer of property. In this respect, it largely follows the agreement-centered approach of the early modern natural law scholars, who, having established the freedom to alienate one's property as an essential aspect of ownership, saw contract as the means through which such an alienation would normally proceed.[33]

Accordingly, some French legal scholars have positioned their own legal system, based on the *Code civil* of 1804, between "ancient" legal systems, on the one hand, and "modern" legal systems, on the other.[34] What is implied by this, at least in respect of the transfer of property by contract, is that modern French law adopts a contractual model that differs both from what came before it, and from those legal systems that later emerged separately out of the original Roman sources. The former is comprised of both Roman law and the customary laws that governed parts of France until the French codification in 1804.[35] The latter, meanwhile, refers to those legal systems that follow the German BGB, itself strongly influenced by the German historical school's work on Justinian's *Corpus Iuris Civilis*.[36]

The main difference between these respective approaches—that is, between the contractual model exemplified by French law and the proprietary model exemplified by both Roman and German law—is that French law understands all contracts, be they real or executory, as transferring *in rem* rights alongside, but in a manner that remains distinct from, the conferral of *in personam* rights under the contract itself. This particular feature of French law is generally called the "*solo consensu*" or consent-only principle.[37] The default rule it lays out is one in which property is transferred to its acquirer by contract as soon as it is possible

33. As Grotius put it, "[a]fter the introduction of ownership it is of the law of nature that men, who are the owners of property, should have the right to transfer the ownership, either in whole or in part", adding that "this right is present in the nature of ownership, at least of full ownership": see Grotius, *supra* note 1, bk 2 at ch 6, para 1.

34. See, e.g., Mazeaud et al, *supra* note 11 at para 1613.

35. Pre-revolutionary France lacked a single, unified legal system; some parts of the country followed Roman law, while others followed custom that was largely influenced by Germanic sources: see *ibid* at 1615.

36. Members of the historical school are often called "pandectists", in that they emphasised the Roman roots of the German legal system; although the relationship of the historical school with natural law can viewed as antagonistic in many respects, there is an interesting case to be made that members of the historical school pursued a particular natural law theory of their own: see Murray Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (Kluwer Law International, 2003) at 134-37.

37. Art 1138, para 1 CcF (1804) provided that "[a]n obligation of delivering a thing is complete by the sole consent of the contracting parties"; the modern equivalent is found at art 1196, para 1 C Civ.

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for it to do so—usually meaning the moment that the contract itself is concluded and *in personam* rights arise between the parties, without the need to accomplish additional formalities.[38] Since the transfer of property occurs *by* contract, however, the parties are always free to determine when property passes in their agreement. They are not bound by the public requirements of property rights in the same way that they would be under the German law.[39]

That being said, the French approach presents an important complication in respect of the ability to actually *enforce* the property rights transferred by contract against third parties. Indeed, the ability to enforce these rights outside of the immediate transaction is subject to essentially the same formalities as German law—that is, the delivery requirement for movable property, and registration for immovable property. As article 1198 of the *Code civil* provides:

> When two successive acquirers of the same corporeal movable claim their right from the same person, the one who has taken possession of this movable first is preferred, even if his right is posterior, on condition that he is in good faith.
>
> When two successive acquirers of rights pertaining to the same immovable claim their right from the same person, the one who has first published his title of acquisition inscribed in authentic form on the land register is preferred, even if his right is posterior, on condition that he is in good faith.[40]

In other words, while French law purports to fully recognise the transfer of property by agreement alone, it can properly be said to apply only a *relative* version of this principle once the above exceptions are taken into account. Rather than constituting a full *in rem* right in the Hohfeldian sense, the property right being transferred is thus closer to an *in personam* one in that it is not fully enforceable against third parties until the requisite formalities are completed.[41] Practically speaking, this means that the differences between the German and French models of property transfer by contract are not as great as they might first appear—even as there remain important theoretical *and* practical differences between these two models of property transfer by contract.

Beginning on the practical side, the relative effects of the transfer of property in French law are limited to *subsequent acquirers* of the property rather than

38. In principle, the seller's obligation to transfer property in a contract of sale is thus be performed at the same moment that the agreement is concluded, without the seller accomplishing any particular act; in such a case, the only obligations that strictly matter from the perspective of the seller are those ancillary to the transfer of property, including the obligation to actually deliver the thing in question: see Marcel Planiol, *Traité élémentaire de droit civil*, t 2, 9th ed (Librairie générale de droit & de jurisprudence, 1923) at para 1447.

39. The possibility of deferring the transfer of property by agreement is now explicitly codified in art 1196, para 2 C Civ; beyond this, French law will recognise an automatic deferral of the transfer in a number of exceptional circumstances, the most notable of which are cases where a contract provides for the sale of as-yet unascertained goods: see Mazeaud et al, *supra* note 11 at para 1618.

40. Art 1198 C Civ (author's translation); taken together, arts 1454, 2941 CCQ largely reproduce the same effects in Quebec civil law.

41. The ability to enforce the transfer of property against third parties is part of what French authors call the notion of "*opposabilité*", according to which the legal result brought about by contract can be set up by and against third parties to the original transaction: see Jacques Ghestin et al, *Les effets du contrat*, 3rd ed (LGDJ, 2001) at para 678.

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the world at large. This means that between two persons who have successively acquired property from the same person, the one who obtains validly enforceable title is thus the first to acquire physical possession or to register it, as the case may be.[42] In all other cases, French law maintains the general rule that the contract operates a full transfer of property with the end result being that the relative effect of these transfers constitutes an exception that is valid only against certain classes of persons.

The Supreme Court of Canada highlighted that this formula presents a practical difference with the German model—in which the acquisition of rights is in general made subject to compliance with certain formalities—in *Ostiguy v Allie*.[43] A majority of the court in that case, with Justice Côté dissenting, concluded that the reforms leading to the adoption of the new *Civil Code of Québec* in 1994 had not undermined the application of the French model of transfer by contract in that Province. Accordingly, the subsequent sale and registration of the property at issue had not displaced the right acquired through prescription, contrary to the argument that had been put forward on the basis of the German model of transfer by contract.[44] In this respect, the result appears to echo the argument put forward by at least one Quebec author, according to which the provision of a guarantee against such title defects at the moment of sale may be fundamentally incompatible with the French approach to property transfer.[45]

Moving beyond these practical concerns, there are also important theoretical problems with the French model of transfer by contract itself. Indeed, while this model corresponds to robust conceptions of both freedom of contract and the freedom to dispose of property, it also makes it difficult to properly explain—let alone justify—the limits that must be imposed on these principles in order to ensure the security of transactions. This is especially true for the requirement that transfers of immovable property be registered in order to be enforceable against subsequent acquirers, which was absent from the original French codification in 1804. The publicity requirement in respect of these transfers did not fully emerge until midway through the nineteenth century, and even then was not incorporated within the *Code civil* until the above provision was added in 2016.[46]

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42. The exception is that the subsequent purchaser must acquire possession in good faith; according to art 550, para 1 C Civ, this means that he must possess "as owner, under an instrument of transfer of whose defects he does not know"; German law provides for similar exceptions at arts 892, 932 BGB, while the Anglo-American common law equivalent is the notion of equitable notice preserved by many Torrens title registration systems; on this last point, see, e.g., Douglas C Harris & May Au, "Title Registration and the Abolition of Notice in British Columbia" (2014) 47:2 UBC L Rev 535 (comparing the approach taken under British Columbia's *Land Title Act*, RSBC 1996, c 250, s 29(2) to that of other jurisdictions).

43. 2017 SCC 22.

44. *Ibid* at paras 32, 52; acquisitive prescription, which is roughly analogous to the Anglo-American common law notion of adverse possession, is defined by art 2910 CCQ as "a means of acquiring a right of ownership, or one of its dismemberments, through the effect of possession"; a similar definition is found in art 2258 C Civ.

45. Gidrol-Mistral and Tran, *supra* note 26 at 309.

46. See *Loi du 23 mars 1855 sur la transcription hypothécaire*, JO, 20 August 1944, 55; this publication regime was later replaced by the *Décret nº 55-22 du 4 janvier 1955*, JO, 4 January 1955, 346; for its part, the current art 1198 C Civ owes its existence to the *Ordonnance nº 2016-131 du 10 février 2016*, JO, 10 February 2016, 35, s 2.

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With respect to movable property, the rule now contained within the *Code civil* originated with the 1804 version of the Code itself.[47] As such, various alternative explanations have been suggested for its existence beyond simply reflecting a legislative choice to require publicity through delivery. One particularly popular view is that the rule recognises the immediate prescriptive acquisition of the property right in favour of its first possessor, according to the maxim "in matters of movables, possession is equivalent to title".[48] However, even this argument is largely unsatisfactory.[49] What the French model of property transfer by contract appears to leave us with, then, is a conception of transfer in which the agreement itself is sufficient to pass property, subject to a few practical amendments imposed by positive law. Unlike in German law, there is no requirement that the parties to a contract recognise the existence of a public dimension to property when transferring it between themselves.

II. Transfer by Contract in Kant and Hegel

The precise nature of the relationship between obligation and property is perhaps one of the most enduring puzzles that confronts all modern legal systems. According to the traditional account recognised to some extent by both common law and civilian legal systems, contracts are understood to grant an *in personam* right to promisees that only they are properly entitled to invoke against promisors. Property, meanwhile, confers upon whoever happens to be the owner of a thing the right to claim it against anyone who happens to be in possession.[50]

That these categories are conceptually useful is undeniable. As I hope to show below, the relationship between contract and *in personam* right, on the one hand, and property and *in rem* right, on the other, also provides the main point of demarcation between Kant and Hegel's transfer theories of contract.[51] With this end in mind, I will begin by exploring Kant's account of contractual transfer—as a transfer of *in personam* rights—that serves as the basis for his separate account of the transfer of property rights. I will then turn to Hegel's understanding of

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47. Art 1141 CcF (1804) provided that "Where a thing which one is bound to transfer or deliver to two persons successively is purely movable, the one of the two who has been put in actual possession is preferred and remains owner of it, although his title is subsequent as to date, provided however that the possession is in good faith".

48. This maxim is codified at art 2276 C Civ.

49. See Mazeaud et al, *supra* note 11 at para 1540; as the author explains, the very notion of prescription implies a passage of time, which seems to contradict the possibility of such a right arising immediately upon the subsequent acquirer's taking of possession.

50. See generally Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1916-1917) 26 Yale LJ 710; the expression "*in personam*" is also used in a well-known passage in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*, [1915] AC 847 at 853, where Viscount Haldane invoked it as part of his justification for the common law doctrine of privity of contract.

51. In making this argument, I am aware Arthur Ripstein has argued that Kant's theory of contract does not properly rest on the notion of "transfer": see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009) at 113; his basis for reaching this conclusion, however, appears to be precisely the fact that Kant does not subsume the transfer of contractual rights within the transfer of property.

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transfer theory, which, following the early modern natural law writers, approaches the transfer of property as the key to understanding contract itself.

A. From Contract to Property: Kant's Doctrine of Right

In *The Doctrine of Right*, which forms the first part of *The Metaphysics of Morals*, Kant begins his account of contract by defining the right it embodies as a "possession of another's choice".[52] However, he takes care to distinguish his use of this phrase from the proprietary notions it might appear to embody. As he explains:

> By contract I acquire something external. But what is it that I acquire? Since it is only the causality of another's choice with respect to a performance he has promised me, what I acquire directly by a contract is not an external thing but rather his deed, by which that thing is brought under my control so that I make it mine.—By contract I therefore acquire another's promise (not what is 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.—This *right* of mine is, however, only a right *against a person*, namely a right against a *specific* physical person, and indeed a right to act upon his causality (his choice) to *perform* something for me; it is not a *right to a thing*, a right against that *moral person* which is nothing other than the idea of the *choice of all united a priori*, by which alone I can acquire *a right against every possessor of the thing*, which is what constitutes any right to a thing.[53]

This single paragraph contains the core of Kant's conception of contract as transfer, the transfer here being in relation to a right to *performance*—in civilian parlance, a "prestation"—that promisees can already count among their assets even before the contract is actually performed.[54] Properly speaking, the object of the right being transferred is thus the promisors' deeds, according to which they are bound to do or refrain from doing a particular action. We can distinguish this object from the effects of the promise itself—that is, essentially, the operation that the parties intend to bring about by the effect of the promise. This operation may entail the provision of services or, in many cases, the transfer of particular property rights from one contracting party to another.[55]

The distinction between the object of the promise and its effects allows Kant to present the right gained by contract as one that is purely *in personam*, even in those cases where the intended effect of the promise involves the transfer of property rights with *in rem* effects. His doing so in turn advances a transfer theory that explains the operation of contract *before* turning to an account of how

52. Kant, *supra* note 4 at 57.
53. *Ibid* at 59.
54. According to Kant, there can only be three forms of acquired right, namely a corporeal thing, another's choice to perform a specific deed (a prestation), and another's status in relation to oneself: see Kant, *supra* note 4 at 37-38; the prestation is the acquired object that corresponds to the *ius personale*—that is, the *in personam* right: see *ibid* at 48.
55. This view of the prestation as the proper object of the transferred right is broadly consistent with the view found in art 1371 CCQ, which provides that "[i]t is of the essence of an obligation that there be… a prestation which forms its object".

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contract relates to the transfer of property rights.[56]

Why Kant insists upon this distinction—that is, between the promissory aspect of contract and the transfer of property rights—appears somewhat mysterious at first glance.[57] Indeed, it is fundamentally at odds with the idea that transfer theory understands contract as a sort of analogy to the transfer of property, which Dedek has argued was the basis on which earlier natural law scholars had constructed their own respective versions of such a theory.[58] Upon closer inspection, however, it appears as though Kant's distinctive approach can be explained in light of two distinct but related concerns. The first was his desire to account for the binding force of contracts generally. The second was to explain precisely why such agreements are properly binding between their parties, even though their effects against the world at large are considerably more limited.

In respect of the first of these two concerns, Kant's solution was to devise the act of promising in a manner that grants it the basic structure of a transfer, according to which one party's assets are diminished in a manner that is correlative to the other's gain.[59] This position not only serves to set Kant's theory apart from the earlier, more property-focused conceptions of transfer, but also from more modern theories that find the basis of contract enforcement in the "promise" exchanged.[60] Indeed, the fundamental distinction between Kant's promise-based transfer theory and Charles Fried's promise theory, for example, lies in the need for the promisor to effectively transfer the *right* to performance to the promisee in a way that allows the latter to impose legal sanctions on the former for non-compliance.[61] Accordingly, promisors assume more than the mere *moral* duty to keep their promises, as the promisees gain a right to effectively *coerce* their performance.[62]

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56. This order is reflected in the manner in which Kant approaches the acquisition of a prestation by way of contract before turning to those classes of contracts that also effect the transfer of property: see generally Kant, *supra* note 4 at 59-60.

57. Peter Benson goes so far as to reject Kant's proposed distinction between the promise and the effect of the promise on the basis that "Kant's view that the object transferred is the promise and not the thing promised necessarily implies a change of ownership with respect to the thing as between the parties at formation": see Benson, "Contract as Transfer", *supra* note 2 at 1722.

58. Dedek, *supra* note 3 at 337.

59. This is the only meaning that Kant could have properly given to the phrase "I have become enriched (*locupletior*) by acquiring an active obligation on the freedom and means of the other" in the excerpt reproduced at 19 above, since the enrichment appears in the form of the right to demand performance, not the acquisition of a particular thing; it also appears consistent with Ernest Weinrib's conception of contract as a "voluntarily assumed correlative change" in the moral position of the parties: see Ernest Weinrib, *The Idea of Private Law*, 2nd ed (Oxford University Press, 2012) at 137.

60. By "promise theory", I mean those theories that view the promise as creating rights that did not properly exist before it was made: see Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) at 56.

61. This reflects Kant's distinction between ethical duties, in which the incentive is the idea of the duty itself, and juridical duties, for which the incentive is justified coercion: see Kant, *supra* note 4 at 20.

62. Fried's theory does not make the same distinction as Kant does between coercible promises and promises generally; accordingly, he finds himself rejecting the doctrine of consideration as inconsistent with his theory, and must find another basis for explaining the doctrine of unconscionability: see Charles Fried, *Contract as Promise* (Harvard University Press, 1981) at 37-38, 110-11.

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By starting with this promise-based transfer theory of contract, Kant is able to account for the promisee's right to demand *performance* of potentially any obligation that might arise out of a contractual framework. This solution may well be sufficient to explain the entitlement to expectation damages resulting from a breach of contract that appears so problematic to many common law writers, in that it appears to answer the challenge put forward by Fuller and Perdue's classic article, "The Reliance Interest in Contract Damages".[63] For Kant, however, this conclusion appears to have been insufficient on its own to account for the binding force of contracts *qua* contracts—that is, as agreements that involve and are binding against *only* a limited number of parties.

This brings us the second concern that appears to have motivated Kant's insistence on the distinction between the transfer of contractual rights and the transfer of property rights, namely his need to explain the strictly *in personam* nature of contractual rights themselves. This concern would have been all the more fundamental if, as a number of authors have suggested, Kant's work presented a fundamental doubt as to the legitimacy of property rights as *in rem* rights—that is, as rights potentially enforceable against the world at large that do not impose a correlative obligation on property owners.[64] Certainly, Kant tells us that acquired rights in general—be they acquired by way of unilateral acquisition of property, by contract, or through status-based relationships—are only fully legitimate within the civil condition.[65] Property rights in particular are said to be only "provisional" in the state of nature, in the sense that ownership in that context appears synonymous with continued physical possession.[66] It is this state of continuous possession, then, that appears as the core aspect of property that is capable of justification in the state of nature—and perhaps nothing more.

By contrast, the equivalent core of contract in the Kantian conception appears to be the notion of agreement itself, stripped of any and all third party effects that may guarantee that it will be respected by strangers to the transaction.[67] Accordingly, Kantian transfer theory insists on separating this core—the *in personam* right between the parties—from at least one particular third-party effect of contracts, namely the transfer of property, going so far as to suggest that purely executory agreements cannot properly effect the transfer of property at all.[68] An additional separate contract corresponding to the Roman law real contract, which Kant called a *pactum re initium*, is required for the promisor to pass

63. Fuller & Perdue, *supra* note 2 at 61-62.
64. See note 11 above and accompanying text; the argument appears to be based primarily on Kant, *supra* note 4 at 44-45; as Byrd and Hruschka put it, the problem that Kant appears to raise in respect of *in rem* rights is "how it can be that all others have an obligation to me simply because I unilaterally take possession and claim ownership of an external object of choice": see B Sharon Byrd & Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge University Press, 2010) at 121.
65. Kant, *supra* note 4 at 46.
66. See *ibid* at 45; Kant's discussion on this page is ostensibly directed at all forms of acquired right, though it appears to be particularly concerned with unilaterally acquired property rights.
67. This view may well exclude torts like inducing breach of contract, which Ernest Weinrib has argued can be understood to "extend to the rest of the world the obligation to respect the contract": see Ernest Weinrib, "Private Law and Public Right" (2011) 61 UTLJ 191 at 204.
68. Kant, *supra* note 4 at 60.

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property rights to the promisee even though the former is already bound to the latter under the original executory agreement.[69]

The requirement of a secondary contract to transfer property is not accidental: the *pactum re initium* is a contract that arises at the same moment that property is physically delivered. When Kant moves to his account of the transfer of property, he is thus affirming the relevance of agreement to the transfer of *in rem* rights in much the same way that had been proposed by the older transfer theories.[70] At the same time, however, this secondary property transfer remains subject to additional formalities, and can be distinguished from the separately justified creation of the obligations that allow property to be transferred in the first place. This allows Kant to avoid the problem of circularity that Dedek identifies within the earlier property-oriented transfer theories. Kant does so by positing a separation between the *obligation* to transfer a thing, on the one hand, and the actual *performance* of the transfer, on the other.[71] Until such performance actually occurs, "the right that arises from a contract is only a right against a person, and becomes a right to a *thing* only by delivery of the thing".[72]

Following Kant's account of transfer by contract, it is thus only where the parties have actually completed a transfer of *property* rights that the right of the promisee becomes more than simply an *in personam* right to compel the transfer of property from the promisor. The nature of both types of rights are different but related, in that Kant recognised that *in rem* rights are not truly rights relating to a thing. Instead, he saw them as rights enforceable against a potentially indeterminate class of persons who may interact with the property in question.[73] It follows, then, that property rights cannot be transferred by agreement alone, and must comply with the additional rules set out in the civil condition. As I will argue in Part III below, it is precisely this aspect of Kant's theory that allows us to make sense of the particular approach taken towards the transfer of property by contract in modern German law. At the same time, it is also what serves to set Kant's particular conception of contractual transfer apart from the more traditional natural law theory that Hegel defends in his *Philosophy of Right*.

B. From Property to Contract: Hegel's **Philosophy of Right**

Like Kant, Hegel also conceived of rights as necessarily involving a relationship between persons, rather than a relationship between persons and things. However, Hegel also rejected the possibility that the rights themselves might be enforceable directly *against* persons, ostensibly on the basis that such a right

69. *Ibid*.
70. See, e.g., Grotius, *supra* note 1, bk 2 at 6, paras 1, 2.
71. Dedek, *supra* note 3 at 343.
72. Kant, *supra* note 4 at 60.
73. For Kant, the "right to a thing is only that right someone has against a person who is in possession of it in common with all others (in the civil condition)": see Kant, *supra* note 4 at 50; in at least this one respect, Kant's account of the difference between the rights acquired under contract and property rights can thus be said to have largely anticipated the one put forward by Hohfeld more than a century later: see Hohfeld, *supra* note 50 at 718.

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amounts to a form of slavery, and is thus fundamentally contrary to freedom.[74] As he explained:

> Kant's *jura personalia* are the rights issuing from a contract whereby I undertake to give something or to perform something—the *jus ad rem* conferred by an *obligato* in Roman law. To be sure, it is only a person who is required to execute the covenants of a contract, just as it is also only a person who acquires the right to their execution. But a right of this sort cannot for this reason be called a 'personal' right; rights of whatever sort belong to a person alone. Objectively considered, a right arising from a contract is never a right over a person, but only a right over something external to a person or something which he can alienate, always a right over a thing.[75]

Following this paragraph, it appears that Hegel's conception of rights effectively requires that legal relationships between persons necessarily pass *through* things, since no person may acquire a right directly against the other person.[76] It further follows that the fundamental distinction between the transfer of *in personam* rights in contract and *in rem* rights in property, which forms the backbone of Kant's transfer theory, can find little support in Hegel's own account of contract as transfer.

In other words, the apparent incompatibility of *in personam* right with the notion of freedom suggested in the above paragraph recalls the distinction often made in civilian legal theory between persons, who *have* rights, and things, which are properly the *object* of rights.[77] As Hegel saw it, the problem with Kant's conception of *in personam* rights is that they are properly enforceable only against a particular person, rather than against a class of persons determined through reference to an externalised object. As a result, Kant's distinctive right transferred by a contract—the prestation, which amounts to the promisee's right to obtain performance *from* the promisor—appears to frame the promisors themselves as the *objects* of the right in question.[78]

By contrast, Hegel presented his own conception of contract in largely proprietary terms, according to which the object of the contractual relationship was largely synonymous with the external thing being transferred.[79] This much is made even clearer in the way that Hegelian abstract right appears to approach the contract

74. Hegel, *supra* note 6 at para 57.

75. *Ibid* at para 40.

76. This appears to have been what Hegel had in mind when he wrote that "[a] person by distinguishing himself from himself relates himself to another person, and it is only as owners that these two persons really exist for each other": see *ibid* at para 40.

77. See, e.g., Marcel Planiol, *Traité élémentaire de droit civil*, t 1, 11th ed (Paris: Librairie générale de droit & de jurisprudence, 1928) at para 2 (defining the French word "*droit*" as a faculty granted to a person by the law, which allows said person to accomplish determinate acts such as using a thing for her profit); this same distinction between subjects and objects of rights has more recently been taken up in discussions of animal rights: see, e.g., Richard A Epstein, "Animals as Objects, or Subjects, of Rights" (2002) John M Olin Law & Economics Working Paper No 171 (2nd Series).

78. This conclusion is supported by statements like "what I acquire directly by a contract is not an external thing but rather [another]'s deed", though Kant makes clear in the same paragraph that the object of a contractual acquisition remains *external*—that is, that the deed of another constitutes an external object for the purposes of contractual transfer: see Kant, *supra* note 4 at 59.

79. Hegel, *supra* note 6 at paras 72-74.

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of service—a class of contracts not normally understood to effect a transfer of property rights at all. Rather than relying on the transfer of a prestation—that is, of a right to demand that the promisor do or refrain from doing something—Hegel understood these contracts to relate to the transfer of things in the form of "determinate" aspects of personality first externalised through a person's will.[80] In so doing, he largely followed the earlier natural law transfer theories by beginning with an account of property—that is, of the external things that can be made the object of rights—before moving on to contract as a means of explaining how property can be transferred from one subject of right to another.

Where Hegel improved on these theories, however, is in addressing one particular difficulty that appears to have influenced Kant's thinking on contract, namely that they do not account for the necessity of a meeting of the wills to transfer rights. If Dedek is to be believed, this may well have been the primary reason for which Kant rejected the traditional, property-based accounts of transfer theory, which largely conceive the transfer of property as comprising two separate unilateral events—that is, the unilateral abandonment of a right by the transferor, and its separate unilateral acquisition by the transferee.[81] Kant's solution to this problem, then, was to ground the basis for this meeting of the wills in a notion of contract that both preceded and remained separate from the transfer of property rights.[82]

Hegel's own solution to this problem appears to have built on Kant's insight that *in rem* rights like ownership necessarily imply a relationship with other persons, rather than directly with the things themselves.[83] Accordingly, the transfer of property rights by contract presents a moment in which the wills of two or more persons directly interact through—and are mediated by—the things in question.[84] Thus, Kant tells us that "transfer is therefore an act in which an object belongs, for a moment, to both together".[85] Hegel's analysis, meanwhile, reached much the same conclusion as Kant's in this respect without having to defer to a pre-existing contractual obligation, in that he tells us that the contractual relationship itself "implies that each, in accordance with the common will of both, ceases to be an owner and yet remains one".[86]

Without drawing any conclusions as to the merits of Kant and Hegel's respective positions, the fact that Hegel appears able to present a distinctive,

80. As the small print explains, "[a]ttainments, erudition, talents, and so forth are, of course, owned by free mind and are something internal and not external to it, but even so, by expressing them it may embody them in something external and alienate them… and in this way they are put into the category of 'things'": see *ibid* at para 43; the full account of the service contract as an alienation of particularised aspects of one's personality is found in *ibid* at para 43.

81. Kant, *supra* note 4 at 59; this is largely what Dedek appears to mean when he suggests that Kant had been concerned with the problem posed by the necessity of acceptance, which older transfer theories had been unable to explain by reference to the transfer of property alone: see Dedek, *supra* note 3 at 346.

82. Kant's solution was to posit the meeting of the wills at the level of the contract—that is, of the *in personam* obligation to transfer—itself: see Kant, *supra* note 4 at 59-60.

83. Hegel, *supra* note 6 at 71.

84. *Ibid* at 72.

85. Kant, *supra* note 4 at 59.

86. Hegel, *supra* note 6 at para 74.

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agreement-centred account of property through transfer by contract in this way casts some doubt on the need for Kant's rigid distinction between *in personam* and *in rem* rights. However, there remain at least two distinct advantages with the Kantian version of transfer theory. The first is that conceiving of contract as an *in personam* right offers a much more natural explanation of service contracts, a point that Stephen Smith has specifically raised against those theories that conceive of contract as essentially a transfer of property.[87] The second, arguably more important advantage is that Kant's version of transfer theory provides an ostensibly more coherent explanation for the manner in which the transfer of property by contract actually operates in practice.

In this latter respect, the comparative difficulties with Hegel's approach emerge, for example, in the work of Peter Benson, who, following Hegel, has tended to present contract as effecting an immediate transfer of ownership.[88] As Benson himself recognises, the conflation of what might otherwise be called the *in rem* and *in personam* aspects of the transfer creates problems in those cases where the thing being sold is not owned by the seller at the moment of sale, or where it has yet to be ascertained at the moment of contract formation.[89] More importantly, however, Benson's proposed answer to these problems amounts to a reintroduction of something like the distinction between rights *in personam* and rights *in rem*, which he calls the "relational transfer of property". This phrase, which recalls the third party enforcement rule in French law, means that the transfer of property will remain limited to the parties themselves, without the full *erga omnes* effects expected of a right *in rem*, until the property becomes ascertainable or is effectively acquired by the seller.[90]

Hegel's account of the relationship between property and contract thus appears to present a strong problem of fit. This is all the more true given that all modern legal systems recognise the survival of a contractual right even in the absence of a valid property transfer.[91] At the very least, making effective use of Hegelian transfer theory probably requires that we read his work in much the same manner that Benson has done—that is, in a manner that is broadly consistent with the French civil law's understanding of transfer by contract. Indeed, as

87. Smith's broader critique of transfer theories is based on the idea that the object purportedly being transferred (e.g., the painting of John's house next Friday) does not yet exist at the moment that the contract is made; it is clear from these examples that Smith's objections are based primarily on the issue of "owning" the right to have another perform a service, rather than with the transfer of property rights as traditionally understood: see Smith, *supra* note 60 at 101-02.

88. Benson, "Contract as Transfer", *supra* note 2 at 1723.

89. Benson presents these cases, along with the broader problem of service contracts, as "three different scenarios that might be thought to present problems for the proposed analysis": see *ibid* at 1727-28.

90. *Ibid* at 1729-30; Benson's views in this respect are interesting to compare with those of Alan Brudner, who, in constructing his own Hegelian theory of contract as an immediate transfer of ownership, is similarly forced to distinguish between the contractual transfer of "value" and the thing that the promisor has actually promised: see Brudner and Nadler, *supra* note 12 at 128.

91. Indeed, the modern rule is that the promisor must convey title to the promised property or find herself in breach of her promise, by contrast to the Roman law rule that the seller in a contract of sale was only bound to deliver the purchaser free and unimpeded possession: see Zimmermann, *supra* note 13 at 278.

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I will argue below, a number of insights can be gleaned from approaching French law itself through the lens of the Hegelian framework. Meanwhile, Kant's own theory can be more properly related to the operation of transfers in those legal systems that follow the German branch of the civilian legal tradition.

III. Understanding the Franco-German Divide

So far, I have argued that the German and French models of property transfer by contract are distinguished by the focus of German law on separate property notions, while French law emphasises freedom of contract in a manner that includes the ability to freely dispose of property. I have also argued that Kant and Hegel's respective transfer theories can be distinguished along largely the same lines, in that Kant conceives of separate rules governing the transfer of contract and property rights—that is, rights *in personam* and *in rem*—while Hegel views the property being transferred as largely indistinguishable from the contractual obligation between the parties.

In the remainder of this paper, I hope to build on the connections already made between the German model of property transfer by contract and Kantian transfer theory, on the one hand, and the French model and Hegelian transfer theory, on the other. As I will argue, only the German model—and Kantian transfer theory—conceive of contract as imposing a distinctive set of correlative rights and duties on its parties. This is because they admit the possibility of contract establishing a direct relationship in which the deeds of the parties themselves, rather than some external object, are properly the object of the obligation. By contrast, both the French model and Hegelian theory offer an alternative view of contract, according to which the obligation is transformed primarily into a means by which property is transferred.

A. Contract as Obligation in German Civil Law

As noted above, the German model of transfer by contract limits what the parties can accomplish through their agreement alone. Indeed, the parties can never actually transfer ownership except in conformity with the requirements of publicity—that is, by completing either delivery or registration.[92] In this way, the German model is largely consistent with the particular version of transfer theory that Kant puts forward in *The Doctrine of Right*, according to which a contract can only transfer *in personam* rights, and in which property, taking the form of rights *in rem*, remains subject to its own separate transfer requirements.[93]

Given this overlap, it is tempting at first glance to conclude that German law shares Kant's apparent concern for the legitimacy of *in rem* rights. This particular concern is that such rights are potentially binding against the world at large, but impose no correlative duty to respect the property rights of others.[94] However,

92. See arts 873, 929 BGB.
93. Kant, *supra* note 4 at 60.
94. *Ibid* at 44-45.

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this concern only masks another, perhaps more fundamental problem revealed by Kantian transfer theory, and which German law appears to be designed to avoid in practice. Namely, the concern that Kant highlights—and which German law evinces—is that allowing property to be transferred by an executory contract undermines the view of contract as an obligation, according to which the object of the contractual right is the particular deed of another person, rather than an external thing.[95]

This particular conception of an "obligation" is far from unique to Kantian transfer theory or German law. It is recognised—albeit with slight variations—by almost all legal systems that follow the modern civilian canon in both its French and German variants.[96] Going further, this notion of obligation can be traced back to Roman law sources, and most prominently the text of *Justinian's Institutes*, which defined it as "a legal bond, with which we are bound by a necessity of performing some act according to the laws of our State".[97] Building onto this Roman definition, Zimmerman notes that "[t]oday the technical term 'obligation' is widely used to refer to a two-ended relationship which appears from the one end as a personal right to claim and from the other as a duty to render performance".[98]

By insisting that the transfer of property rights be understood separately from the contractual rights themselves, both German law and Kantian transfer theory thus preserve the integrity of the contract as an obligation—that is, as an essentially *in personam* right of the promisee that is correlative to the promisor's duty of performance. Accordingly, the actual prestation to do or to refrain from doing something is understood to be the proper object of the contract, while the transfer of property amounts to *performance* of the obligation *to transfer* that has already been undertaken. It follows that only real contracts, in which agreement and performance occur simultaneously, are capable of effectively transferring property. As Kant explained:

> If I conclude a contract about a thing that I want to acquire, for example, a horse, and at the same time put it in my stable or otherwise in my physical possession, then it is mine (*vi pacti re initi*), and my right is a *right to the thing*. […] Now if a contract does not include delivery *at the same time* (as *pactum re initium*), so that some time elapses between its being concluded and my taking possession of what I am acquiring, during this time I cannot gain possession without exercising a separate act to establish that right, namely a *possessory act* (*actum possessorium*), which constitutes a separate contract. This contract consists in my saying that I shall send for the thing (the horse) and the seller's agreeing to it.[99]

95. *Ibid* at 59.
96. Art 241, para 1 BGB provides that "[b]y virtue of an obligation an oblige is entitled to claim performance from the obligor"; for its part, art 1126 CcF (1804) provided that "[a]ny contract has for its object a thing which one party binds himself to transfer, or which one party binds himself to do or not to do"; see also art 1373, para 1 CCQ, which provides that "[t]he object of an obligation is the prestation that the debtor is bound to render to the creditor and which consists in doing or not doing something".
97. Inst 3.13.
98. Zimmermann, *supra* note 13 at 1.
99. Kant, *supra* note 4 at 60.

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In other words, Kant's transfer theory suggests that the real contract, through which German law requires that the actual transfer of property occurs, does not amount to an obligation-generating event, at least from the perspective of the transferor-promisor.[100] In this view, the real contract simply amounts to an agreement to transfer property rights—that is, to actually perform the obligation already undertaken—and is distinct from the obligation-generating agreement in which the transferee obtains the right to performance at a later date.[101] If we return to the BGB provision pertaining to the actual transfer of ownership in movable property, we find that the agreement may intervene at the same time as performance, or the parties may later agree that delivery already rendered has amounted to an effective transfer of ownership.[102] What matters is that the parties intended to alienate and to acquire, and that property has actually been handed over at the time of agreement, thereby completing the transfer in accordance with the general principles pertaining to the alienation and acquisition of property rights.[103]

By contrast, the Kantian conception of the purely executory contract amounts to one in which the promisees obtain only an *in personam* right to force promisors to actually perform their end of the bargain. Where the contract in question is one where one or more parties have agreed to transfer property, the promisee's right to performance effectively amounts to a right to compel the promisor to hand over possession of the property, and in so doing to complete the transfer through a separate agreement. As Kant explains:

> But if I leave it in the seller's hands, without making separate arrangements with him as to who is to be in physical possession of the thing (holding it) before I take possession of it (*apprehensio*), and so before the change of possession, then this horse is not yet mine, and what I have acquired is only a right against a specific person, namely the seller, to put me in possession (*poscendi traditionem*), which is the subjective condition of its being possible for me to use it as I please. My right is only a right against a person, to require of the seller performance (*praestatio*) of his promise to put me in possession of the thing.[104]

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100. However, the real contract can impose obligations on the transferee, as Kant appears to recognise when he states that "[t]his contract consists in my saying that I shall send for the thing (the horse) and the seller's agreeing to it", adding that "it is not a matter of course that the seller will take charge, at his own risk, of something for another's use": see *ibid*; this view is consistent with the manner in which the real contract was understood to impose obligations on the receiving party in Roman law, as described in Inst 3.14: "[r]eal contracts, or contracts concluded by delivery, are exemplified by loan for consumption, that is to say, loan of such things as are estimated by weight, number, or measure, for instance, wine, oil, corn, coined money, copper, silver, or gold: things in which we transfer our property on condition that the receiver shall transfer to us, at a future time, not the same things, but other things of the same kind and quality".

101. Kant appears to insist on this distinction when he posits that "I cannot call the *performance* of something by another's choice mine if all I can say is that it came into my possession *at the same time* that he promised it (*pactum re initium*), but only if I can assert that I am in possession of the other's choice (to determine him to perform it) even though the time for his performing it is still to come": see Kant, *supra* note 4 at 38.

102. Art 929 BGB.

103. Zekoll & Reimann, *supra* note 10 at 234.

104. Kant, *supra* note 4 at 60.

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This distinction between the transfer of prestations and the transfer of property allows Kantian transfer theory—and, it would seem, German law as well—to emphasise the properly obligational content of the contractual relationship. Meanwhile, the transfer of property is relegated to a secondary agreement by which the parties actually *perform* their respective obligations—that is, in the case of a contract pertaining to the transfer of property, their respective obligations to alienate and acquire the property in question.[105]

Accordingly, Kantian transfer theory shares at least two important features with German law. The first is the apparent recognition that property rights, whether acquired unilaterally or derivatively through agreement, are in principle subject to the same basic requirement—that is, the requirement that they be acquired in a manner that is public, or at least knowable by all who might be concerned. The second, related feature is that the proper object of a contract is never the transfer of property rights, but rather the promisor's prestation—that is, the promisor's agreed-upon obligation to do or to refrain from doing something. As I will argue below, this view largely contrasts with the one put forward by the French conception of transfer by contract, in which an ostensibly contractual undertaking to transfer specific property simultaneously effects the transfer of the property rights in question.

B. Contract as Transfer of Property in French Civil Law

Having argued that both the Kantian account of transfer by contract and German law insist on the properly *in personam* nature of the contractual relationship, I will now attempt to show an affinity between Hegel's own transfer theory and the other major model of property transfer by contract supplied by the French civilian tradition. Admittedly, this demonstration is comparatively more difficult than the one already made above, particularly given the ambiguities inherent in Hegel's account of the relationship between property and contract. In fact, it is not quite clear that Hegel conceives of contract as giving rise to an *in personam* obligation to perform one's promise at all, even as he seems to recognise the existence of a similar obligation to compensate the promisee in the event of a contractual breach.[106]

As suggested above, however, and as I will argue here, reconciling Hegel's account of contract with the manner in which contract actually operates in every modern western legal system requires that we read it to include some sort of *in personam* obligation to perform that is distinct from the property being

105. For sale contracts, these obligations are set out in art 433, para 1 and art 433, para 2 BGB, respectively.

106. Support for such a distinction may be found for example in Hegel's suggestion that "[t]he identical will which is brought into existence by the contract is only one *posited* by the parties, and so is only a will shared in common and not an absolutely universal will": see Hegel, *supra* note 6 at para 75; it also appears implicit in Hegel's transition from contract to tort, which is based on the "immediate" relationship between the parties being "explicitly at variance with the universal": see Hegel, *supra* note 6 at para 81.

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transferred.[107] Accordingly, while the transfer of property remains the primary focus of the parties' relationship, the Hegelian account of contract appears to recognise a somewhat separate right in the promisee to demand performance of the contract from the promisor.[108] It follows that a legal system consistent with Hegel, yet still compliant with the manner in which contract is understood to operate in practice, would thus recognise contract itself as a transfer of *in rem* rights that reserves certain *in personam* features for the parties to the transaction.

As it turns out, this conception of contract largely corresponds to the approach taken in French civil law. Like Hegelian transfer theory, French law presents all contracts, be they real or executory, as effecting a transfer of *in rem* rights alongside, but in a manner that is separate from, the conferral of *in personam* rights under the contract.[109] Going further, however, it is even possible to affirm that French law actually places the proprietary transfer *ahead* of the contractual obligation, which is understood primarily as a means of effecting the transfer of property. This much is supported by the placement of contracts alongside successions and testamentary dispositions within Book III the *Code civil*, the title of which is "*Des différentes manières dont on acquiert la propriété*"—that is, literally, "the different ways in which one acquires property".[110]

What this means is that the broader view of contract taken by both French civil law and Hegelian transfer theory appears to be largely analogous to the German and Kantian notion of real contract, in which the parties' agreement is directed primarily towards the respective intention to alienate property, on the one hand, and acquire it, on the other.[111] The notion of a contractual obligation, in the sense of a pure obligation to do or to refrain from doing something, only fully intervenes in respect of a transfer of property where the parties have agreed to defer the transfer in question, or where the property is otherwise incapable of

107. See the discussion at 28-29 above; going further still, the distinct existence of something like an *in personam* obligation between the parties is suggested by the fact that all modern western legal systems recognise some form of parties-only principle relating to the enforcement of contracts, and which serves to distinguish the rights and obligations that exist between them from those enforceable by and against the world at large: see generally David J Ibbetson and Eltjo JH Schrage, "Ius Quaesitum Tertio: A Comparative and Historical Introduction to the Concept of Third Party Contracts" in Eltjo JH Schrage, ed, *Ius Quaesitum Tertio* (Duncker & Humblot, 2008) 1 at 29-31.

108. As Hegel puts it, "[i]f I then agree to stipulated terms, I am by rights at once bound to carry them out": see Hegel, *supra* note 6 at para 79.

109. See art 1138, para 1 CcF (1804); art 1196, para 1 C Civ; both of these provisions distinguish the transfer of property from the obligation undertaken by the parties, while simultaneously setting out the principle that the transfer of property can occur by consent alone—that is, by the effect of the undertaken obligations themselves, without the need for the parties to actively perform.

110. Art 711 CcF (1804), which was then the first article of Book III, similarly provided that "[o]wnership of property is acquired and transmitted by succession, by gift inter vivos or will, and by the effect of obligations".

111. Hegel is dismissive of the broader distinction between real and executory contracts, arguing that it is based on "not the nature of the relation of the stipulation to performance but only the manner of performance", and adding that "it is always open to the parties at their discretion to stipulate in any contract that the obligation of one party to perform his side shall not lie in the making of the contract itself as such, but shall arise only from the performance by the other party of his side": see Hegel, *supra* note 6 at para 79.

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being transferred.[112] The actual obligation to transfer property is in all other cases rendered essentially redundant, operating at the very same moment that the parties conclude their agreement.[113]

Accordingly, the French approach to the transfer of property by contract can be said to conform to Hegelian transfer in at least two distinct but related ways. The first is with respect to the French law's conception of contract as immediately effecting a transfer of property rights, which appears to have been heavily influenced by the views of the older natural law scholars.[114] The second is in the approach that both French civil law and Hegelian transfer theory take towards the requirement of publicity—that is, the role played by the requirements of delivery and registration.

Hegel, like French law, appears to have taken the view that publicity does not amount to an essential requirement of the derivative acquisition of property by contract. Instead, Hegel saw it as an essentially legislative choice that could be made for pragmatic reasons, echoing his view that the "understanding"—by which he seems to mean positive law—can and must determine the precise degree of control required to acquire property unilaterally.[115] As Hegel explained:

> The principle of rightness passes over in civil society into law. My individual right, whose embodiment has hitherto been immediate and abstract, now similarly embodied in the existent will and knowledge of everyone, in the sense that it becomes recognized. Hence property acquisitions and transfers must now be undertake and concluded only in the form which that embodiment gives to them. In civil society, property rests on contract and on the formalities which make ownership capable of proof and valid in law.[116]

Although Hegel recognised the possibility of imposing publicity requirements on contractual transfers of property, he does not appear to have considered them a requirement from the perspective of abstract right. In this respect, his position contrasts markedly with the views espoused by Kant, according to which property rights themselves are only ever provisional in the state of nature—that is, outside the civil condition.[117] Indeed, Hegel appears to have left the parties free to structure the transfer of property as they will even in the abstract, much in the same manner that French law understands the alienation and acquisition of property by contract to operate by agreement alone, and thus outside of any strict requirement of publicity.[118]

Thus, by conceiving contract as essentially a transfer of property, both French civil law and Hegelian transfer theory have paradoxically afforded the parties a

112. Art 1196, para 2 C Civ.
113. Art 1196, para 1 C Civ.
114. Mazeaud et al, *supra* note 11 at para 1615.
115. Hegel, *supra* note 6 at para 55.
116. *Ibid* at para 217.
117. Kant, *supra* note 4 at 45; that being said, Hegel does argue that "[o]riginal, i.e. direct, titles and means of acquisition (see Paragraphs 54 ff.) are simply discarded in civil society and appear only as isolated accidents or as subordinated factors in property transactions": see Hegel, *supra* note 6 at para 217.
118. For Hegel, one does not only have the power to alienate property, but *must* do so "in order that thereby my will may become objective to me as determinately existent": see *ibid* at para 73.

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freedom of contract that is rejected by both German law and the Kantian conception of transfer. This approach avoids one of the more difficult problems outlined above, namely the apparent problem caused by viewing the actions of persons as possible objects of rights.[119] At the same time, however, the freedom it confers upon the parties comes at a relatively steep price. Indeed, by shifting the focus of contract away from the direct relationship between persons—as Hegel does, and French law appears to do—this approach also undermines the very notion of contractual obligation as a distinct legal category.

Instead, what we are left with is a conception of contract that is itself divided into two distinct but potentially simultaneous operations. The first is a transfer of property—that is, a transfer of *in rem* rights—from the promisor to the promisee. The second corresponds to the properly *in personam* dimension of the contract, though strictly speaking it is no longer synonymous with a personal right to demand performance—that facet of the exchange having already been covered in many cases by the transfer of property rights.[120] In those cases, the *in personam* aspect of the transaction becomes only a right to demand compensation for a *breach* of the agreement, raising the question of whether a properly contractual right to performance can be said to exist at all.[121]

Conclusion

Across the common law world, the twentieth century has largely been a contest between two visions of contractual obligation. Perhaps the most important of these have been reliance theories, which emerged out of Fuller and Perdue's classic article "The Reliance Interest in Contract Damages".[122] The other, promise theory, has largely been asserted against the emergence of these theories as a way of justifying the continued relevance of the binding executory contract. If Charles Fried is to be believed, however, this promise-based account may come with its own significant difficulties, particularly in its apparent incompatibility with some of the features of contract that most legal systems recognise to one extent or another.[123]

If transfer theories are to occupy a space alongside these two competing visions of contract, they must likewise be able to recognise which features of

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119. See the discussion at 25-26 above.

120. In French law, for example, the automatic transfer of ownership means that the transferee may enforce the contract by means of a *vindicatio*; this principle has even been extended to the corollary right of vendors to be paid for the transferred property by allowing them to revendicate that property even after it has been shipped, delivered, or even resold—in the latter case transforming into a right to revendicate the amounts received by the purchaser on resale: see Henri Mazeaud et al, *Leçons de droit civil*, t 3, vol 1, 6th ed by Véronique Ranouil and François Chabas (Montchrestien, 1988) at paras 193, 196.

121. The right to claim damages for breach of contract has been classified as a "secondary", essentially tort-like obligation by a number of authors: see, e.g., Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 UW Austl L Rev 1 at 10-11; Charlie Webb, "Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation" (2006) 26 Oxford J L Stud 41 at 42-43.

122. Fuller & Perdue, *supra* note 2 at 53-54.

123. See note 62 above and accompanying text.

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modern contract law they can explain, and which features fall outside a properly transfer-based explanation. With this premise in mind, this paper has sought to compare the two competing versions of transfer theory that emerge out of the respective works of Kant and Hegel, on the one hand, with the two major real-world models of transfer by contract, namely those of Germany and France, on the other.

As I have argued, only the German model and Kantian transfer theory properly conceive of contract as an obligation to perform or to refrain from performing a particular act—that is, an *in personam* relationship whose proper object is the promisor's freedom to act, not an external thing. Accordingly, the promisee can properly demand that the promisor do or refrain from doing some particular action. This contrasts with both the French and Hegelian approaches, which reveal a conception of contract that is centred on the transfer of property. As a result, neither French law nor Hegel's theory of transfer clearly differentiate those dimensions of contract that are properly *in personam*—in the sense of being relevant only between the parties—from those that have to do with the actual transfer of property rights.

This conclusion has important implications. On a theoretical level, it suggests that both the French and Hegelian accounts of transfer ultimately undermine a distinction that lies at the heart of contract itself—namely, that between the obligation to do or to refrain from doing an act *in the future*, and the actual realisation of that promised act or forbearance through its *performance*. On a more practical level, it means that both of these approaches are not entirely compatible with the way that contract is understood to actually operate in most jurisdictions—including within France itself. Indeed, it is quite telling that the approach French law takes towards non-property transferring contracts is largely consistent with the German and Kantian models, in which a separate act of performance is required to satisfy an existing contractual obligation.[124]

What remains unclear from this analysis is precisely what place the Anglo-American common law might occupy vis-à-vis these two alternative transfer theories. It may even be doubted whether either model is properly capable of explaining the approach that this family of legal systems takes towards the transfer of property by contract, particularly since they do not appear to adhere to any single theory of transfer at all. While it is certainly not my objective to resolve this issue by way of conclusion, it is worth noting that two particular features of Anglo-American legal systems pose particular challenges in this respect. The first is the sharp distinction that these systems still recognise between immovable and movable property, which were largely abandoned in civilian legal systems at the time of codification.[125] The second is the lasting legacy of separate equitable doctrines, which perhaps more than anything continues to distinguish the Anglo-American legal tradition from its civilian analogues.[126]

124. See most notably art 1142 CcF (1804).
125. Rheinstein, *supra* note 17 at 625.
126. Ralph A Newman, *Equity and Law: A Comparative Study* (Oceana, 1961) at 30.

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