

EFFECTS OF MISTAKE AND OTHER DEFECTS  
ON THE PASSAGE OF LEGAL TITLE



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## Effects of Mistake and Other Defects on the Passage of Legal Title

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This book is dedicated to my parents, Thomas and Regula Zogg,  
who have always provided every imaginable kind of support,  
during this project and far beyond that.



## PREFACE\*

This book analyses the question of how legal ownership in tangible movable property – goods and corporeal money<sup>1</sup> – is transferred from one person to another and of how certain kinds of defects, particularly mistakes, affect the passage of legal title in that regard. Take the simple case that A, the beneficial legal owner of a car, transfers that car to B – for example by way of sale, barter or gift – and that A is in some manner mistaken about certain facts relevant to the transaction. A might, for example, wrongly believe that there is a contract between him and B, or that the relevant contract is valid, or he might believe that B is in fact someone else. In such cases, a broad variety of issues may arise. This book's scope, however, is limited to the question of whether and in what circumstances *legal* ownership passes to B or whether it remains vested in A. We shall not – or only peripherally – deal with the question of whether A might claim the transferred property's value from B by a *personal* restitutionary claim or whether A might assert *equitable* property rights by way of proprietary restitution (for example under a constructive or a resulting trust). We shall neither consider whether A might – once legal ownership has passed to B – *revest* property (legal or equitable) by way of rescission.<sup>2</sup> Our analysis furthermore presupposes that the very asset transferred from A to B might still be found in B's hands in an unchanged form. We shall not insofar deal with questions of *mixture* or *tracing* (i.e. whether A might assert rights in relation to mixtures or traceable substitutes of the asset transferred to B) or *following* (i.e. whether A might assert rights against third-party recipients of the transferred asset).<sup>3</sup>

Though this area of the law may well be regarded as a core area of private law, it has not yet received much attention in academic literature. It is the object of this book to set out the current state of the law and to offer – based on the existing case law – a coherent and rationalised explanation of how legal ownership is

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\* This is an updated version of the author's doctoral thesis ("Transfer of legal ownership in tangible movable property: The effects of mistake and other defects on the passage of title"), which has been accepted by the University of Zurich, Faculty of Law, in 2016 with the distinction *summa cum laude*.

<sup>1</sup> This book's scope is confined to goods and corporeal money; it does not deal with transfers of real property, choses in action or incorporeal bank money.

<sup>2</sup> Those issues are discussed by the author in detail in another book; ZOGG, Proprietary Consequences.

<sup>3</sup> A profound analysis of tracing and following may be found in the monumental work of L. SMITH, Tracing; see also ZOGG, Proprietary Consequences, Chapter 1 sections 3 and 4.

transferred from one person to another and of how mistakes and other defects operate in that regard.

The book will be divided into three main parts. In a first step, some basic principles applying in the context of defective transfers of ownership shall be delineated at a somewhat abstract level (chapter 1). This will be an essential prerequisite to our analysis of the respective impacts of any particular defect on the passage of property.

Second, we shall examine the mechanics of how legal title is transferred from one person to another (chapter 2). It will be seen that there are basically three different modes of transfer at common law which may effect the passage of legal title, namely *delivery*, *sale* and *deed*. The respective requirements and the scope of those modes of transfer will be scrutinised in some detail. In particular, the question shall be raised whether and to what extent a valid contractual (or other) obligation is needed to transfer legal ownership and whether those three modes of transfer are, accordingly, governed by a *principle of causality* (a valid obligation is required) or *abstraction* (no obligation is required).

In a third step, we shall examine various kinds of defects with regard to the question of whether and in what circumstances they might prevent the passage of legal ownership (chapters 3 and 4). Our focus will clearly lie on the most difficult type of defect, namely mistake. It will be seen that the question of whether and under what conditions mistakes may prevent the passage of property *ab initio* is a delicate one which is not clearly settled by the case law.



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## LIST OF ABBREVIATIONS

A-G	Attorney General
A&E	Adolphus & Ellis' Queen's Bench Reports
ABCA	Alberta Court of Appeal
ABGB	Allgemeines Bürgerliches Gesetzbuch (Austria)
AC	Law Reports, Appeal Cases (3rd Series)
affd	affirmed
AG	Aktiengesellschaft
AlbLR	Alberta Law Review
All ER	All England Law Reports
All ER (Comm)	All England Law Reports (Commercial Cases)
All ER (D)	All England Direct Law Reports (Digests)
All ER Rep Ext	All England Law Reports Reprint, Australian Extension Volumes
App Cas	Law Reports, Appeal Cases (2nd Series)
B	Baron
B&A	Barnewall & Alderson's King's Bench Reports
B&C	Barnewall & Cresswell's King's Bench Reports
BC	Borough Council
BCC	British Company Law Cases
BGB	Bürgerliches Gesetzbuch (Germany)
BGE	Bundesgerichtsentscheid (decision of the Federal Court of Switzerland)
BingNC	Bingham's New Cases, English Common Pleas
Bros	Brothers
Burr	Burrow's King's Bench Reports tempore Mansfield
C	Chancellor
CA	Court of Appeal
Cal App 2d	California Appellate Reports, 2nd Series
CanLII	Canadian Legal Information Institute
Car & P	Carrington & Payne's Nisi Prius Reports
CB	Common Bench Reports/Chief Baron of the Exchequer
CBNS	Common Bench Reports, New Series
CBR (NS)	Canadian Bankruptcy Reports, New Series
CC	County/City Council
CCC (2d)	Canadian Criminal Cases, 2nd Series

Ch	Law Reports, Chancery Division (3rd Series)
ChD	Chancery Division/Law Reports, Chancery Division (2nd Series)
CJ	(Lord) Chief Justice
CJM	Chief Justice of Manitoba
CLC	Commercial Law Cases
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
CLR	Commonwealth Law Reports, Australia
Co Rep	Coke's King's Bench Reports
Cox	Cox's Criminal Cases
CPL	Conveyancer and Property Lawyer
CR	Criminal Reports, Canada
Crim LR	Criminal Law Review
De G F&J	De Gex, Fisher & Jones' Chancery Reports
Dears	Dearsley's Crown Cases Reserved
Dist CA	District Court of Appeal
Div Ct	Divisional Court
DLR	Dominion Law Reports
DPP	Director of Public Prosecutions
East	East's Term Reports, King's Bench
EdinLR	Edinburgh Law Review
EMLR	Entertainment and Media Law Reports
ER	English Reports
EWCA Civ	England & Wales Court of Appeal (Civil Division)
EWCA Crim	England & Wales Court of Appeal (Criminal Division)
EWHC (Admlty)	England & Wales High Court (Admiralty Court)
EWHC (Ch)	England & Wales High Court (Chancery Division)
EWHC (Comm)	England & Wales High Court (Commercial Court)
EWHC (QB)	England & Wales High Court (Queen's Bench Division)
EWHC (TCC)	England & Wales High Court (Technology and Construction Court)
Ex	Exchequer Reports
ex p	<i>ex parte</i>
ExD	Law Reports, Exchequer Division
FC	Federal Court
FCAFC	Federal Court of Australia: Full Court
H&C	Hurlstone & Coltman's Exchequer Reports
H&N	Hurlstone & Norman's Exchequer Reports
HC	High Court
Hil	Hilary term



HL	House of Lords
HL Cas	Clark & Finnely's House of Lords Reports New Series
HLR	Housing Law Reports
IR	Irish Reports
IRC	Inland Revenue Commissioners
J	Justice
JA	Justice of Appeal
JBL	Journal of Business Law
JCL	Journal of Contract Law
(J)JSC	Justice(s) of the Supreme Court of the United Kingdom
KB	Law Reports, King's Bench
KBD	King's Bench Division
LBC	London Borough Council
LC	Lord Chancellor
LJ(J)	Lord Justice(s)
LLC	Limited liability company
Lloyd's Rep	Lloyd's Law Reports
Lloyd's Rep Bank	Lloyd's Law Reports Banking
LMCLQ	Lloyd's Maritime & Commercial Law Quarterly
LQR	Law Quarterly Review
LR A&E	Law Reports, Admiralty and Ecclesiastical
LR App Cas	Law Reports, Appeal Cases (2nd Series)
LR CCR	Law Reports, Crown Cases Reserved
LR Ch App	Law Reports, Chancery Appeal Cases
LR Ex	Law Reports, Exchequer Cases
LR HL	Law Reports, English & Irish Appeals
LR PC	Law Reports, Privy Council Appeal Cases
LR QB	Law Reports, Queen's Bench (1st Series)
LS	Legal Studies
LT	Law Times Reports
m	million
M&G	Manning & Granger's Common Pleas Reports
M&W	Meeson & Welsby's Exchequer Reports
Mich	Michigan Reports
MLR	Modern Law Review
Mood CC	Moody's Crown Cases Reserved
MR	Master of the Rolls
NA	National association
NIQB	High Court of Justice Northern Ireland: Queen's Bench Division
NZ L Rev	New Zealand Law Review

NZLJ	New Zealand Law Journal
NZLR	New Zealand Law Reports
OJLS	Oxford Journal of Legal Studies
Ottawa LR	Ottawa Law Review
OUCLJ	Oxford University Commonwealth Law Journal
P	President
P&CR	Property & Compensation Reports
PC	Privy Council
Pty Ltd	Proprietary limited company
QB	Law Reports, Queen's Bench (3rd Series)
QBD	Queen's Bench Division/Law Reports, Queen's Bench Division
QC	Queen's Counsel
R	The King/Queen ( <i>Rex/Regina</i> ) = The Crown
revd	reversed
RLR	Restitution Law Review
SA	société anonyme
SASR	South Australian State Reports
SC	Supreme Court
sch(s)	schedule(s)
SCR	Supreme Court Reports, Canada
SGA	Sale of Goods Act
SI	statutory instrument
Str	Strange's King's Bench Reports
sub nom	under the name ( <i>sub nomine</i> )
TLR	Times Law Reports
Trin	Trinity term
TruLI	Trust Law International
UKHL	United Kingdom House of Lords
UKPC	United Kingdom Privy Council
UKSC	United Kingdom Supreme Court
UWALR	University of Western Australia Law Review
V-C	Vice-Chancellor
Ves Jr	Vesey Junior's Chancery Reports
WLR	Weekly Law Reports
YB	Yearbook
ZEuP	Zeitschrift für Europäisches Privatrecht
ZGB	Zivilgesetzbuch (Switzerland)